THE

FEDERAL REPORTER.

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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.

PERMANENT EDITION.

OCTOBER—DECEMBER, 1893.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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AMENDMENTS TO RULES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

Third Circuit.

In the circuit court of appeals for the third circuit the following order was made October 13, 1893:

The general order regulating the sessions of this court, adopted June 16, 1891, is amended as follows:

Hereafter the March term of this court shall commence on the first Tuesday of March.

In the circuit court of appeals for the third circuit, December 7, 1893, in lieu of the rule then existing numbered 23, the court adopted the following rule, to apply to cases thereafter brought:

23.[1]

PRINTING RECORDS.

1. On the filing of the transcript the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

[1] For rule 23, as originally adopted in the third circuit, see 47 Fed. x.; as amended September 22, 1892, see 51 Fed. v.

Eighth Circuit.

In the circuit court of appeals for the eighth circuit the following order was made February 20, 1893:

It is now ordered by this court, that the order in relation to the issuance of mandates in cases finally disposed of, entered on the eighth day of February, 1892,[2] be, and the same is hereby, vacated and set aside.

It is further ordered, that the clerk of this court issue a mandate or other proper process to the lower court, in all cases finally disposed of in this court, sixty days after the final disposition thereof, except in cases dismissed under the provisions of rule twenty and section one of rule sixteen of this court, and except in cases where it shall be otherwise expressly ordered.

Ninth Circuit.

In the circuit court of appeals for the ninth circuit the following order was made November 27, 1893:

It is ordered that two district judges, in turn, in the order of the seniority of their commissions, be, and they are hereby, designated and required to attend and sit in this court at each term or session thereof, and that notice be given said judges by the clerk in pursuance of this order at least thirty days before the beginning of such term or session; and if either of said judges so advise the clerk of his inability to attend during the then coming term or session, the clerk shall thereupon notify the judge next in seniority of commission that he is designated and required to attend at said term or session.

Hereafter the United States circuit court of appeals will meet but twice a year for the argument and submission of causes, to wit: On the first Monday of October and the first Monday of April of each year.

Court will, however, meet on the first Monday of every month for the purpose of handing down opinions, and for the hearing and disposition of such motions as may be properly brought to its attention.

[2]The order of the court mentioned above, entered February 8, 1892, was as follows:

Ordered, that the clerk issue a mandate or other proper process to the lower court, upon all final judgments of this court, thirty days after the rendition thereof, except in cases when it shall be otherwise expressly ordered.

FEDERAL REPORTER, VOLUME 57.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.
HON. LE BARON B. COLT, CIRCUIT JUDGE.
HON. WILLIAM L. PUTNAM, CIRCUIT JUDGE.
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.[1]
HON. WILLIAM J. WALLACE, CIRCUIT JUDGE.
HON. E. HENRY LACOMBE, CIRCUIT JUDGE.
HON. NATHANIEL SHIPMAN, CIRCUIT JUDGE.
HON. WILLIAM K. TOWNSEND, DISTRICT JUDGE, CONNECTICUT.
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. GEORGE SHIRAS, JR., CIRCUIT JUSTICE.
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.

[1] Deceased July 7, 1893.

HON. GEORGE M. DALLAS, CIRCUIT JUDGE.
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.
HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.
HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.
HON. JOSEPH BUFFINGTON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.
HON. HUGH L. BOND, CIRCUIT JUDGE.[1]
HON. NATHAN GOFF, CIRCUIT JUDGE.
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.
HON. CHARLES H. SIMONTON, DISTRICT JUDGE, E. and W. D. SOUTH CAROLINA.
HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.
HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. HOWELL E. JACKSON, CIRCUIT JUSTICE.
HON. DON A. PARDEE, CIRCUIT JUDGE.
HON. A. P. MCCORMICK, CIRCUIT JUDGE.
HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.
HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.
HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.
HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.
HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.[2]
HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.
HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.
HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.
HON. JOHN B. RECTOR, DISTRICT JUDGE, N. D. TEXAS.
HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.
HON. HOWELL E. JACKSON, CIRCUIT JUDGE.[3]

[1] Deceased Oct. 24, 1893.
[2] Deceased Dec. 1, 1893.
[3] Commissioned Associate Justice Supreme Court, Feb. 18, 1893.

HON. WILLIAM H. TAFT, CIRCUIT JUDGE.
HON. HORACE H. LURTON, CIRCUIT JUDGE.
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.
HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.[1]
HON. WILLIAM A. WOODS, CIRCUIT JUDGE.
HON. JAMES G. JENKINS, CIRCUIT JUDGE.[2]
HON. PETER S. GROSSCUP, DISTRICT JUDGE, N. D. ILLINOIS.
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.
HON. JAMES G. JENKINS, DISTRICT JUDGE, E. D. WISCONSIN.[2]
HON. WILLIAM H. SEAMAN, DISTRICT JUDGE, E. D. WISCONSIN.
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.
HON. HENRY C. CALDWELL, CIRCUIT JUDGE.
HON. WALTER H. SANBORN, CIRCUIT JUDGE.
HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.
HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.
HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.
HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.
HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.
HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

[1] Appointed Secretary of State, U. S. March 6, 1893.
[2] Commissioned Circuit Judge, March 23, 1893.

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.
HON. JOSEPH McKENNA, CIRCUIT JUDGE.
HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.
HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.
HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.
HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.
HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.
HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.
HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.
HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.
HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

CASES REPORTED.

CASES CITED.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FRISBIE v. CHESAPEAKE & O. RY. CO.

(Circuit Court, D. Kentucky. May 31, 1893.)

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATION.
An averment that a corporation is a citizen of a certain state is insufficient to give a federal court jurisdiction. The averment should be that the corporation is organized under the laws of a certain state.
2. SAME—DEFECTIVE PETITION FOR REMOVAL—WAIVER.
Where the petition for removal of a cause to a federal court avers that one party, a corporation, is a citizen of a certain state, instead of averring that it is organized under the laws of the state, a motion to remand should be granted, although plaintiff has appeared in the federal court, and demurred generally to the defendant's answer.

At Law. Suit in the circuit court of Bracken county, Ky., by H. B. Frisbie against the Chesapeake & Ohio Railway Company. Defendant removed the cause to this court. Plaintiff demurred to defendant's answer, and now moves to remand. Granted.

C. B. Simrall, Alfred Mack, and J. T. Simon, for plaintiff.
Hallam & Myers and W. H. Jackson, for defendant.

Before LURTON, Circuit Judge, and BARR, District Judge.

LURTON, Circuit Judge. This suit was begun in the circuit court of Bracken county, Ky., and on petition of the defendant, alleging that it is a controversy wholly between citizens of different states, it was removed to this court. The matter is now heard upon a motion by plaintiff to remand to the state court, because there is no averment that the defendant company was a nonresident of Kentucky at the time the suit was begun. Such an averment is necessary, inasmuch as the right of removal upon the ground that the suit is wholly between citizens of different states is a right which, by the act of 1887, as corrected by the act of 1888, may be exercised only by "the defendant or defendants therein being nonresidents of that state." A petition for removal which fails to show that the de-

fendant was a nonresident when the suit was begun is fatally defective. Camprelle v. Balbach, 46 Fed. Rep. 81.

It has been very earnestly urged by the learned counsel who have appeared for the defendant company that this defect in the petition has been waived by the plaintiff, who, after the filing of the record in this court, appeared and demurred orally to the answer of the defendant company, upon the ground that the answer was insufficient in law and fact, and made no issue upon the cause of action stated in the petition of plaintiff. Pending consideration of this demurrer plaintiff moved to remand the cause to the state court for the reason heretofore stated. A demurrer for the reason that a pleading does not state a cause of action or set up a valid defense, raises an issue, and is a trial of the cause of action. Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. Rep. 495. Where the case stated in the transcript or in the petition for removal is one cognizable in the United States courts, as where it is averred that the suit is wholly between citizens of different states, and involving a sum within the jurisdiction of the court, the jurisdiction of the court would attach upon the appearance of the parties and the filing of a plea to the merits, notwithstanding the cause was one which was not cognizable by the particular United States court to which it had been removed. The principle is that decided in Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. Rep. 982, and in Ex parte Schollenberger, 96 U. S. 369. In the first case cited it was held that, where a defendant appears and pleads to the merits, he waives any right to question thereafter the jurisdiction of the court, on the ground that the suit had been brought in the wrong district. Plaintiff's contention is that this is a controversy wholly between himself, a citizen of Kentucky, and the defendant company, a citizen of Virginia; that it is therefore a cause within the general jurisdiction of the United States courts, and that plaintiff could have brought this suit within the district of Virginia, or in the district of the plaintiff's residence, provided the defendant did not reside therein; that it is therefore a suit pending in the wrong district, yet, being a cause cognizable by the United States courts, is one cognizable by this particular court, if the jurisdiction of the particular court be conceded by a plea to the merits. This contention is probably well taken if the case appearing on the record is in fact one within the general cognizance of United States courts.

Just at this point the case of defendant breaks down. The petition of plaintiff states that the defendant company is a railroad corporation, but it does not aver the state of its origin. The answer is silent as to this. The petition for removal avers that "the suit is wholly between citizens of different states, to wit, between said petitioner, who avers that it was at the time of the bringing of this suit, and still is, a citizen of the state of Virginia, and the said plaintiff, who, as your petitioner avers, was and still is a citizen of the state of Kentucky." An averment that a corporation is a citizen of a particular state is insufficient. A corporation is not a citizen of a state, within the meaning of the constitution. The averment

should be that it was a corporation created by the laws of a particular state. In Insurance Co. v. French, 18 How. 404, and in Muller v. Dows, 94 U. S. 444, a similar averment was held bad. In the latter case Mr. Justice Strong said:

"A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation, and for the purpose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state, which, by its laws, created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen. Such an averment is usually made in the introduction or in the stating part of the bill. It is always there made, if the bill is formally drafted. But if made anywhere in the pleadings, it is sufficient."

The defective averment is not corrected elsewhere in the pleadings. In this view of the case it becomes unnecessary to consider whether a corporation can reside elsewhere than in the state of its creation. This question seems to be finally settled in the negative by the late cases of Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. Rep. 935, and Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44. In this view it would seem that an averment that a corporation had been created by the laws of another state would necessarily imply that it was a nonresident of the state in which the plaintiff resided. The motion to remand must be allowed for the defect in the averment as to the state under whose law the defendant company came into being. Where a cause is cognizable in a United States court the jurisdiction of the particular court may be waived, but where it is an action not within the general jurisdiction of any United States court the defect is not waived or jurisdiction conferred by appearance or consent.

CENTRAL TRUST CO. OF NEW YORK v. SOUTH ATLANTIC & O. R. CO.

VIRGINIA, T. & C. STEEL & IRON CO. v. BRISTOL LAND CO.

(Circuit Court, W. D. Virginia. July 21, 1893.)

Nos. 180, 182.

1. COURTS — CONCURRENT STATE AND FEDERAL JURISDICTION — POSSESSION OF SUBJECT-MATTER.
   Where a state and a federal court have concurrent jurisdiction of a controversy, the court which first takes control of the subject-matter and of the parties cannot be ousted of its jurisdiction by subsequent proceedings instituted in the other court. Riggs v. Johnson Co., 6 Wall. 166, followed.
2. SAME—APPOINTMENT OF RECEIVER.
   When a state court has lawfully appointed a receiver of a corporation, and such receivership still exists, a federal court should not take jurisdiction of a suit by other complainants for the appointment of a receiver.
3. RECEIVERS — APPOINTMENT BY STATE COURT — FEDERAL COURT WILL NOT THEREAFTER APPOINT.
   A Virginia circuit judge appointed a receiver of a certain corporation, who took peaceable possession of the property, and conducted the busi-

ness until the evening of the same day, when he was dispossessed by an armed mob led by deposed officials and employes of the corporation. Thereafter, at the suit of the same complainants, a court of appeals judge appointed a receiver, but this decree was appealed from, partly on the ground that one receiver had already been appointed, and was reversed. *Held*, that the receivership under the state circuit judge's appointment was unaffected by the subsequent proceedings, and that a federal court should not take jurisdiction of a suit by other complainants against the same respondent, praying the appointment of a receiver.

In Equity. Bills by the Central Trust Company of New York against the South Atlantic & Ohio Railroad Company, and by the Virginia, Tennessee & Carolina Steel & Iron Company, against the Bristol Land Company, praying the appointment of receivers. The causes were consolidated, and receivers appointed accordingly. The hearing is now on demurrers to the petitions of William McGeorge and others, stockholders and creditors of the iron company, and of John M. Bailey, claiming to be receiver of the three corporations by virtue of an order from a state court. Demurrers overruled, and bills dismissed.

R. A. Ayers and Butler, Stillman & Hubbard, for complainant Central Trust Co.

Jas. B. Richmond, for defendants South Atlantic & O. R. Co., Bristol Land Co., and Virginia T. & C. Steel & Iron Co.

Frank S. Flair, for McGeorge and others.

PAUL, District Judge. The first named of these suits is brought by the complainant company the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, against the South Atlantic & Ohio Railroad Company, a corporation created by and existing under the laws of the state of Virginia, and a citizen and resident of said state of Virginia, and of the western district of Virginia; and the second named brought by the complainant company the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation created by and existing under the laws of the state of New Jersey, and a citizen and resident of the said state of New Jersey, against the Bristol Land Company, a corporation created by and existing under the laws of the state of Virginia, and a citizen and resident of said state of Virginia.

Substantially the same facts exist in these causes as were presented in the cause of Central Trust Co. of New York v. Virginia, T. & C. Steel & Iron Co., which was dismissed at the May term, last, of this court, at Abingdon, Va., for want of jurisdiction. 55 Fed. Rep. 769. On the 8th day of August, 1892, the Central Trust Company of New York presented its bill in the above-named cause to Hon. Hugh L. Bond, circuit judge of this court, and on the same day the defendant companies in this cause presented to him their respective bills. In each of said bills the complainant company alleged the insolvency of the defendant company, as evidenced by a judgment by confession obtained against it on the same day in this court, on its law side, at Abingdon, Va., on which judgment an

execution had issued on the same day, and had been returned on the same day nulla bona. In the first named of these two suits the defendant company appeared by its vice president, John C. Haskell, and consented that a receiver should be appointed, and in the last named the defendant company appeared by its president, John C. Haskell, and consented that a receiver should be appointed; and thereupon Judge Bond appointed said John C. Haskell and D. H. Conklin receivers of each of said defendant companies, respectively.

On the 19th day of October, 1892, a petition was presented to the court by William McGeorge and others, claiming to be stockholders and creditors of the Virginia, Tennessee & Carolina Steel & Iron Company, and John M. Bailey, claiming to be the receiver of the several corporations named by virtue of an order made by Hon. D. W. Bolen, judge of the fifteenth judicial circuit of Virginia, in vacation, on the 6th day of August, 1890, and asking that they be made parties complainants or defendants, as the court, in its discretion, might determine, and asking that the several causes named be consolidated, and heard together. In said petition it is alleged that the Virginia, Tennessee & Carolina Steel & Iron Company is the main and substantial company of the companies named; that the other companies—the South Atlantic & Ohio Railroad Company and the Bristol Land Company—are mere offshoots or dependent corporations, created and built up by a diversion of the property and assets of the Virginia, Tennessee & Carolina Steel & Iron Company for such purpose; that practically they are all one company. And the petition further alleges that the several confessions of judgment referred to as having been made on the 8th day of August, 1892, in this court, on its law side, at Abingdon, were made by a person who had no power or authority to make such confessions of judgments; that said judgments were procured by fraud and collusion between the representatives, respectively, of the complainant and the defendant companies; and that the orders awarded by Judge Bond, appointing receivers for each of said defendant companies, were obtained by misrepresentation, fraud, and collusion by and between said representatives of the complainant and the defendant companies, respectively. At the May term of this court last, at Abingdon, Va., these causes were consolidated and continued, with leave to the petitioners to amend their petitions. Amended petitions have now been filed by the petitioners; and demurrers to said amended petitions have been entered by the complainant companies, who have also filed their answers to the same. These causes, as stated, having been consolidated, will be considered together.

The court being satisfied that the petitioners have the right to intervene in this cause, the demurrers will be overruled. Fost. Fed. Pr. § 201.

In determining these causes, the court deems it unnecessary to consider any of the many questions raised in the petition of William McGeorge and others, and the answers filed thereto, except that re-

lating to the appointment of John C. Haskell and D. H. Conklin as receivers of the defendant companies by the circuit judge of this court. This question is paramount because it is alleged in the petition and proven by the evidence that, at the time said Haskell and Conklin were so appointed as such receivers, the state circuit court of Washington county, Va., had already, more than two years previously, assumed jurisdiction over the subject-matter of this contention, and had appointed a receiver for the defendant companies in this suit.

Among the exhibits filed is the following order of Hon. D. W. Bolen, a circuit judge of the state of Virginia, to wit:

"Virginia.

"In Vacation. Before Hon. D. W. Bolen, Judge of the Fifteenth Judicial Circuit, Sitting During the Indisposition of Hon. John A. Kelly, Judge of the Sixteenth Judicial Circuit.

"Jonas Wilder and als., C'm'p'ts, v. Virginia, Tennessee & Carolina Steel and Iron Company, D'f'ts. In Ch'nc'y.

"Upon presentation and reading of the bill of complaint, verified by the affidavits of Jonas Wilder, Wm. G. Sheen, John M. Bailey, and A. H. Blanchard, the exhibits therewith filed, and the affidavits of John R. Dickey, J. F. Hicks, Jonas Wilder, W. G. Sheen, A. J. Wilcox, J. H. Fleenor, J. L. Burson, F. N. Hash, W. F. Aldrich, A. A. Hobson, V. Keebler, M. J. Drake, John H. Dishner, F. W. Aldridge, John M. Bailey, (Nos. 1, 2, 3, and 4,) J. H. Winston, Jr., and upon motion of complainant for an order for an injunction and the appointment of a receiver upon consideration of all which it is adjudged and ordered that upon the complainants, or some one of them, or some one for them, executing bond with good security before the clerk of the circuit court of Washington county, in the penalty of $500.00, conditioned according to law for the payment of all such damages as may be incurred, and all such costs as may be awarded in case this injunction shall be dissolved, an injunction is awarded, according to the prayer of the bill, to be directed unto the Virginia, Tennessee and Carolina Steel and Iron Company, its officers, agents, and employes, restraining it and them, and each of them, from collecting any money due it; from selling, mortgaging, removing, interfering with, or in any way disposing of, its property, or creating or incurring any liabilities upon the property of said company. And said injunction also to be directed to the defendants F. W. Huidekoper, John H. Inman, A. H. Bronson, George S. Scott, Nathaniel Thayer, H. C. Fahnestock, George Blogden, W. G. Oakman, N. Baxter, Jr., A. M. Shook, F. D. Carley, E. A. Adams, R. A. Ayers, C. L. James, J. C. Haskell, William P. Clyde, Exstine Norton, restraining them, and each of them, from acting or assuming to act as directors of said Virginia, Tennessee and Carolina Steel and Iron Company, and from in any way transacting business in the name of, or in behalf of, the company, and from any interfering with any of the property of the company; also, restraining them from releasing or attempting to release any subscriber to the capital stock of said company from any liability on account of such subscription to the capital stock of said company. And said injunction also be directed to the Bailey Construction Company, Bristol Land Company, and the South Atlantic and Ohio Railway Company, their agents, officers, or employes, and each and all of them, restraining them, and each of them, from collecting any money, incurring any liabilities, or in any way interfering with the property or business of the South Atlantic and Ohio Railway Company, Bailey Construction Company, Bristol Land Company, until the further order of court or judge in vacation. And as incident to the injunction, and for the purpose of preserving the property affected thereby, and for the purpose of protecting the rights and interests of all parties in interest, it is ordered and decreed that, upon the injunction herein allowed, being perfected, that John M. Bailey be, and he is hereby, appointed a receiver in this case, and as such receiver will take

charge and possession of the property and assets of the Virginia, Tennessee and Carolina Steel and Iron Company, and of the Bailey Construction Company, of the South Atlantic and Ohio Railroad Company, and of the Bristol Land Company, and manage, operate, and control the same, and collect all money due to either of said corporations; and said receiver shall, in the management and operation of the said railroad company, employ and appoint all necessary officers, agents, and employes, and make and enforce all necessary rules and regulations, and shall keep all necessary and proper accounts of expenses and disbursements in managing and operating said railroad. Said receiver shall, every two weeks, render an account of the disbursements and expenditures, and of his transactions as receiver, which account is to be filed in this cause; and he shall commence, and, as soon as can be done, complete, and file in this cause, an inventory of all property taken possession of by him as such receiver. But before acting as such receiver, the said John M. Bailey shall execute bond, with good security, before the clerk of said circuit court of Washington county, in the penalty of $10,000, conditioned for the faithful discharge of his duties as such receiver according to law, and according to this order. This order appointing a receiver to remain in force until further order of court or judge in vacation.

"D. W. Bolen, Judge of the 15th Judicial Circuit of Va.

"Enter this order. To clerk circuit court of Washington county.

"D. W. Bolen, Judge of the 15th Judicial Circuit of Va.

"August 6, 1890."

The evidence proves that John M. Bailey, the receiver appointed under this order of Judge Bolen, took peaceable possession of the offices, books, shops, rolling stock, and other property of the defendant companies, appointed employes who took service under his orders, ran the trains of the defendant railroad company, and generally conducted the business thereof, from about 9 o'clock A. M. on the 8th day of August, 1890, until about 6 o'clock P. M. of the same day, when he and the employes serving under him were forcibly ejected from the offices of the defendant railroad company in the city of Bristol, Va., in defiance of the said order of Judge Bolen, appointing him receiver. In the light of the evidence, it is impossible to arrive at any other conclusion than that he was thus ejected by force from the offices, and dispossessed of the other property of the defendant companies, of which, by authority of said order of Judge Bolen, he had peaceably assumed charge, and then had in his possession, as an officer of the circuit court of Washington county, Va. And, furthermore, the evidence clearly discloses that said forcible ejectment was done and effected under such circumstances as seem to justify the allegations of petitioners that it was the work of an armed mob; and the evidence is equally clear that the mob was inspired and led on by the deposed railroad officials and employes, who had been superseded by the receiver appointed under Judge Bolen's said order, and the employes appointed by him, and the friends and adherents of said deposed railroad officials and employes in the city of Bristol and vicinity. The evidence as to this fact is all one way, and is full and complete. Indeed, this grave charge of defiance and forcible resistance of Judge Bolen's order appointing J. M. Bailey receiver is not denied anywhere in the answers filed in this cause.

But complainant company alleges that said Bailey, receiver, had been discharged from his office by virtue of a decision of the

supreme court of appeals of Virginia in the case of Iron Co. v. Wilder, and of Wilder v. Kelley, 88 Va. 945, 14 S. E. Rep. 806; but an examination of that decision shows that the order of Judge Bolen, above recited, was never before the supreme court of appeals of Virginia in either of the cases mentioned, and that said decision had no bearing or reference whatever to the appointment of Bailey as receiver, as made by Judge Bolen in said order. On the contrary, that decision expressly states that the appeal was from an order made by Hon. R. A. Richardson, one of the judges of the supreme court of appeals of Virginia, awarding an injunction, and appointing John M. Bailey receiver, etc. A copy of the record in that case has been filed as an exhibit in this cause, from which it appears that the complainants in error in that case, who are the defendants here, did not then contemplate an appeal from the above-recited order of Judge Bolen, appointing John M. Bailey receiver, for they assign as grounds of error in Judge Richardson's order the following:

"That the Hon. R. A. Richardson had no jurisdiction to grant the injunction, for the reason that the injunction granted by Judge Bolen on the 6th day of August, 1890, was still in full force and effect.

"Because Judge Richardson had no jurisdiction to appoint a receiver, no such authority being conferred by the statute upon a judge of the court of appeals, and no judge can appoint a receiver, except the chancellor, who, by his general jurisdiction, can appoint a receiver, as a matter incident to the granting of an injunction.

"Judge Richardson further had no jurisdiction to appoint a receiver for the reason that the said Bailey was already a receiver under the order of Judge Bolen of August 6, 1890, which was still in force.

"And for the further reason that two injunctions between the same parties, touching the same subject-matter, cannot be had in any court at one and the same time."

It is thus shown by the evidence, and is not denied by the complainant, that by an order of the circuit court of Washington county, Va., awarded by Hon. D. W. Bolen, a circuit judge of the state of Virginia, the said state court had assumed jurisdiction and acquired possession of the subject-matter of the contention in this cause, and had appointed a receiver to take charge of the same; that said receiver had taken charge thereof, in pursuance of said order, but had been forcibly dispossessed of the same; and that all these things had been done and effected prior to the 8th day of August, 1892, the day on which the defendant companies in this cause made application to Judge Bond for an injunction and for the appointment of receivers, and he appointed said John C. Haskell and D. H. Conklin receivers, and that at that time the said order of Judge Bolen, entered in the circuit court of Washington county, Va., on the 6th day of August, 1890, was in full force and effect. And the court is of opinion that although it appears that the said state court had subsequently entered an order temporarily restraining its said receiver from taking charge of the property of which it had assumed jurisdiction, and although a motion was then pending in said court to dissolve the injunction, and vacate the order appointing a receiver, yet, as said cause is

still pending in the circuit court of Washington county, Va., the fact is not invalidated that the said state court had assumed prior jurisdiction and acquired prior possession of the subject-matter of this contention when, on the 8th day of August, 1892, the complainant companies presented their bills to Judge Bond, and, furthermore, that said state court still holds such prior jurisdiction. It does not, however, appear that these facts were made known to Judge Bond at the time the said bills of said complainant companies were presented to him, and he appointed said John C. Haskell and D. H. Conklin receivers in this cause. If these facts had been known to him, he, no doubt, would have denied the prayers of the bills presented to him, and have left the causes in question to be further dealt with and determined by the state court which had acquired prior jurisdiction of the same.

Under the full light of the facts, as now disclosed by the evidence, there appears no reason why receivers should be appointed in the circuit court of the United States. All the matters which could be decided by this court are embraced in the suits which are pending in the circuit court of Washington county, Va. There is no reason advanced to this court, nor can it conceive of any, why a new suit should be instituted in this court to accomplish the purposes which can be accomplished by the suits pending in the state court. No reason has been assigned for bringing this second suit, nor can the court see any. The only reason that the court can possibly conjecture for bringing about this conflict of jurisdiction between a federal court and a state court must be referred to the disposition which is, unfortunately, so frequently seen in controversies where property of a corporation is involved,—of contending factions to get control of the same. The law is well settled that, where a state court and a United States court have concurrent jurisdiction, the court which first takes control of the subject-matter and of the parties cannot be ousted of its jurisdiction by subsequent proceedings instituted in the other court. This is sustained by a long line of decisions:

"Undoubtedly, circuit courts and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction, and the general rule is that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on mesne process or property seized upon execution; and the general rule is that where there are two or more tribunals, competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized." Riggs v. Johnson Co., 6 Wall. 166.

"A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded, within the general scope of the subject-matter of the suit." Ward v. Todd, 103 U. S. 327.

"Where two courts have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate, and neither party can be forced into the other jurisdiction." Smith v. McIver, 9 Wheat. 532; Shelby v. Bacon, 10 How. 56.

"* * * The broad proposition that, upon the principle of comity, no court can take from another, of concurrent jurisdiction, property in its possession or control." Freeman v. Howe, 24 How. 450.

In the case of Sharon v. Terry, in the circuit court for the northern district of California, (Justice Field delivering the opinion of the court,) it was held that:

"Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree." 36 Fed. Rep. 337.

"The jurisdiction of this court attached as soon as the bill was filed and process served, and the fact that an actual seizure was made under the bill subsequently filed, and after process was served under a bill previously filed in this circuit, will not deprive this court of its jurisdiction. * * * The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the things in controversy, if tangible and susceptible of seizure. * * * The broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained. The jurisdiction thus acquired is exclusive, and it is the duty of all other tribunals, both by law and comity, not to interfere with it." Owens v. Railroad Co., etc., 20 Fed. Rep. 10.

See, also, Miller v. Tobin, 18 Fed. Rep. 609; Osgood v. Railroad Co., 6 Biss. 330; Armstrong v. Bank, Id. 524; Bills v. Railroad Co., 13 Blatchf. 227; Williams v. Morrison, 32 Fed. Rep. 177; and Hay v. Railroad Co., 4 Hughes, 376.

In view of this array of authorities, the court would be loath to violate the well-established rule of comity which prevails between the federal courts and the state courts in cases of concurrent jurisdiction, by sustaining the appointment of receivers to supersede the prior appointment of a receiver in the same cause made by a circuit court of the state of Virginia. For these reasons the court is of the opinion that the order entered in this cause on the 8th day of August, 1892, appointing John C. Haskell and D. H. Conklin receivers of the defendant companies, was improvidently made, and must be vacated, and the said receivers discharged. The suits must be dismissed, at the costs of complainants.

HINDS et al. v. KEITH.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 23.

1. REMOVAL OF CAUSES—WAIVER OF PLEAS TO JURISDICTION.
   While the filing of a petition in the state court for removal to the federal court is not such an appearance in the state court as will waive the petitioner's exception to its jurisdiction in case the attempt to remove is unsuccessful, yet the actual removal of the cause to the federal court subjects the petitioner to the jurisdiction of that court, gives it jurisdiction for the purpose of trial and final disposition of the case, and is a waiver of a privilege claimed by pleas that the suit is not for the recovery of real property, the possession thereof, or for a trespass thereto, or that petitioners are not resident freeholders or householders in the county where the suit is brought, but of another county, which pleas are by the state statute pleas in abatement.
2. FEDERAL COURTS—FOLLOWING STATE LAW OF EVIDENCE.
   In actions at law in the federal courts the rules and law of evidence generally of the state within which such courts are held prevail.

8. EVIDENCE—MOTIVE.
On trial of an action against a marshal and his sureties for damages for illegal seizure of goods claimed by plaintiff by purchase from the attachment debtor, it is error to permit plaintiff to testify that he acted in good faith and honesty in making the purchase from the debtor, and had no purpose to aid him in defrauding his creditors.

4. SAME—HEARSAY.
In such an action a question asked of a witness, "Was it not generally understood there in the community that he [the debtor] was selling goods at cost, and less than cost?" is objectionable, because seeking to prove by notoriety or reputation a particular fact, in which the public had no interest.

5. SAME—OPINION EVIDENCE.
The question "From your experience as a merchant would you or not say an ordinarily prudent business man would form a partnership with another to go into his business without inquiring as to his mercantile business, and examining his books?" was objectionable, as calling for an opinion involving a conclusion which, if material, was an inference to be drawn by the jury from circumstances which might be proven.

6. SAME—HEARSAY.
Evidence of a witness engaged in business at another locality than the attachment debtor, but within the same county, that witness "knew of" the debtor "engaging in the mercantile business at" such other place, "that he heard from numerous parties that" the debtor "was selling out at less than cost, and that it was generally believed in the community that" the debtor "was in embarrassed circumstances, and would break or fail in his mercantile business," was inadmissible as hearsay or rumor, and because the belief testified to was not shown affirmatively to have been the general belief in the community in which the debtor did business, where the plaintiff resided, and where the sales by the debtor to the plaintiff were made.

7. WRONGFUL ATTACHMENT—ACTION FOR—BURDEN OF PROOF.
The plaintiff having bought for cash at a fair and reasonable value, the burden was on defendant to prove that plaintiff had notice, actual or constructive, that the debtor was insolvent or in embarrassed circumstances, or information of suspicious circumstances sufficient to put him upon inquiry, which if followed up would have led to knowledge that the sales were made with intent to hinder, delay, or defraud creditors.

8. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.
Where the verdict and judgment is for plaintiff, and it is evident that the whole evidence shown by the record, with all inferences the jury could justifiably have drawn from it, was insufficient to support a verdict for defendants, the judgment should not be reversed, although there may have been errors in ruling on the evidence or in charges given or refused.

9. REHEARING—PETITION FOR—CERTIFICATE OF COUNSEL.
A petition for rehearing not supported by certificate of counsel, as provided by rule 29 of the circuit court of appeals, (47 Fed. Rep. xiii.,) should be denied.

10. EVIDENCE—HEARSAY.
The notoriety of a sale or purchase in a community is no more than hearsay, and is inadmissible in evidence to raise a presumption of knowledge in the community of such sale or purchase.

11. FRAUDULENT CONVEYANCES—EVIDENCE—KNOWLEDGE OF PURCHASER.
The fact that the debtor sold goods cheaper generally than other merchants in the same place did, and sold some particular articles at cost, or below cost, was not of itself such a suspicious circumstance as if known to the plaintiff ought to have put him on inquiry, or which, if followed up, would necessarily or naturally have led to knowledge of the debtor's fraudulent intent.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

At Law. Action by Pope W. Keith against Joseph M. Hinds, United States marshal, and Charles C. Sheats, William B. Green, Leroy M. Peevy, and Perry L. Harrison, sureties on his official bond, for damages for an alleged illegal seizure of a stock of goods. The defendant Harrison having died pending the action, the suit abated as to him. From a judgment for plaintiff, defendants appealed. Affirmed, and application for rehearing denied.

H. C. Tompkins and Thomas R. Roulhac, (R. W. Walker and Humes, Sheffey & Speake, on the brief,) for plaintiffs in error.

R. C. Brickell, J. E. Brown, and D. D. Shelby, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. This action was brought by Pope W. Keith, the defendant in error, against James M. Hinds, as United States marshal, and his sureties on his official bond, the plaintiffs in error, to recover damages for an alleged illegal seizure of a stock of goods which said Keith had purchased from one C. M. Fennell, and on which certain writs of attachment against Fennell were levied by the marshal, and which were sold under the levy. The defendants justified under the attachments, alleging that the goods belonged to Fennell at the time of the levy, and also attacking the validity of Keith's purchase on the ground of fraud. The stock of goods was at the time of the levy in the possession of Keith, who claimed to have purchased them from Fennell. The suit was commenced in the circuit court of Jackson county, state of Alabama. Process was issued, and served on the plaintiffs in error. They severally appeared, and pleaded in abatement that the suit was not for the recovery of real property, or for the possession thereof, or for a trespass thereto, and that they were not resident freeholders of Jackson county, but were freeholders or householders in the state, having a permanent residence in a county other than said county of Jackson. Having filed these pleas, the defendants, now plaintiffs in error, filed a petition for the removal of the cause to the circuit court of the United States for the northern district of Alabama. The cause having reached the circuit court of the United States, the pleas in abatement were overruled by the court. The case went to trial on its merits, and a verdict was rendered for the plaintiff, now the defendant in error.

The first assignment of error is that the court erred in overruling these pleas.

The pleas in abatement were of a mere personal privilege, exempting the defendants from suit in other than local actions, without the county of their residence, and is a creature of the statute of the state. The case was a removable one, and it was, on the petition of the defendants, removed to the federal court. The filing of the petition for removal was not such an appearance in the state

court as to waive the defendants' exception to the jurisdiction in that court in case their attempt to remove had been unsuccessful; but the actual removal of the case to the federal court subjected the defendants to the jurisdiction of that court, and operated to give it jurisdiction, for the purpose of trial and final disposition of the case, and was a waiver or relinquishment of the privilege claimed by the pleas in abatement. Bushnell v. Kennedy, 9 Wall. 387; Ahlhauser v. Butler, 50 Fed. Rep. 705. There is a statute which provides that "there shall be no reversal in the supreme court or in a circuit court upon a writ of error, for error in ruling on any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact." Rev. St. § 1011. The jurisdiction of the court referred to in the exception in this statute seems to relate to jurisdiction as to subject-matter, and clearly shows that pleas in abatement are not to be favored.

The court did not err in overruling defendants' objection to Keith's evidence in reference to the transactions with Fennell. Rev. St. § 858; Goodwin v. Fox, 129 U. S. 602, 9 Sup. Ct. Rep. 367. But it was virtually conceded in the argument of counsel for the plaintiffs in error that there was no error in the ruling of the court on this point.

There are numerous assignments of error relating to the rulings of the court below touching the admission and rejection of evidence, and the giving and refusing of instructions to the jury. There was a good deal of evidence admitted against the objection of the defendants which, in our judgment, was wholly immaterial, and could not affect the real issues in the case one way or the other. The admission of such evidence was therefore harmless. There are, however, some exceptions to the ruling of the court on the admission and rejection of evidence which we will briefly notice. We think that the court erred in permitting Keith to testify that he acted in good faith and honesty in making the purchases from Fennell, and that he had no purpose to aid him in defrauding his creditors. The courts in many of the states have held that in cases in which knowledge, motive, or intent may be imputed to parties by circumstantial evidence, they are permitted to testify directly as to the existence of such motive or intent, and the ruling of the court below was in harmony with these decisions. But we think the sounder principle and better rule is to exclude such evidence. The supreme court of Alabama has declared that the rule is well settled in that state that a "party certifying for himself should not be permitted to state the motive or intention with which he did an act; that such motive or intention is an inferential fact, to be drawn by the jury from proven attendant facts and circumstances." Burke v. State, 71 Ala. 382; Whizenant v. State, 20 Ala. 383. In actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the state within which such courts are held prevail. Rev. St. § 721; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. Rep. 119; Ex parte Fisk, 113 U. S. 720, 5 Sup. Ct. Rep. 724.

There are three exceptions to the exclusion of evidence, which are found in the forty-first, forty-second, and forty-third assignments of error. The forty-first and forty-second assignments of error are the sustaining by the court of objections to the following questions asked a witness: "Was it not generally understood there in the community in the fall and winter of 1884 that he [Fennell] was selling goods at cost, and less than cost?" And "from your experience as a merchant, would you or not say an ordinarily prudent business man would form a partnership with another to go into his business without inquiring as to his mercantile business, and examining his books?"

The first question was objectionable because it sought to prove by notoriety or reputation an objective fact,—a particular fact,—in which the public had no interest, and which cannot be proved in that way, (1 Greenl. Ev. 138; Shutte v. Thompson, 15 Wall. 163;) and the second question called for the mere opinion of the witness,—an opinion involving a conclusion which, if material, was an inference to be drawn by the jury from circumstances which may be proven. Such evidence was inadmissible. The forty-third assignment of error is the exclusion of the evidence of the witness Shelton, which was "that he was engaged in the mercantile business at Larkinsville, Jackson county, Ala., in 1884, and the early part of 1885, and during the time knew of C. M. Fennell engaging in the mercantile business at Scottsboro, in the same county; that in the latter part of 1884 he heard from numerous parties that Fennell was selling out at less than cost, and that it was generally believed in the community that Fennell was in embarrassed circumstances, and would break or fail in his mercantile business." This testimony, if it was to any material fact, was hearsay and rumor, and the belief testified to was not shown affirmatively to have been the general belief in Scottsboro, the community in which Fennell did business, where Keith resided, and where the sales by Fennell to Keith were made. It was properly excluded.

The real issue in the case is whether Keith had notice, actual or constructive, that Fennell was insolvent or in embarrassed circumstances at the time of the sales by Fennell to him, and that he (Fennell) made the sales with intent to hinder, delay, or defraud his creditors. Keith paid Fennell in cash the fair, reasonable value of the goods. This fact being shown, it devolved on the plaintiffs in error, the defendants below, to show that Fennell by the transaction attempted to hinder, delay, or defraud his creditors, and that when Keith purchased from him he knew that such was his intention, or had information of suspicious circumstances, which ought to have led him to make inquiry, and that if he made such inquiry, and followed it up, it would have led to knowledge of Fennell's fraudulent intent. Stix v. Keith, 85 Ala. 465, 5 South. Rep. 184; Skipper v. Reeves, 93 Ala. 332, 8 South. Rep. 804.

There was much evidence tending to show that Fennell's intent in making the sales was fraudulent, and in this respect it may

be conceded that the plaintiffs in error discharged the burden of proof resting on them. But this fraudulent intent is immaterial unless they traced to Keith knowledge of it, or information of suspicious circumstances, which ought to have led him to make inquiry, and which, if followed up, would have led to knowledge of such fraudulent intent. The burden of showing such knowledge or information of such suspicious circumstances was, as we have said, on the plaintiffs in error, and, in our opinion, they have failed to discharge it. We have been unable to find in the evidence any fact or circumstance tracing to Keith knowledge of Fennell's insolvency or fraudulent intent, or information of any suspicious fact or circumstance, which ought to have put him on inquiry, and which, if followed up, would have led to such knowledge at or prior to the sales.

The bill of exceptions sets out all the evidence in the case and that which was excluded. If the whole evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the defendants, now plaintiffs in error, the case will not be reversed, although there may have been errors committed by the court below in rulings on evidence, in charges given, and in the refusal to give certain charges requested by the defendants. Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. Rep. 322; Railroad Co. v. Moore, 121 U. S. 570, 7 Sup. Ct. Rep. 1334.

Our opinion is that the verdict was not only responsive to the evidence and the law applicable to the case, but that, in view of all the evidence, no other verdict could properly have been rendered by the jury. The judgment is affirmed.

On Petition for Rehearing.

(May 30, 1893.)

TOULMIN, District Judge. Rule 29 of this court provides that a petition for rehearing must be supported by certificate of counsel. The petition in this case is not supported by such certificate, and for that reason should be denied. We, however, will not rest our denial of the petition solely on this ground, but will consider the petition on its merits. The counsel for plaintiffs in error claim that the court erred in holding that evidence that it was "generally understood in the community that Fennell was selling goods at cost" was inadmissible, and that the court was wrong in considering that the objective fact sought to be thus proved was that Fennell was selling goods at cost. They claim that what they sought to prove by this evidence was notice to Keith of the fact that Fennell was thus selling goods by showing that it was a matter of notoriety in the community, and that this fact was a suspicious circumstance, which ought to have put Keith on inquiry. If Fennell's financial embarrassment or insolvency was proved by proper evidence, then proof of its notoriety in the com-

munity would be admissible to bring home knowledge of the fact to Keith, who resides there. 1 Brick. Dig. p. 847, §§ 616-617. But the notoriety of a sale or purchase in a community is nothing more than hearsay, and is inadmissible as evidence, and it is, in our opinion, inadmissible to raise a presumption of knowledge in the community of such sale or purchase. Steele v. Worthington, 7 Port. (Ala.) 266; Yarborough v. Moss, 9 Ala. 382. If, then, the court misconceived the purpose of the inquiry as to the notoriety of Fennell's selling goods at cost, as is claimed, we are still of the opinion that there was no error in the ruling of the court in reference to it. There was evidence, admitted without objection, that Fennell sold an overcoat at a price below cost, and that he sold some other goods at very low prices, some of them, in the opinion of the witnesses, at cost; that no one else in the community had the reputation of selling as cheaply; and that it was generally understood that he was selling cheaply. But the evidence further was that he was selling for cash and others on credit, that he bought for cash generally, and most other merchants there bought on credit, and that discounts are given from 1 to 10 per cent. on cash purchases. It also appeared that while Fennell actually sold some goods of a particular class somewhat cheaper than merchants there generally did, there were some kinds of goods that could be bought cheaper elsewhere, and it appeared that some of the goods bought from Fennell by merchants, or by other persons for them, were sold by such merchants at the same prices. The fact that Fennell sold goods cheaper than other merchants generally in the same place did, and that he sold some particular article, whether as a leader or otherwise, at cost or below cost, is not of itself such a suspicious circumstance as, if known to Keith, ought to have put him on inquiry, and which, if followed up, would necessarily or naturally have led to knowledge of Fennell's fraudulent intent. Considering all the facts and circumstances as shown by the evidence, we are satisfied with the conclusions heretofore reached by us in the case.

There was evidence of Fennell's removing some goods from his store in Scottsboro to Woodville some time in the fall of 1884, and prior to Keith's purchase; but there was no evidence, direct or circumstantial, of Keith's knowledge of this. There was also evidence of Fennell's removing goods from a store in Woodville, 20 miles from Scottsboro, about the time of the seizure by the marshal. This was a very suspicious circumstance, but this occurred, even if known to Keith, after the purchase by him.

Rehearing denied.

McMULLEN v. NORTHERN PAC. R. CO.

(Circuit Court, E. D. Wisconsin. August 4, 1893.)

1. REMOVAL OF CAUSES—PRACTICE — REFUSAL OF PARTY TO RECOGNIZE JURISDICTION.

In a cause removed to a federal circuit court from a state court which had refused to order the removal, plaintiff, after refusing to recognize the

jurisdiction of the federal court, although he had due notice of its order docketing the cause, will not be heard in the federal court in opposition to a motion to dismiss the cause because it has been pending three stated terms without prosecution.

2. SAME—WAIVER BY DEFENDANT.

Where a state court persists in holding a cause for trial after it has been duly removed to a federal court, the defendant does not, by participating in such trial, waive his rights in the federal court. Insurance Co. v. Dunn, 19 Wall. 214.

At Law. Action by Mary McMullen, administratrix, against the Northern Pacific Railroad Company. Heard on defendant's motion to dismiss. Granted.

Ryan & Merton, for plaintiff.
Thomas H. Gill, for defendant.

SEAMAN, District Judge. The defendant moves to dismiss, upon due notice and affidavits, (1) under circuit court rule 40, because the cause has been pending three stated terms of the court without prosecution; and (2) under rule 69, because plaintiff has not given security for costs. The record shows that the action was commenced in the county court of Waukesha county, July 27, 1891, and that upon a petition and bond for removal filed in that court, and transcript of the record filed in this court, before the first day of its succeeding term, an order of this court was made on October 5, 1891, (being the first day of said next term,) docketing said cause, upon full understanding of the circumstances, and of the refusal of said county court to order removal. The plaintiff was duly notified of such order of this court, but declined to recognize jurisdiction; has neither appeared nor moved for remand, but now makes special appearance, by counsel, to urge in opposition to this motion (1) that jurisdiction has never been obtained by this court; and (2) that the defendant has waived all question by proceeding to trial and judgment in the court of original jurisdiction.

Neither of these objections meets the motion to dismiss. The plaintiff has ignored all the proceedings for removal of the cause, and rested upon the claim in her behalf that the petition for removal was not filed in time to become effective. In such case, jurisdiction would remain with the county court, and the plaintiff would be entitled to proceed to judgment, as it is now stated has been the course. On the other hand, if the petition and bond were duly filed, they operated at once to divest that court of all jurisdiction, whether an order for removal was made or refused. Kern v. Huidekoper, 103 U. S. 485; Insurance Co. v. Dunn, 19 Wall. 214. And in the latter case, if the county court insisted on holding the cause for trial, the participation therein of the defendant, under such requirement, would not waive or affect its rights in this court. Id.

With this position of the plaintiff, it is unnecessary—if not improper, in view of the order of October 5, 1891, docketing the cause—to inquire on this motion whether or not the filing of the petition for removal was made effective by the amendment granted by the

county court. It is sufficient that the rules here invoked in behalf of defendant have been violated, and entitle it to dismissal, and that the excuses offered by the plaintiff, by way of objections, all favor such disposition. 1 Desty, Fed. Proc. § 113. The plaintiff cannot claim to hold her cause for hearing in both courts, and, under the circumstances shown, must take dismissal here. It is so ordered, at plaintiff's cost.

CITY OF CARLSBAD et al. v. W. T. THACKERAY & CO.

(Circuit Court, N. D. Illinois, N. D. August 10, 1891.)

TRADE-MARKS AND TRADE-NAMES—CARLSBAD SALTS.

The city of Carlsbad, Bohemia, sole owner of the celebrated mineral springs of that city, having for 50 years been engaged in the business of evaporating the waters, and selling the salts thus obtained under the names "Carlsbad Salts" and "Carlsbad Sprudel Salts," is entitled to an injunction to restrain other parties from using these words, even with the word "Artificial" added thereto, as names for artificial salts containing the same chemical elements, although the artificial salts may be superior to the natural product.

In Equity. Bill by the city of Carlsbad and others against W. T. Thackeray & Co. to restrain respondent from infringing complainants' trade-marks. Decree for complainants.

A. M. Gerstlet and Jerome Carty, for complainants.
John G. Elliott, for defendant.

BLODGETT, District Judge. By the bill in this case, complainants charge that the city of Carlsbad, situated in Bohemia, in the empire of Austria, is the sole owner of the celebrated mineral springs of said city, and has for many years been engaged in the business of evaporating the waters of said springs, and thereby producing the essential salts contained in them, and from which said waters derive their peculiar medical qualities and value, and has put said salts upon the market under the names of "Carlsbad Sprudel," "Carlsbad Salts," and "Carlsbad Sprudel Salts," and that such salts have become widely known by such names, and are understood to mean and indicate salts obtained from the natural waters of the springs so owned by the city of Carlsbad. That defendant has engaged in the business of making artificial salts, and putting them upon the market, and offering them for sale, by the names and designations of "Carlsbad Sprudel" and "Carlsbad Sprudel (Artificial,)" which salts are not made from the natural waters of the Carlsbad Springs, but, by reason of the name "Carlsbad" being used, are calculated to deceive purchasers and thus injure the business of the complainant and also impose upon the public. An injunction is prayed, restraining defendant from making and selling any artificial salts as "Carlbad Salts" or as "Carlsbad Sprudel," and from using the word "Carlsbad" as the designation of the defendant's salts.

Defendant is a corporation doing business in the city of Chicago, and on the hearing of the motion for the injunction admitted that

it is engaged in making and selling artificial salts which are labeled and designated by the names of "Carlsbad Sprudel" and "Carlsbad Sprudel Salts," and that upon some of the labels the word "Artificial" is printed in brackets after the word "Carlsbad."

Affidavits are also produced in behalf of defendant tending to show that the chemical constituents of the Carlsbad waters have long been publicly known, from reports of chemical analysis made by eminent chemists, which have been widely published by the complainants, and those interested in the sale of their salts; that the essential chemical elements of the waters, as well as their therapeutic quality, is treated of in well-known medical works and medical journals; and that the word "Carlsbad," as applied to salts, has come to mean and imply a salt containing the chemical elements of the Carlsbad waters, the same as the name "Epsom Salts," and "Glauber Salts" indicate, in the medical nomenclature, salts which contain certain chemical combinations.

The proof shows that the salts made by complainants from these natural waters, and labeled "Carlsbad Sprudel," etc., have been on the market for over 50 years, and there can be no doubt, from the proof, that their wide reputation arises from the fact that they are known to be the product of the natural waters of the Carlsbad springs, whose healing qualities are a matter of general notoriety. There can be no doubt that the city of Carlsbad, being the manufacturer of these salts, had the right to indicate their origin by its own name, to the same extent that a natural person would have such right; and it is equally clear to my mind that no other manufacturer of salts, even of the same chemical elements, has the right to put them on the market in the complainants' name. The complainants' salts are not only made in Carlsbad, but are made by Carlsbad, and no one else has the right to use the name of Carlsbad as a designation of salts obtained from the Carlsbad waters.

The mere fact that skilled chemists can combine the constituents of those salts so as to make a more or less perfect imitation of them does not justify defendant in trading upon the reputation which has been established for complainants' goods. I have no doubt that the eminent chemist, Dr. Haines, whose affidavit is filed here by defendant, would, on the mention of the words "Carlsbad Sprudel," know just what kind of salts were meant, and the constituent elements of them; but that fact does not make complainants' name public property, and allow every one to affix it as a designation or label to salts of his own make, although his manufacture may contain, so far as chemistry can determine, the same chemical constituents as complainants' salts. The terms "Carlsbad Sprudel Salts" mean more than a mere combination in certain proportions of certain chemical elements. They mean an article produced by the complainant from the Carlsbad waters.

Nor does the addition of the word "Artificial" by the defendant to its label enable the defendant to escape from the charge of wrongfully availing itself of complainants' name and reputation. The word is so placed as not specially to attract attention. In

fact, the average purchaser would only ask for Carlsbad Sprudel, and be handed the package done up in wrapping paper; thus giving no opportunity for examination until the purchaser undoes it for use, when it would likely be too late to correct the mistake.

Nor does the claim that these artificial salts made by defendant are in fact better than those made by complainant, owing to the fact that the natural spring waters vary from time to time in the proportions of mineral constituents, avail as a defense, as complainant has the right to the benefit of the good will and trade it has established for its own product, and if defendant can produce a better article it should do so on the credit of its own name, and not on the good name of the complainant. An injunction will be ordered as prayed.

FIRST NAT. BANK OF SHEFFIELD et al. v. TOMPKINS.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1893.)

No. 109.

1. VENDOR'S LIEN — NOTICE — INNOCENT PURCHASER — NOTICE TO A BANK — KNOWLEDGE OF PRESIDENT.

   Where a bank acquires title to real estate by conveyance from its president, who held the land under a deed reciting full payment of the purchase money, and it has no actual knowledge that the purchase money was not in fact paid, it is an innocent purchaser without notice, and is not chargeable with constructive notice because of the knowledge of its president.

2. SAME—NOTICE—WHAT CONSTITUTES.

   A conversation by a grantor with a director of a bank, in which the former states that he is willing to convey a half interest in certain land to the president of the bank, with the understanding that such president was to deed the whole interest to the bank, and that the president or the bank was to pay him by giving him credit upon notes then running against him in the bank, does not amount to notice to the director that the grantor intends to retain a vendor's lien, but rather imports a notice that no such lien is to be retained.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

In Equity. Bill by Henry B. Tompkins against the First National Bank of Sheffield, Ala., and Charles D. Woodson to enforce and foreclose a vendor's lien. Defendant Woodson having died pending the suit, Richard W. Austin, administrator, was substituted in his stead. Decree for complainant. Defendants appeal. Reversed.

David D. Shelby, for appellants.

R. C. Brickill, (Brickill, Semple & Gunter, on the brief,) for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge. On the 15th December, 1889, the appellee filed a bill in the circuit court against the appellants to

enforce and foreclose a vendor's lien on one undivided half interest in and to lots numbered 13 and 14, block No. 62, on Montgomery avenue, in the city of Sheffield, county of Colbert, in the state of Alabama; and therein alleged that, being the owner in full fee simple of said one undivided half interest, he did, on the 5th April, 1887, or some date subsequent thereto, execute a deed to said one undivided half interest to Charles D. Woodson, then president of the First National Bank of Sheffield, with the understanding and agreement that said two lots were to be deeded by said Woodson to said bank; that the price to be paid therefor was, as expressed in said deed, $4,000; that no part of said purchase price of said interest was ever paid by said Woodson or by said bank; that the said Woodson, as president of said bank, acting for and by authority of the board of directors of said bank, had full knowledge, as did said bank itself, that the purchase was made by Woodson for the bank; that the purchase money has never been paid, in whole or in part; that no note was taken for said purchase price of $4,000, because it was understood and agreed that it was a cash transaction, and that the purchase price would shortly be paid, with interest at 8 per cent. per annum; that the deed dated the 5th April, 1887, was not actually acknowledged and delivered until the 23d of October, 1888. It was further alleged in said bill that on the 6th day of April, 1888, said Woodson, who held title to the other one undivided half interest in said two lots, deeded the whole interest in said lots to the bank, and that at the time said bank accepted the deed said Woodson, the president of the bank, as well as the bank itself through its proper officers and board of directors, had actual knowledge or were put upon legal notice that the said undivided one-half interest had not been paid for in whole or in part; and, further, that he, Tompkins, is not now indebted to said Woodson or to said bank in any sum whatever. The prayer of the bill was for a decree subjecting the undivided half interest in said two lots to the payment of the vendor's lien. Discovery under oath from the defendants was expressly waived.

To the bill, Charles D. Woodson answered, admitting the conveyance and the price, but denying that no part of the price was paid to complainant by defendant. On the contrary, he says:

"The full amount of said purchase price, to wit, four thousand dollars, ($4,000.00,) was by this defendant paid to and received by complainant before said deed was made, or was by defendant paid out on complainant's account at his instance, or upon his request before that time; and when said deed was made defendant was not indebted to the complainant in the sum of four thousand dollars on account of the purchase of said interest in said two lots, or in any sum at all."

Defendant Woodson further admitted that he was the president of said bank, and so remained until the 30th day of November, 1889, when it went into the hands of a receiver, to be wound up as provided by the laws of the United States. The said answer denies that in making the purchase Woodson acted for, or by authority of, the bank, or for its board of directors, or that the bank

had full knowledge or any knowledge of defendant's action in the premises; and he says that the purchase was entirely an individual matter between complainant and the defendant, with which the bank or its board of directors had nothing whatever to do. But when he conveyed said lots to the bank he stated to its board of directors that said purchase money had been fully paid, and that he conveyed to them the unincumbered fee-simple title to said lots, and said bank had no knowledge or notice of any claim thereon of complainant, and, in fact, complainant had no claim on said lots at that time, nor since; and he avers that the complainant now owes the bank more than $7,000, money borrowed by him from said bank since the said deed was made, for which he executed his notes, which notes are unpaid, and which are now held by the said bank or its receiver.

The bank answered, admitting that the complainant owned at one time a one-half interest in the property described in the bill; the conveyance to Charles D. Woodson; that Woodson was the president of the bank, and had conveyed the whole property to the bank, but alleged full payment of the purchase money to complainant before the deed was put to record; that the deed from complainant to Woodson was the only evidence and information which was presented to the bank of the ownership of the undivided half interest sued for, and the board of directors relied upon the recitals of the deed from complainant to said defendant as being true, and that at the time of the purchase from Woodson of the lots, which were for the purpose of erecting a bank building, the bank did not have any notice or information of any character whatever of any unpaid balance of purchase money upon the property in question; that Woodson assured the directors at the time the bank purchased the property that the recitals of the deed made by the complainant to him were true, that the entire purchase money was settled and paid. Further answering, the bank says that at the time the said Woodson made and executed his deed to the bank the bank paid said Woodson $5,000, as is stated in said deed, and had no knowledge or information or notice of any outstanding title, equity, or adverse interest of any kind or description; and there was no fact within the knowledge of the bank which could or did put the bank on inquiry as to the title to said property, and the bank relied on, and was entitled to rely on, the bona fides of the record of the deed from the complainant to said Woodson and from said Woodson to the bank.

On final hearing in the circuit court, a decree was rendered in favor of the complainant, recognizing his lien on the lots in question to secure the payment of $4,000, with interest thereon, aggregating $5,813.33, and ordering the bank to pay said sum, with interest and costs, within a short day, and, in default thereof, that the undivided half interest in the property be sold by a special master to pay the same. From this decree the First National Bank of Sheffield and R. W. Austin, administrator of the estate of Charles D. Woodson, deceased, appealed to this court, assigning errors as follows: (1) In decreeing complainant was entitled to the relief prayed for in the

bill; (2) in decreeing that the defendant had a vendor's lien on the real estate described in the bill and in the decree; (3) in decreeing that the defendant Woodson was indebted to the complainant in the sum of $5,813.33 and interest thereon; (4) in failing to render decree dismissing the bill; (5) in not holding and decreeing that the purchase money sued for had been paid; (6) in not holding that the defendant bank was an innocent purchaser of said real estate described in the bill for value and without notice of complainant's claim.

The view we take of the facts in the case as shown by the evidence renders it unnecessary to consider any of the errors assigned except the last. It is undisputed that on the 23d October, 1888, Tompkins, by warranty deed, conveyed to Charles D. Woodson his undivided half interest in and to the lots in question, and therein recited that it was "for and in consideration of the sum of four thousand (4,000) dollars cash, in hand paid by C. D. Woodson, of Colbert county, Alabama, the receipt whereof is hereby acknowledged, have this day bargained, sold," etc.; that by warranty deed acknowledged and delivered on the 13th day of December, 1888, C. D. Woodson, for and in consideration of $5,000, paid by the First National Bank of Sheffield, conveyed the whole of the two lots in question to the First National Bank of Sheffield, and that the consideration named in the last-mentioned deed was paid in cash. The case shows that the bank had no notice of the transaction between Tompkins and Woodson save what was contained in the deed from Tompkins to Woodson, unless the bank was chargeable with notice by reason of the fact that Woodson was president of the bank.

It is true that the complainant testifies that a few days prior to the delivery of his deed to Woodson he had a conversation with James R. Crow, at that time a director in said bank, in which he told said Crow that he was willing to make a deed to Woodson, with the understanding that Woodson had already deeded, or was to deed, the whole interest in the lots to the bank; that he was to make a deed for the consideration of $4,000; and that Woodson was to pay him, or the bank was to do so, by giving him credit for that amount upon the notes then running in his name in said bank. If this evidence of the complainant is given full force, it cannot be taken as giving any notice to Director Crow, much less to the bank, with regard to any intention of the complainant to retain a vendor's lien on the property thereafter to be conveyed. It rather imports a notice that no vendor's lien was to be retained. In Bayley v. Greenleaf, 7 Wheat. 51, Chief Justice Marshall said:

"To the world the vendee appears to hold the estate divested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as in law. A vendor relying upon his lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as a complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be set up in a court of chancery to the exclusion of bona fide creditors."

And in that case the court held that a vendor could not enforce his lien for unpaid purchase money against trustees for the creditors of the vendee to whom the land has been conveyed without notice of the lien. The supreme court of Alabama has decided in many cases that the vendor's lien will not prevail against bona fide purchasers paying the purchase money without notice. Burch v. Carter, 44 Ala. 115; Scott v. Griggs, 49 Ala. 185; Hudgens v. Cameron, 50 Ala. 379; Lambert v. Newman, 56 Ala. 623; Thurman v. Stoddard, 63 Ala. 336; Ware v. Curry, 67 Ala. 274. In the case of Whelan v. McCreary, 64 Ala. 319, Mr. Chief Justice Brickell, speaking for the court, declares the law of Alabama as follows:

"Whoever gives value, or enters into transactions by which his position is materially changed, and from which change loss must ensue, on the faith that the vendor of real estate, or person with whom he deals, has, as the title papers exhibit, a clear, legal title, will be protected against outstanding and latent equities, of which he has no notice. A mortgagee taking a security for a contemporaneous loan or advance falls within the rule, and is entitled to protection. Boyd v. Beck, 29 Ala. 713; Wells v. Morrow, 38 Ala. 125. The only notice, actual or constructive, of Mrs. Whelan's equity, which is attributed to the insurance company, is imputed, because notice, it is insisted, is traced to Williams, one of the directors, active and instrumental in making the loan to Cunningham and McCreary, and taking the mortgage. Whatever facts may have been known to Williams which ought to have excited inquiry on his part came to his knowledge while he was acting as the agent of Cunningham, in a transaction in which the insurance company had no interest. The rule is settled in this state that a corporation will not be affected by notice which one of its directors or other officer may have received when not acting for the corporation, but in the transaction of his own private affairs, and under such circumstances that its communication to other officers of the company is not to be expected. Terrell v. Bank, 12 Ala. 502. If the facts were stronger for the imputation of notice to Williams than are found in the record, notice could not be imputed to the insurance company."

The case of Barnes v. Gaslight Co., 27 N. J. Eq. 33-37, involved a question with regard to notice very similar to the case in hand, and the chancellor held as follows:

"That the defendants are bona fide purchasers for valuable consideration is not denied. Their title is not impugned, except on the ground of notice, and the claim to relief is based on the allegation that at the time when the conveyance was made by Mr. Potts to them he was their president, and this fact is relied upon as of itself sufficient to establish notice to them of all the facts which the bill charges were within his knowledge. The general proposition is undoubtedly true that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. Story, Ag. § 140. On principles of public policy the knowledge of the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration; for, in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company. Stratton v. Allen, 16 N. J. Eq. 229. His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them in his own interest, opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys."

—Citing, in support of the same, Bank v. Cunningham, 24 Pick, 270; Kennedy v. Green, 3 Mylne & K. 699; In re European Bank, L. R. 5 Ch. App. 358; In re Marseilles Extension Railway Co., L. R. 7 Ch. App. 161; Ang. & A. Corp. 8; Winchester v. Railroad Co., 4 Md. 231. To the same effect, see 1 Mor. Priv. Corp. (2d Ed.) § 540; 1 Morse, Banks & Banking, § 104. As, when the bank bought the property, the record showed a perfect title in Woodson, with the purchase price fully paid, and as the bank had no actual notice of outstanding secret equities, and was not charged with constructive notice of any such equities because of any knowledge of Woodson, its president, of whom it acquired the property, it follows that the bank was an innocent purchaser without notice, and, as such, acquired the property divested of any vendor's lien which may have existed in favor of Tompkins as against Woodson. For this reason the decree of the circuit court should be reversed, and the case remanded, with instructions to dismiss the bill, with costs, and it is so ordered.

ALABAMA IRON & RY. CO. et al. v. ANNISTON LOAN & TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 126.

1. RECEIVERS—SALE OF CERTIFICATES—RATIFICATION—ESTOPPEL.
The president of a bank in which a receiver kept his deposits, having been authorized by the receiver to sell certain receiver's certificates, made the sale after his authority had been revoked, and caused the amount realized to be credited to the receiver on the books of the bank, and on the receiver's pass book. The receiver did not repudiate the sale, but, on the contrary, drew checks against the deposits, and reported the transactions to the court, which, in the foreclosure decree, recognized the validity of the certificates, and directed that the sale should be made subject thereto. *Held*, that the receiver was estopped to question the validity of the certificates, as against an innocent purchaser.

2. SAME.
The fact that the receiver, on afterwards learning that the bank was insolvent, demanded and received from the bank and from the president, personally, certain collateral securities, to protect his deposits, was not a repudiation of the sale, but rather a fresh ratification, and acceptance of the deposits as the proceeds of the sale.

3. SAME—RECEIPT OF PROCEEDS—DEPOSITS IN BANK.
The deposits representing the proceeds having been placed in the bank, by the president, in the form of checks, drafts, etc., on other banks, which were in fact duly honored by them, the deposits must be held to have come into the receiver's hands, within the rule which makes the receipt of the proceeds by the receiver a condition precedent to the validity of the certificates, although the bank was never in a condition to pay over any considerable proportion of the deposits to the receiver.

4. SAME—ESTOPPEL OF COURT.
Under the circumstances, the court, having recognized the validity of the certificates, and caused the foreclosure sale to be made subject to the lien thereof, was bound to recognize the estoppel of the receiver, as its agent, and to protect the innocent purchaser of the certificates by enforcing the same against the purchaser of the property.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

In Equity. Petition of intervention filed by the Anniston Loan & Trust Company in the foreclosure suit brought by the Central Trust Company of New York against the Sheffield & Birmingham Coal, Iron & Railway Company. The intervener sought to enforce the lien of certain receiver's certificates, as against the purchasers at the foreclosure sale. In the court below there was a decree in favor of the intervener, and an appeal was taken by the Alabama Iron & Railway Company, the Townley Coal & Coke Company, Napoleon Hill, trustee, and James C. Neely, trustee. Decree affirmed.

Statement by LOCKE, District Judge:

On the 15th day of August, 1890, the Anniston Loan & Trust Company filed its intervening petition, claiming payment for five separate receiver's certificates, numbered 8, 9, 10, 11, and 12, issued on 10th day of October, 1889, by Jacob G. Chamberlain, late receiver of the Sheffield & Birmingham Coal, Iron & Railway Company. The intervention set forth that the receiver placed said certificates in the hands of Charles D. Woodson for sale; that the said Woodson, on the 10th October, 1889, sold the same to one Duncan T. Parker, now deceased, for $5,000 for each certificate; that the said Parker paid Woodson said price for the certificates, the same having been placed in Woodson's hands by the receiver to be negotiated and sold by Woodson, with only power and authority to act for and represent said receiver in the matter of the sale of said certificates; that on the 2d November, 1889, Duncan T. Parker sold and delivered the certificates, for the sum of $5,000 each, to the petitioner, the Anniston Loan & Trust Company.

Said petition further sets forth that it was the duty of Chamberlain to pay the semiannual interest on said certificates, being $750, due on 10th April, 1890, at the National Park Bank of New York, and that said interest was not paid. It is further stated in said petition that said receiver duly reported the sale of said certificates as made by said Charles D. Woodson, such report being made to the circuit court of the United States, and that said proceeds had been placed by Woodson, to the credit of said receiver, in the First National Bank of Sheffield, less 6 per cent. commission for selling the same; that on the 3d day of December, 1889, a decree was rendered by said circuit court of the United States, foreclosing the mortgages, and ordering a sale of the property in said original suit, and that the purchasers be required to pay the receiver's certificates, numbered as aforesaid, owned and held by petitioner; that on the 4th January, 1890, the said circuit court made an order modifying the former decree, of 3d December, 1889, authorizing such purchasers of said properties at the foreclosure sale to contest the validity of said certificates so sold by Woodson, and the said modified decree was made after Parker had purchased said certificates from the duly-authorized agent of said receiver, in good faith, for a valuable consideration, and had sold them to petitioner; that on the 21st April, 1890, said property was sold under said decree, and part of the same purchased by Napoleon Hill, trustee, and part by James C. Neely, trustee. Petitioner then prays for relief,—that the amount of said certificates be paid to it by the purchaser of said property.

To this a demurrer was interposed, and on the 12th November, 1890, petitioner amended its intervention, setting forth more specifically the authority given to said Jacob G. Chamberlain, receiver, to issue said receiver's certificates, and stating that the action of Woodson was as the authorized agent of the receiver, in selling said five certificates, and reiterating, in a great measure, what had already been set forth in the original petition. On the 2d December, 1890, respondents renewed their demurrer to the petition and amended petition, which was overruled.

On the 31st January, 1891, respondents filed their answers to the intervention of the Anniston Loan & Trust Company substantially as follows:

They deny that said Chamberlain, receiver, ever engaged Woodson, the president of the First National Bank of Sheffield, Ala., to act as his agent in the negotiation and sale of said receiver's certificates, and allege that Woodson disposed of the same without warrant or authority from Chamberlain, receiver, and contrary to the direct instructions and request of said receiver; that said certificates were not disposed of by Woodson, as alleged in the intervention, on the 10th October, 1889, to one Duncan T. Parker, or any one else, nor were they disposed of for the sum of $5,000 each. And respondents aver that said five certificates were not disposed of by Woodson until after the 13th October, 1889, and that they were then sold, or otherwise disposed of, by Woodson, without authority, and against the express instructions of the receiver, to some person or persons unknown to respondents, and for a price not greater than 75 cents on the dollar, and also call for strict proof that said Duncan T. Parker, or any one in his behalf, ever paid to Charles D. Woodson $5,000 for each of said certificates. And respondents aver that, if the said Parker ever bought the certificates at all from said Woodson, they were bought for a less sum than they were directed by the court to be sold for, and that the purchase of the same was against the order of the court, and against the instructions of the receiver. They further allege that the price paid for said certificates by said Parker, whatever the price may have been, was never turned over or transferred by Parker, or any one for him, to said Woodson nor to said Chamberlain, as receiver. They aver that they were not informed as to what said Parker may have done with said certificates, but deny that Parker sold and transferred said certificates to the intervener for $5,000 each. They also deny that it was the duty of Chamberlain to pay the interest upon said certificates, or that said Chamberlain reported the sale of said certificates, Nos. 1, 2, and 3, and also Nos. 8, 9, 10, 11, and 12, for him, by said Woodson, or that the proceeds were placed to his credit in the First National Bank of Sheffield. Respondents admit, however, that said Chamberlain did report to the court that the proceeds of the five certificates in litigation had been placed by Woodson to the receiver's credit in the First National Bank of Sheffield, less commission for selling same; but respondents aver and show to the court that such statement, made by said receiver, was made through misinformation, and brought about by misrepresentation and misconduct of said Woodson; and that said receiver proceeded to correct said statement in said report so soon as he became aware of the error into which he had been led.

Respondents admit that a decree had been taken on the 3d December, 1889, as alleged in the intervention, and that it was ordered in said decree that the purchaser of the property should pay for said certificates, in addition to the amount bid at the sale of the property. And they further admit the court did on the 4th day of January, 1890, make another decree, modifying and changing the one of December 3, 1889, so as to authorize the purchaser of the property to test the validity of the said five certificates, but deny that Woodson was the agent for the receiver, or that his sale of the said certificates was binding upon the purchaser of the property. They also admit the sale of the mortgaged property on the 21st April, 1890, under the decree, as modified, authorizing the purchaser of the property to contest the validity of the five certificates.

In answer to the amended petition, substantially the same admissions and denials were made as in the answers to the original petition of intervener.

On the 6th March, 1891, an order was entered, by consent, referring the cause to a special master, who on the 3d of August, 1892, filed an extended report upon matters of fact, in substance finding as follows:

That Chamberlain, the receiver, by an order of the court, duly and regularly made, issued receiver's certificates for an amount, in the aggregate, of $150,000. Of these certificates, five, for $5,000 each,—Nos. 8, 9, 10, 11, and 12, inclusive,—the receiver placed in the hands of C. D. Woodson, who was at the time president of the First National Bank of Sheffield, to sell. That these five certificates are the subject of controversy in this suit, and the re-

ceiver was authorized and empowered to sell them at not less than par, less a reasonable amount to be paid for the negotiation of the same, and the proceeds to be applied to the purposes named in the decree. On October 13, 1889, Chamberlain, the receiver, sent a telegram from Atlanta, Ga., to Woodson, at Fifth Avenue Hotel, New York, in the following language: "Do not place receiver's certificates, under any circumstances, as I have given option for their sale. Also, return acceptance of ten thousand dollars to me, at Sheffield, at once. Answer here. J. G. Chamberlain." On the same day, Woodson replied to this telegram as follows: "Telegram received. Will return you the papers as requested. C. D. Woodson." In violation of the instructions contained in this telegram to him, Woodson, on October 14, 1889, sold in New York these five certificates to H. E. Garth, for D. T. Parker,—said Garth, in his testimony, says,—"either for $17,000, or seventy cents on the dollar." And D. T. Parker, on the 21st and 22d of October, 1889, sold them to O. H. Parker, president of the Anniston Loan & Trust Company, for said company, for $22,500, being ninety cents on the dollar. That D. T. Parker purchased from Woodson, and paid him for, the certificates, after the receipt by Woodson of the telegram from the receiver to Woodson, directing him not to dispose of the certificates, and, in effect, countermanding any authority which might previously have been given to him to sell the certificates, but that Parker purchased and paid for the certificates in perfect good faith, relying upon Woodson's reputation for probity and honor. D. T. Parker, it appears, is dead, and also Woodson. The testimony of Garth as to the sale by Woodson to Parker is: "I have been engaged in the banking business for many years, and am now president of the Mechanics' National Bank of this city. I knew C. D. Woodson and D. T. Parker. I purchased of Mr. Woodson three certificates of the Sheffield & Birmingham Coal, Iron & Railway Company, of $5,000 each,—Nos. 1, 2, and 3,—and shortly afterwards bought for Mr. D. T. Parker five certificates, of $5,000 each, from Mr. Woodson. As well as I can remember, they were numbers 8, 9, 10, 11, and 12. Mr. Woodson called at my office with Nos. 1, 2, and 3, and I bought them, paying him 80 cents on the dollar for them; and in about two or three weeks afterwards he called to see me again, and I bought the five for Mr. D. T. Parker, at his (Parker's) request. I believe their numbers were 8, 9, 10, 11, and 12. I paid Mr. Woodson either 70 cents on the dollar, or $17,000, for the five certificates of $5,000 each. Mr. Woodson told me that the receiver of the Sheffield & Birmingham Coal, Iron & Railway Company owed his bank, and gave the certificates to him to sell. I do not know what capacity he was acting in, further than that I knew he was president of the First National Bank of Sheffield, and that he had stated that the receiver was indebted to his bank. I sold the certificates Nos. 1, 2, and 3, that I bought. Those bought for Mr. Parker were handed to him. So far as I know, the legality of the purchase of certificates Nos. 1, 2, and 3 has never been doubted or questioned. I have already stated the price, and about the time when the certificates were purchased. As nearly as I can remember, the first were bought the last of September, and the others the middle of October, 1889. So far as I know, the interest on Nos. 1, 2, and 3 has been paid regularly. I never heard to the contrary. I cannot say how long I knew Mr. Woodson before the purchase of the certificates; probably a year. He was engaged in the banking business. I heard that he had been in the banking business a number of years in Atlanta, Ga., and Sheffield, Ala. I cannot say what his standing was in banking and financial circles in the city of New York. He informed me that his bank was hard up, but was perfectly good. So far as I know, everybody regarded him as thoroughly honest and reliable." The evidence shows that the certificates were regularly sold to the Anniston Loan & Trust Company at 90 cents, and that they still own them. The first notice they had of any question as to them was when they were presented at the bank where interest was payable. It is thus shown that the intervener is a bona fide holder for value, and that the first purchase was, in like good faith, for value.

Upon the question as to whether the receiver ratified the sale by receiving the purchase price, the intervener offered the testimony of the witnesses T. L. Benham, J. R. Jones, and R. W. Austin, and the documentary evidence of

a mortgage from Charles D. Woodson to Jacob G. Chamberlain, receiver, executed October 28, 1889, on real estate in Birmingham, to secure indebtedness of $33,335, due by two notes,—one for $23,500, proceeds of receiver's certificates, and $9,835, proceeds of two acceptances,—both these notes signed, "First National Bank of Sheffield," and "C. D. Woodson;" mortgage from Charles D. Woodson to Jacob G. Chamberlain, receiver, executed November 9, 1889, on real estate in Sheffield and Colbert county, to secure same indebtedness; assignment by said bank to Chamberlain, as receiver, as further security for said indebtedness, of seven notes, aggregating $10,000, given by Henry B. Tompkins and J. M. White to said bank. The testimony of Benham, cashier, and Jones, bookkeeper, of the First National Bank of Sheffield, showed that Woodson made a deposit of money in the bank to the credit of Chamberlain, as receiver, of $17,000, on October 22, 1889; another, of $6,500, November 5, 1889,—and that Woodson said at the time that these deposits were the proceeds of the receiver's certificates. That the bank book shows these entries to the credit of Chamberlain, receiver. That Chamberlain, as receiver, had an account on the books of the bank, and had a pass book, and that these two items,—one for $17,000, and the other for $6,500,—were credited on his pass book. That Chamberlain, as receiver, had to his credit on the books of the bank, November 5, 1889, $25,278.83. That this included the item of $17,000, but not the item of $6,500. That this last item was placed on the pass book by the instance of Woodson, and that Woodson did not exactly explain the debit entry to it. That there were other deposits that Chamberlain, receiver, had made, in addition to these, between the 10th of October and the 5th of November. That he deposited $4,060.28, October 28th, and, same date, $844.45. That these were all the deposits between those dates, and no deposit afterwards. That, after the 9th of November, checks by Chamberlain, receiver, on the following dates, and for the following amounts, were honored, viz.: November 13th, $150.08; November 14th, $235.26; November 15th, $38.43; November 22d, $123.37; November 25th, $20.40; and November 26th, $31. That the receiver was overdrawn in the bank, September 19th, $7,972.50. That the receiver checked out, between October 22d and the time of the suspension of the bank, $2,859.18, and that his check out October 22d, for $576.46, was paid that day. That the deposit of $17,000 was made up of several items. The items were $6,000 and $4,000 charged to W. L. Moody & Co., of New York; $3,000 in the National Bank of Republic, transferred by him to the Burney National Bank of Birmingham, and that bank sent to the First National Bank of Sheffield $3,000 in gold, which was received, and $1,500 and $2,000 charged to the Central National Bank of New York. The total of these amounts aggregates $16,500, which, with the $500 individual check of Woodson, makes $17,000. That these several amounts were recognized and reported by the banks upon which they were drawn, and that their monthly accounts and settlements with his bank showed that these amounts were actually deposited to its credit in said banks, respectively, and that his bank got the benefit of them. That Woodson did deposit October 22, 1889, to the credit of Chamberlain, as receiver, that which was equivalent to $6,500, according to commercial usage under ordinary circumstances. That Chamberlain, as receiver, reported to the court the proceeds of these certificates as on deposit in the bank to his credit, and on December 3, 1889, the court rendered a decree of foreclosure and sale of the property for which the original bill was filed, and by that decree charged the property and its proceeds with the payment of these certificates. That at the same time the bank was insolvent. That Woodson was its president, and that, although the credit was given, part on October 22d, ($17,000,) and balance, ($6,500,) November 9th, yet at no time after the date of either credit was the bank in a condition to have paid any considerable portion of either.

These were the findings of fact by the master, but, as matters of law, he found that the receiver was, by his conduct, so far as he was concerned, estopped from denying the validity of the disposition of these certificates by Woodson, but that the entries and deposits in the bank were not equivalent to a payment by Woodson to the receiver, and that the intervener's claim was, therefore, not a valid claim, and should be disallowed.

To this report the intervener filed exceptions, specifying, under 15 heads, alleged improper rulings. Upon this the case came on, and, being fully heard, the exceptions were sustained, the decision of the special master set aside, and judgment given for the intervener for the full amount of the certificates, with interest, whereupon appellants took an appeal, assigning as error that the court erred in overruling and setting aside the special master's finding and report, and in finding that the five certificates constituted a valid claim and charge against the property, and in giving judgment for intervener.

John B. Knox, for intervener.

Henry B. Tompkins and Brickell, Semple & Gunter, for respondents.

Before LOCKE and BILLINGS, District Judges.

LOCKE, District Judge, (after stating the facts.) The nine grounds of exception assigned, upon examination, resolve themselves into but three principal questions that require examination: Was the Anniston Loan & Trust Company a bona fide holder of the $25,000 of receiver's certificates, the subject-matter of this litigation? Had they been legally disposed of, so that any title had been acquired by said company? And was the receiver—and the appellants—estopped from setting up the invalidity of said certificates? The first question is, without hesitation, answered in the affirmative. In our view of the other two questions, we deem it unnecessary to consider separately each of the grounds, as the determination of the one question, whether or not the certificates were a valid claim against the property, must include all reasons for such conclusion. Nor do we consider it necessary to examine and review the minutiae of the peculiar circumstances of the delivery and sale of the certificates, or whether or not the testimony which was introduced to show the revocation of the power given to Woodson to sell, and which was objected to, and argued at length, was admissible. It is conceded by the report of the master—in which view we agree—that, as far as the action of the receiver could do it, the sale was ratified by him; and the only question remaining is whether the proceeds ever came into the hands of the receiver, as to justify the court in recognizing the sale, and confirming the validity of the lien given by the certificates.

The principle of law, that, in order to hold the body of the trust liable for the receiver's certificates, the proceeds must come to the hands, custody, or control of the receiver, is not questioned by either party; and it is conceded that the receiver acted in perfect good faith in accepting a credit with the bank, and protecting himself and such deposit, as far as possible, by taking securities, and that he is estopped from repudiating the sale, and denying the receipt of the proceeds. The sale was not repudiated by the receiver upon his learning of it, nor does it appear that he made demand for the money, as money, when informed that the proceeds had been placed to his credit in the bank where he had been doing his banking business for a long time, to the extent of many thousand dollars, and where he still made deposits of large amounts,

and continued drawing checks, for several weeks. The embarrassment of the receiver, and the ground of claim on the part of the purchaser, so far as they have any, arise from the failure of the bank, and not from any insufficiency of deposit of proceeds. The funds were received by him precisely as they are received by the banks at the clearing house, and precisely as they are received by one depositor who is paid by the check of another depositor; that is, the receipt of the amount appropriated and placed to his credit by the bank, with his acceptance and acknowledgment. Had he received a check upon the said bank, duly certified by the cashier, and had the same placed to his credit could it have been considered more a valid payment? Levy v. Bank, 4 Dall. 234.

The amount to his credit from the sale of the certificates was in his possession and control, the same as the amount he had deposited since the sale. It is true that subsequently, when he learned that there might be a question of the solvency of the bank, he demanded and obtained from the president of the bank personal notes, mortgages, and collateral securities, to secure his deposits. But this, in our opinion, so far from tending to invalidate the sale of the certificates, was a fresh and conclusive ratification of the sale, and of the acceptance of the deposit of the proceeds. The giving of notes secured by mortgage or collaterals, by a bank, to protect a deposit, is no evidence that there has not been a money transaction, or valid credits received.

Is the court bound to recognize the estoppel of its agent, and protect the parties who have been, from the force of events subsequent to their transaction, and unforeseen by them, forced into the position occupied by the petitioners herein? The learned judge in the court below considered that it is, and with this view the peculiar circumstances of the case induce us to agree. This sale had been recognized and treated as valid and binding by both the receiver and the court until it was too late for the purchasers to protect themselves from loss. Koontz v. Bank, 16 Wall. 196; Oddie v. Bank, 45 N. Y. 735; Bank v. Burkhardt, 100 U. S. 686; From the 5th of November, when the last credit of $6,500 was given to Chamberlain on the books of the bank, until the 4th of January, neither the validity of the sale, nor the integrity of the receipt of the proceeds, were questioned. The receiver continued drawing checks against the fund thus accumulated, and the decree was drawn, presented, and signed, recognizing all as valid. The report of the sale and deposit of proceeds made to the court; the drawing, presenting, and consent to signing of the decree of foreclosure, in which the validity of these certificates was plainly and distinctly recognized,—were all done with full knowledge and understanding of the circumstances subsequently set up.

The appellants herein purchased the property subject to any liens which might be held to be valid on account of the existence of these outstanding certificates, of which they had full knowledge, and they now hold by assignment, or by buying in at foreclosure sales in suits brought by themselves, the securities which were con-

sidered, when taken, abundantly ample to protect the deposits. Under these circumstances, to permit them to successfully contest their payment, and cast the burden of any possible loss upon the innocent purchasers, who had not been informed of any error or mistake of theirs until too late to protect themselves, would, it seems to us, as expressed in the emphatic language of the learned judge in the court below, "bring discredit on the temple." We fail to find any error in the action of the circuit court, and the judgment is affirmed, with costs.

FALK v. DONALDSON et al.

(Circuit Court, S. D. New York. July 3, 1893.)

1. COPYRIGHT—PROCEEDINGS TO OBTAIN — PHOTOGRAPHS—DEPOSIT OF COPIES.
In obtaining a copyright for a photograph, it is not necessary that the two copies required to be deposited with the librarian of congress should be mailed after publication.

2. SAME—SUBJECT OF COPYRIGHT.
A photographist, who, by posing, and by the arrangement of lights, shades, and various accessories, produces an artistic photograph of an actress, representing his ideal of a character which she is accustomed to impersonate on the stage, is entitled to the protection of the copyright law.

3. SAME—INFRINGEMENT.
A lithograph, which, to the eye of the ordinary observer, reproduces the material parts of a copyrighted photograph, is an infringement, although it is not an exact copy, and lacks the artistic excellence of the photograph.

In Equity. Suit by Benjamin J. Falk against Robert M. Donaldson, Charles K. Mills, and George W. Donaldson for infringement of a copyright. Decree for complainant.

Isaac N. Falk, for complainant.
Wetmore & Jenner, for defendants.

TOWNSEND, District Judge. This is a bill in equity for an injunction and accounting by reason of an alleged infringement of complainant's copyright in a photograph of the actress Julia Marlowe.

The claim that complainant neglected to comply with the statutory requirements is disproved by the evidence. It appears that on January 6, 1888, complainant caused to be sent to the librarian of congress the printed title, and on February 22d, and within 10 days of publication, he caused two finished copies to be sent to the librarian of congress. Both of these acts were duly certified to by the librarian of congress. It is not necessary that the copies should be mailed after publication; if mailed before, they are mailed within 10 days of publication. Chapman v. Ferry, 18 Fed. Rep. 541; Belford v. Scribner, 144 U. S. 505, 12 Sup. Ct. Rep. 734.

The defendants deny that the photograph represents any original, intellectual conceptions of the complainant.

The complainant is a photographist. On December 27, 1887,

Miss Marlowe came to his studio, bringing several different costumes; and the complainant took photographs of her in some 20 or 30 different positions, representing different characters assumed by her on the stage. Among them was the photograph in suit, which represented the actress in the character of Parthenia, in the play of "Ingomar, the Barbarian." Complainant testified as follows:

"I tried to produce an ideal portrait of the Greek maiden of the play, and considered that the main sentiment embodied in the character is a combination of simplicity, innocence, and courage. * * * I posed Miss Marlowe as shown in the photograph itself, arranged the illumination and the background, as shown in the picture itself, and secured the expression therein shown, and, outside of that, did the mechanical work of attending to the camera, focusing, and exposing the image."

Complainant further explained, at length, the methods employed by him in such cases, to make the subject so forget his surroundings as to mentally assume the part or character to be represented in the picture; and the arrangement of curtains, screens, and headlights, so as to bring out expression and character.

The defendants claim that a photographist is a mere mechanic, and that it is absurd to suppose that complainant could have suggested to a trained actress like Miss Marlowe either costume, facial expression, or pose. A gas man at the Bijou Theater testified that he had seen her there in the exact pose represented in the photograph. The costume was the one ordinarily worn by the actress when playing this part. The mode of dressing the hair merely followed the fashion of the day. In another photograph, taken during the year in which complainant's photograph was taken, Miss Marlowe wore the same gown, and assumed a position somewhat similar to that shown in complainant's photograph, except that the arms were not raised. But I am unable to assent to the claims of defendants, for the following reasons: An examination of the photograph shows that it is the work of an artist. The question is whether the artist was Miss Marlowe, or complainant. How far the artistic contributions are to be attributed to the talent of Miss Marlowe, it is impossible to say. The testimony of complainant as to his share in producing the result is not denied. He was an artist before he became a photographist. He had had a large experience in taking photographs, and on this occasion he appears to have availed himself thereof, and by the use of lights and shadows, and various devices, to have produced a most satisfactory result.

There is another circumstance which points to this particular pose as the work of complainant. It will be noticed that the position assumed by Miss Marlowe is a side view. It is one where the direction of the head and eyes is such that she could not have judged, by herself, how far to turn the body, and raise the hands, or how to incline the head, so that the lights and shadows might best reveal the beauties of face and figure. It is only necessary to examine the bundle of 15 photographs introduced by defendants

to show that the pose of complainant's photograph was common among actresses, in order to see how strikingly poses, mechanically alike, may artistically differ.

I do not find in defendant's exhibit of a photograph of Miss Marlowe anything which refutes complainant's claim of originality in his photograph. Each is the side view of the same woman, in the same gown. But in one, a pretty woman is standing for her picture; in the other, she has lost her personality in the character she has assumed, as interpreted in the pose chosen by the complainant. It seems to me only necessary to compare the two photographs in order to detect those differences which, not to be expressed in words, yet, taken together, serve to show that the one is in no sense a counterpart of the other.

It does not seem any more absurd that Falk should have posed Miss Marlowe than that Sarony should have posed Oscar Wilde. The notoriety of the latter depended largely upon the costumes designed, and poses assumed, by him. But under the finding of facts in Lithographic Co. v. Sarony, 111 U. S. 60, 4 Sup. Ct. Rep. 279, the court held the Wilde photograph to be an original work of art, the product of plaintiff's intellectual invention, and entitled to protection under the copyright act. A comparison of the two cases shows that what Sarony did, complainant did. In the Sarony Case it was not found that the photographist originated the costume or the character. It was, as I recollect it, a photograph of a character in one of the Gilbert & Sullivan operas. But the photograph was Sarony's mental conception of the character, produced, as in this case, by the use of lights and shades, and various accessories. On these grounds, and because a useful, new, harmonious, characteristic, picture was the result, the court held plaintiff to be the author thereof. The court, in the Sarony Case, referring to the decision in Nottage v. Jackson, 11 Q. B. Div. 627, says:

"Lord Justice Cotton said: 'In my opinion, "author" involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing or a painting or a photograph.' And Lord Justice Bowen says that photography is to be treated, for the purposes of the act, as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination. * * * These views of the nature of authorship, and of originality, intellectual creation, and right to protection, confirm what we have already said."

And in Falk v. Engraving Co., 48 Fed. Rep. 264, recently affirmed by the United States circuit court of appeals in this circuit, the court, upon facts substantially the same as in this case, sustained the copyright. 54 Fed. Rep. 890.

In the light of these decisions, it seems to me established that in the present case the complainant was the author of an original work of art, the product of his intellectual invention.

Defendants deny that they have copied complainant's photograph, or any part thereof. There is a sharp conflict of testimony as to whether Mills, one of the defendants, admitted that their lithograph was a copy of complainant's photograph, and attempted

to settle with complainant for infringement. If it were necessary to decide this question, I should consider, in view of the general character of the testimony of Mills, and the contradictions therein, that the admission was sufficiently proved. But the real question is not one as to admission of fact, but whether the lithograph is an illegal appropriation of the substantial parts of the photograph. In such a case the inquiry always is whether the alleged infringer has appropriated the results of the original conception of the artist. It is not a question of quantity, but of quality and value; not whether the part appropriated is a literal copy of the original production, but whether it is a substantial and material part. The question is, to what is the artist or author entitled as his conception, and what of such original conception has been appropriated? Gray v. Russell, 1 Story, 11; Folsom v. Marsh, 2 Story, 115; Drone, Copyr. 410. The forcible argument of counsel for defendants upon this point proceeds upon the theory that the idea or conception of the original artist may be followed and used by another, provided he clothes such idea or conception in different language or form. He claims that the lithographer had a perfect right to use the photograph for study, suggestion, and even as a model, in developing his own ideas, and that, as he had merely taken the conceptions of the other, and clothed them in his own form and expression, his work was original. Copying, he says, involves, not only taking another's ideas or conceptions, but also their expression.

The question presented here is whether the defendants have so far copied the design of complainant as to appropriate his manifestation of his conception, or a substantial part thereof. The lithograph is not strictly a copy of the photograph. It differs from it in various ways. Some 40 differences have been suggested by experts introduced by defendants. Expert testimony in such a case has no greater weight than expert testimony upon the question of infringement. "The test of sameness is determined by the eye of the ordinary observer." Gorham Co. v. White, 14 Wall. 528; Ripley v. Glass Co., 49 Fed. Rep. 927. But the testimony is helpful in suggesting and locating the differences, and it enables us to discover their general character; and it seems to me that, taken together, they show mere differences of detail. The lithograph lacks the artistic excellencies of the photograph, but I cannot understand how the fact that an attempted appropriation has been inartistically accomplished can help the infringer. If a painter originates and copyrights a work of art, can a chromo manufacturer copy the design, to advertise the wares of a merchant, and defend against an action on the ground that the mechanic has not caught the spirit of the artist, or mixed the pigments in the same tones of color? Is the sculptor compelled to see his life work in marble appropriated, and modeled in soap or sugar, because, forsooth, the "dimples are lacking" from the imitation, or "the one is three or four times larger than the other?" And yet these are among the reasons assigned by the experts for the

defendants why there is no similarity between the photograph and lithograph.

In the determination of the question as to the nature and extent of the similarity which must be shown between the original and the alleged copy, in order to constitute infringement, we are guided by several recent decisions. Judge Coxe, in Untermeyer v. Freund, 37 Fed. Rep. 343,—a design patent case,—says:

"The policy which protects a design is akin to that which protects the work of an artist, a sculptor, or a photographist, by copyright. It requires but little invention * * * to paint a pleasing picture, and yet the picture is protected, because it exhibits the personal characteristics of the artist, and because it is his. So with a design. If it presents a different impression upon the eye from anything which precedes it; if it proves to be pleasing, attractive, and popular, and does not show a wide departure from other designs,—its use will be protected."

And, in the recent case of this complainant v. Lithographing Co., 48 Fed. Rep. 678, where Judge Wheeler sustained the copyright of a photograph of a woman and child, he said:

"The defendants * * * have used plaintiff's production as a guide for making others, and have thereby substantially copied it as he produced it, and infringed upon his exclusive right of copying it."

In Turner v. Robinson, 10 Ir. Ch. 121, 510, the defendant was charged with piracy, in having copied a painting representing the death of Chatterton. He denied direct copying, but admitted having seen the original while on exhibition, and claimed that he had made his photographs from an arrangement of figures, objects, and scenery, which he had prepared in his own gallery. The court said:

"The stereoscopic slides are not photographs taken directly from the picture in the ordinary mode of copying; but they are photographic pictures of a model itself copied from, and accurately imitating, in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be, by means of which it was effected." Drone. Copyr. 108.

Bearing in mind the general rule as thus interpreted, let us compare the photograph with the lithograph. Imperfect and comparatively lifeless as the lithograph is, yet it needs no expert to show that, although varying somewhat in design, it is a copy of the conception of complainant. The angle of the head, the clasping of the arms, the interlaced fingers, and the general expression and pose, irresistibly suggest and recall the photograph. Defendants claim that the value of the photograph has not been impaired by the publication of the lithograph, and there is no infringement, because the photograph and lithograph are not rivals, and are not in competition in any way. This fact does not affect the question of infringement, but only the measure of damages. Falk v. Howell, 37 Fed. Rep. 202. The measure of complainant's rights is not limited by the mere fact that the lithograph would not dis-

place the photograph in the market. He is entitled to any lawful use of his property, whereby he may get a profit out of it. It is not a question of the extent of damages, but of violation of rights. I have not overlooked the suggestions of counsel for the defendants that the application of the copyright law to cases like the present may lead to abuse, and be productive of injustice. But this court must administer the law as it finds it. Under the rule established in the Sarony Case, the complainant must be held to be the author of the conceptions expressed in the photograph. The defendants have appropriated a substantial portion of such conceptions.

Let there be a decree for an injunction and an accounting.

LA REPUBLIQUE FRANCAISE et al. v. SCHULTZ.

(Circuit Court, S. D. New York. July 3, 1893.)

1. TRADE NAMES—INFRINGEMENT—PLEADING.
   In a suit to enjoin the use of the word "Vichy" by defendant in connection with mineral waters, where complainant alleges the various transfers by which it acquired title to certain springs in France, from which it has long obtained mineral waters for sale under that name, it is not necessary to make profert of the instruments of title, for the question of title is not in issue, and the gist of the suit is a tortious act.

2. SAME—RIGHT TO USE GEOGRAPHICAL NAME—MINERAL WATERS.
   A right may be acquired to use a geographical name as a trade name in connection with mineral waters derived from springs in that locality by persons who own all of such springs, and the use of such name by others who obtain their waters elsewhere will be enjoined.

3. SAME—WHAT CONSTITUTES—INDUSTRIAL PROPERTY TREATY WITH FRANCE.
   The word "Vichy," used in connection with mineral waters, and derived from the locality in France where the waters are obtained, is a trade name, or "nom commercial," within the meaning of the industrial property treaty with France of 1883, art. 6, (25 Stat. 1376,) and as such is entitled to protection in the United States, though it has not been deposited as required by the treaty in the case of trade-marks.

4. TREATIES—IMPLIED REPEAL.
   The treaty between the United States and France of April 16, 1869, was impliedly repealed by the industrial property treaty of 1883, (25 Stat. 1372,) since the latter treaty covered the whole subject-matter of the former one.

In Equity. Suit to enjoin the use of a trade name. On demurrer to the bill. Overruled.

Jones & Govin, (Edward K. Jones, of counsel,) for complainants.

Briesen & Knauth, (Arthur v. Briesen, of counsel,) for defendant, in support of the first ground of the demurrer cited the following authorities:

Steph. Pl. rule 7, p. 436; Post v. Hardware Co., 25 Fed. Rep. 905; Story, Eq. Pl. 23; Pitts v. Whitman, 2 Robb. Pat. Cas. 189, 195; Wilder v. McCormick, 2 Blatchf. 31, 35; McMillin v. Transportation Co., 18 Fed. Rep. 260; Kay v. Marshall, 1 Mylne & C. 373; Westhead v. Keene, 1 Beav. 287; Marshall v. Turnbull, 34 Fed. Rep. 827, 828.

TOWNSEND, District Judge. This case is presented by a demurrer to a bill in equity for an injunction against the use of the word "Vichy" by defendant. The bill alleges that the complainants, the Republic of France and the Compagnie Fermiere de l'Etablissement Thermal de Vichy, hereafter called the Vichy company, are respectively owner and lessee of various mineral springs in and about the town of Vichy, the waters of which are known under the name of "Vichy" waters; that the reputation of these waters for their medicinal qualities is very great throughout the United States; that the name "Vichy," as applied thereto, is of great value to the complainants, etc.; that they have the exclusive title to said springs, and to the use of said name in connection therewith. The bill further alleges that in the year 1344 one Jean, Lord of Vichy, being then the owner of certain springs in France, sold the same to one Pierre, Duke of Bourbon; that afterwards, in 1531, the then king of France, Francis the First, confiscated the property of the house of Bourbon; that thereupon, and afterwards, the crown of France became the owner of said mineral springs, and remained such until 1790, when said springs were united to the public domain of the state of France; that in June, 1853, the French empire, by imperial authority of Napoleon the Third, and by its several ministers and departments, leased and conceded to a certain firm of Lebobe, Callou & Co., of the city of Paris and of the town of Vichy, all the right and privilege of taking the waters from said springs, and the preparation and sale thereof, which lease was for the term of 33 years, to wit, until 1886. The bill further alleges that the Vichy Company was duly formed and established according to French law, and has succeeded to the rights of said prior lessees, and acquired all the property, rights, privileges, and franchises from said prior owner of the lease, and that by a certain agreement duly entered into between the minister of public works, commerce, and agriculture and the said Vichy Company, which agreement is dated April, 1864, and which was sanctioned by the imperial authority, the lease was extended until 1904. The bill further alleges that, on September 4, 1870, the empire of France was overthrown, and that the rights, property, and privileges of said empire, including its property in and title to said Vichy springs, devolved upon the complainant, the French republic, whereupon it duly became, and has ever since remained, the sole and exclusive owner of the aforesaid mineral springs and thermal establishment at Vichy, and entitled, subject to the terms of the said lease, to the exclusive property in and to the use and enjoyment of the same, including the right to designate and brand the said mineral waters by the name "Vichy."

The first ground of demurrer assigned is as follows:

"That the said complainants have not in their said bill of complaint made profert of the instruments and documents under which they allege title or any proprietary or leasehold rights to the mineral springs mentioned in the bill, nor of the agreements in relation thereto that are mentioned in the bill of complaint, nor of the decrees set up in the bill of complaint, nor of the

charter or certificate of incorporation of the complainant La Compagnie Fermiere de l'Etablissement Thermal de Vichy."

In support of this demurrer defendant cites certain text-books and cases. An examination of them shows that they do not apply to this case. Several of the citations state the rule in actions at law. The bills in equity referred to were, with one exception, for the alleged infringement of patents. In such cases the patent itself is the foundation of the statutory right of the complainant. It is therefore necessary for him either to give a full description of the patented invention, or to refer to, and make profert of, the patent. Post v. Hardware Co., 25 Fed. Rep. 905. At common law, where title was in issue, and depended upon a deed, the party was bound to make profert thereof. But no such profert was necessary in a case where the title was mere inducement to an action, as in trespass or case. Gould, Pl. c. 8, § 47; Steph. Pl. 381. This suit is brought to restrain an alleged injury to an incorporeal right. The gist of the suit is the tortious act. By the demurrer all the material allegations of the bill are admitted,—that the complainant the republic of France and its predecessors have for several hundred years owned these springs; that the complainant the Vichy Company has a lease of the springs, which was extended by imperial authority until 1904, and that the defendant has been and is manufacturing counterfeit waters, without license, to which he applies labels with the word "Vichy," printed thereon, to the great damage of complainants.

The claim of title to the springs is not in issue. It is merely inducement to the alleged infringement, the actual and threatened wrong, which is the foundation of the action. In equity pleadings the party should allege the facts with sufficient fullness, so that the court, assuming them to be true, can collect that he has title, and can make the facts the basis of a decree if the case be admitted by the answer. 6 Amer. & Eng. Enc. Law, 756; Heard, Eq. Pl. 28; 1 Daniell, Ch. Pl. & Pr. § 361; Webber v. Gage, 39 N. H. 182. "The nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words." 1 Daniell, Ch. Pl. & Pr. § 363; Story, Eq. Pl. § 241. If the defendant can show that any of the instruments referred to are material, or essential to the preparation of his defense, he can apply for the production of such instruments in accordance with the usual practice in chancery.

The second ground of demurrer assigned is as follows:

"That the said complainants have not in their said bill of complaint disclosed such a compliance with the acts of congress and the treaties between the United States and the French republic as entitles them to prosecute their said bill of complaint against this defendant in this court, and have therefore failed to show the jurisdiction of this court."

Complainants claim that the word "Vichy" is not a trade-mark, but a trade name, and, as such, protected upon principles analogous to those applied to trade-marks. Although defendant claims that this word is a trade-mark, much of his argument proceeds upon the

theory that it is not a trade-mark. In that event he contends that complainants have failed to show any law under which they are entitled to protection, or any right to the exclusive use of the term. Unless the word "Vichy" is a trade-mark, the complainants are entitled, on the facts alleged in the bill, to an injunction against the use of it by defendant. They allege title to all the mineral springs situated in Vichy, and the exclusive right to the sale of the waters thereof, and that the name "Vichy," as applied to said waters, has become of great value to the complainants, and has always constituted an important and necessary incident and means to the sale of said waters. That such a name may be so used, and will be protected against infringement by other persons not obtaining their product from the same locality, is too well settled for discussion. Canal Co. v. Clark, 13 Wall. 311; Newman v. Alvord, 51 N. Y. 189; Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291; Brewing Ass'n v. Piza, 24 Fed. Rep. 149; Apollinaris Co. v. Norrish, 33 Law T. (N. S.) 242. Whether a geographical name may become a trade-mark when adopted as such, where its owner is the owner of the place of origin, and has the monopoly of the vendible product, is perhaps an open question. Browne, Trade-Marks, (2d Ed.) pp. 91, 182, 521; Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. Rep. 625; Judge Putnam, in City of Carlsbad v. Tibbetts, 51 Fed. Rep., at page 856, citing cases. But I do not think it necessary to pass upon this question at this time, because the rights of the complainants may be determined by a consideration of the treaties between the United States and the French republic, referred to in the demurrer.

The defendant, claiming that the word "Vichy" is a trade-mark, contends that complainants are not entitled to relief, because they have failed to comply with the provisions of the treaty of April 16, 1869, between the United States and France, or of the general treaty of March 20, 1883, between certain countries, including the United States and France, for the protection of industrial property. I shall not consider the treaty of 1869, because, as the treaty of 1883 covers the whole subject-matter of the former treaty, it may be considered as impliedly repealed. Murdock v. City of Memphis, 20 Wall. 617; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. Rep. 312. In the industrial property treaty of 1883 these three expressions are used: "Marque de fabrique," translated "trade-mark;" "marque de commerce," translated "commercial mark;" "nom commercial," translated "commercial name." The treaty provides that "every trade-mark or commercial mark regularly deposited in the country of origin shall be admitted to deposit, and so protected in all the other countries of the Union." 25 Stat. 1376, art. 6. And the final protocol, on page 1380, par. 4, is as follows:

"Paragraph 1, of article 6, is to be understood in the sense that no trade or commercial mark shall be excluded from protection, in one of the states of the Union, by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws of this state, provided that it does

satisfy, in this regard, the laws of the country of origin, and that it has been in this latter country, duly deposited. Saving this exception which concerns only the form of the mark, and under reservation of the provisions of the other articles of the convention, the domestic legislation of each of the states shall receive its due application."

Article 8 of the treaty is as follows:

"The commercial name shall be protected in all the countries of the Union, without obligation of deposit, whether it forms part, or not, of a trade or commercial mark."

The question raised by this demurrer is whether the word "Vichy" is a trade-mark or commercial mark, in which case it is claimed that it can receive no protection without registration, or a commercial name, as to which no such obligation exists. It is not alleged in the complaint that the word "Vichy" has been registered. Whether such registry is required in the case of a trade or commercial mark it is unnecessary to consider. It is only necessary to inquire whether the word "Vichy" is or is not a nom commercial, or commercial name. As the two terms, "commercial mark" and "commercial name," used in the treaty, are translations of terms used in the civil law of France, it becomes necessary to examine their meaning in said system, in order to understand the distinction between them. The distinction between a trade-mark and a commercial mark is pointed out by Pouillet in his work on Marques de Fabrique, (section 6,) from which I translate as follows:

"A trade-mark is not a commercial mark, and it is with reason that the law mentions both. The trade-mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The commercial mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it, in his turn, to the consumer."

And again, in section 63:

"A name of a town, or more generally a name of a locality, may, like an ancestral name, serve as a trade-mark; yet here still it is on condition that the name shall be presented under a distinct, special form, always the same. It is this peculiar expression which constitutes the mark, and not the name taken separately and for itself."

It will thus be seen that our word "trade-mark" comprehends both the marque de fabrique and marque de commerce of France. Browne, Trade-Marks, § 85.

Under the title "Noms Commercial," Pouillet divides the various classes of commercial names into the general heads of names of manufacturers and names of localities. He defines the commercial name, as follows: Section 374: "The commercial name is the name of the individual, or any name which is the property of a merchant, without reference to its use as a mark, or trade-mark, in a distinctive form. * * * It is the name considered as the accessory of the business, as the 'pavillon de la merchandise,'" which I understand to mean "sign" or "brand" or "standard" of the goods. He adds: "M. Gastambide says, speaking of the name from a commercial point of view, 'The name will be for us a mere means of securing good will.'" Under sections 394-411 of "Noms Commercial" the author includes names of places, and

discusses fully the rights of parties under the law of France, who claim the exclusive use of a name of a locality, including owners of mineral waters or springs. It therefore appears that the name "Vichy" is a commercial name, and, as such, is protected under the industrial property treaty, without obligation of deposit, whether it does or does not form part of a trade or commercial mark.

The demurrer is overruled.

LOUISVILLE, N. A. & C. RY. CO. v. OHIO VAL. IMPROVEMENT & CONTRACT CO. et al.

(Circuit Court, D. Kentucky. May 23, 1893.)

1. NEGOTIABLE INSTRUMENTS — ILLEGAL GUARANTY — BILL TO CANCEL—BONA FIDE PURCHASERS.
   A bill brought by a railroad company to cancel its guaranty upon the bonds of another company, on the ground of illegality and fraud, is not demurrable because it fails to show that defendants are not bona fide holders for value, for, when fraud or illegality in the inception of negotiable instruments is shown, it devolves upon the indorsee to show that he is a bona fide holder.
2. EQUITY JURISDICTION — MULTIPLICITY OF SUITS—NEGOTIABLE INSTRUMENTS.
   A railroad company, whose guaranty appears indorsed upon several hundred bonds issued by another company, having been placed there illegally and fraudulently, may maintain a bill in equity against the holders thereof to cancel the guaranty, on the ground of preventing a multiplicity of suits, although it might have a good defense at law to each of the bonds.

In Equity. Suit by the Louisville, New Albany & Chicago Railway Company against the Ohio Valley Improvement & Contract Company and others to obtain the cancellation of complainant's guaranty upon certain bonds issued by the Richmond, Nicholasville, Ervine & Beattyville Railway Company. Heard on demurrers to the supplemental bill. Demurrers overruled.

Henry Crawford and Helm & Bruce, for complainant.

St. John Boyle and Muir, Heyman & Muir, for defendants.

LURTON, Circuit Judge. The questions now for consideration arise upon the demurrers filed by certain defendants to the supplemental bill filed by the original complainant. For a proper understanding of these questions, it is necessary to state the substance of the original bill, as well as of the supplemental bill. The original bill alleged that the defendant the Richmond, Nicholasville, Ervine & Beattyville Railway Company, hereafter styled the Beattyville Railway Company, had contracted with the Ohio Valley Improvement & Contract Company for the construction and equipment of its line of railway, situated in the state of Kentucky; that the construction company, as a consideration, was to receive the first mortgage bonds of the railway company, to the extent of

$25,000 per mile, deliverable as the work progressed, and also a controlling interest in its shares of stock. The bill then charged that the complainant railway company had entered into a contract with the defendant construction company, by which, in consideration of a transfer to it of a majority of the entire stock of the Kentucky Railway Company, that it (the complainant railway company) would guaranty the payment of the principal and interest of the railway bonds to be received by the construction company. The bill further alleged that this contract had been so far executed that the guaranty of the railway company had been indorsed upon 1,185 of the Beattyville Railway Company's bonds, which had been delivered to the construction company. This indorsement upon these bonds was in these words:

"For value received, the Louisville, New Albany and Chicago Railway Company hereby guaranties to the holder of the within bond the payment by the obligor therein, of the principal and interest thereof, in accordance with the tenor thereof."

It also charged that the bonds thus guarantied had been delivered to the construction company, and that a large portion of them were still held by the construction company; that others had been delivered to certain persons who had subscribed therefor, and who were named as defendants to the bill; that others, still, were in the hands of the Louisville Trust Company, to be delivered to subscribers when paid for. The bill alleged such a state of facts as to make the guaranty upon such bonds illegal and fraudulent, and the contract for the guaranty of further bonds to be received by the construction company likewise illegal.

Upon the filing of the bill the usual injunction was granted, enjoining all of the named defendants from transferring, incumbering, selling, or removing from within the jurisdiction of the court, any of the bonds thus illegally and fraudulently guarantied; and such steps were thereafter had, under the original bill and answer, as resulted in a decree canceling the guaranty upon all bonds then in the possession or control of the construction company. Since that decree, complainant company has filed a supplemental bill, alleging, among other things, that the work of construction of the Beattyville Railway has been abandoned; that it is insolvent, and in the hands of a receiver appointed by this court, under a bill filed by the holders of its mortgage bonds; and that complainant has lately learned that certain persons, who are made defendants to this supplemental bill, claim to be the owners and holders of Beattyville Railway bonds, many of them guarantied by complainant company, and which have not been heretofore canceled. The supplemental bill prays that these holders of said guarantied bonds be made defendants, and that they be required to bring their bonds into court, and submit to a cancellation of the guaranty thereon.

Certain of these defendants have appeared and demurred upon the ground that this court has no jurisdiction of the matters complained of; no case appearing on the face of the bill, entitling the complainant, in a court of equity, to any relief against them.

Neither the bill nor the supplemental bill contain any specific allegation as to the circumstances under which the demurring defendants became holders of bonds. It does not affirmatively appear whether they are, or are not, holders for value and without notice. But it seems to me that where a bill alleges a state of facts showing that negotiable securities have been issued illegally and fraudulently, and have come into the possession of the defendant, that it devolves upon the defendant, in view of such fraud and illegality, to show that he is a purchaser for value. "Where fraud or illegality in the inception of negotiable paper is shown, the indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough." Story, Prom. Notes, § 196; Smith v. Sac Co., 11 Wall. 139. "It is an elementary rule that, if fraud or illegality in the inception of a negotiable paper is shown, the indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough." Stewart v. Lansing, 104 U. S. 505. For the purpose of this demurrer, the defendants must be treated as standing, with respect to these guarantied bonds, in no better situation than the construction company.

Defendants next insist that a court of equity could not entertain jurisdiction of a suit to set aside any illegal contract, where there is an adequate and sufficient defense at law. Cancellation is one of those purely equitable remedies exercised exclusively by courts of equity. The jurisdiction has always existed, but will not generally be exercised if the legal remedy, whether defensive or affirmative, is certain, complete, and adequate. There is a strong line of authority, from courts of the highest respectability, supporting the view that equity has jurisdiction to decree cancellation of a deed, bond, note, or other obligation, whether the instrument is or is not void at law, or whether it be void for matter appearing on its face, or aliunde. Hamilton v. Cummings, 1 Johns. Ch. 521, and cases cited, English and American; Jones v. Perry, 10 Yerg. 59; Johnson v. Cooper, 2 Yerg. 525. But in the United States courts the jurisdiction has been much more sparingly exercised, and some circumstances must appear, calling strongly for equitable interposition. Thus, in the case of Grand Chute v. Winegar, it was held that a bill would not lie to cancel bonds held by the defendant, where it appeared on the face of the bill that the defense at law was perfect. 15 Wall. 373. Under the strictest limitations as to the circumstances justifying the exercise of equitable jurisdiction for purpose of cancellation, it would seem that if, for any reason, it appears that a legal remedy would be inadequate to the attainment of complete justice, as where the instrument sought to be canceled is negotiable, and has not matured, the remedy at law, in such cases, must be deemed inadequate, inasmuch as the complainant would be subjected to the hazard of being cut off from defenses if the instrument should come to the hands of an innocent holder for value. So, where any vexatious or injurious use of an instrument could be made, if suffered to remain in the hands of one

not entitled to enforce payment, equity will interpose, and cancel the instrument. Pom. Eq. Jur. §§ 221, 911.

I do not, at this stage of this case, deem it necessary or proper to determine whether or not these bonds, in the hands of innocent purchasers for value, would be enforceable against the complainant company. The question should be reserved for further argument, and careful consideration. But if the defense of the complainant company would be cut off, in case these bonds should pass into the hands of bona fide holders, it is clear that equity should interpose, and enjoin such transfer, and cancel the guaranties indorsed upon them.

Upon another ground, altogether, I am of opinion that equity has jurisdiction to maintain this bill, and that is to prevent a multiplicity of suits. Exclusive of the bonds heretofore canceled, the complainant's guaranty appears upon some six or seven hundred bonds, of $1,000 each. It would become liable to suits upon coupons upon each bond as it matures. It is obvious that in course of time these bonds might pass into the hands of hundreds of persons, and the complainant company thus be subjected to a ruinous number of actions. A judgment in its favor, as between it and a particular holder, would not conclude any other holder. If the defenses to these bonds be treated as purely legal, and the remedy sought a legal remedy, the jurisdiction would exist. "It is not essential that the remedy sought shall be purely an equitable remedy. The very fact that a multitude of suits are to be prevented constitutes the very inadequacy of legal methods and remedies, which calls the concurrent jurisdiction of a court of equity into being, under such circumstances, and allows it to adjudicate upon purely legal rights, and confer purely legal reliefs." 1 Pom. Eq. Jur. § 243.

There has been much conflict of authority as to the circumstances which will justify a court of equity in taking jurisdiction to prevent a multiplicity of suits; but an examination of numerous authorities brings me to the conclusion that where a complainant may be subjected to a multitude of separate suits by separate claimants, and the judgment in one case would not be conclusive in others, a case arises for equitable jurisdiction, if the defendants have a community of interest in the questions at issue, and in the kind of relief sought, by reason of the common origin of their several claims. This conclusion has the support of Mr. Pomeroy, who, after an elaborate consideration of this question, says:

"Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the denials of some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no common title, nor community of right, nor of interest in the subject-matter, but because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual

member of the numerous body. In a majority of the decided cases this community of interest in the questions at issue, in the nature and kind of relief sought, has originated from the fact that the separate claims of all the individuals composing the body arise by means of the same unauthorized, unlawful, and illegal act or proceeding. Even this external feature of unity, however, does not always exist, and is not deemed essential. Courts of the highest standing and equity have repeatedly appeared and exercised this jurisdiction where individual claims were not only legally separate, but were separate in term, and arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claims at issue, and in the remedy." Pom. Eq. Jur. §§ 222, 911, et seq.

The case of Railway Co. v. Schuyler, 17 N. Y. 592, is an interesting and instructive case. In that case it appeared that spurious certificates of stock in a railroad corporation had been issued by an officer having apparent authority to do so, and undistinguishable on their faces from certificates of genuine stock, and were outstanding in the hands of numerous holders. The holders of such spurious certificates were made parties defendant to the bill filed by the railroad company. After an elaborate consideration of the question, as to whether or not the bill would lie, that court maintained its jurisdiction, and held that the false certificates having a common origin and common ground of invalidity, though the holders became such under different circumstances and conveyances, and claimed different rights, yet they were all properly joined as defendants, and the bill maintained as a bill to prevent a multiplicity of suits.

In Supervisors v. Deyoe, we find a similar case. The treasurer of Saratoga county, under an authority to issue notes for money advances to the county to the amount of some $20,000, issued 73 notes to the amount of $138,000. These notes were held by 53 persons, many of whom had brought separate suits upon their notes. The supervisors filed a bill in equity against all the holders of said notes, including those who had brought suits at law. Upon demurrer to the bill it was held that upon the facts a case was made, entitling the plaintiff, upon equitable principles, to implead the holders of the notes, for the purpose of having their respective rights, and the liability of the company, determined in one action; that the claims were of the same general character; and that the action was maintainable for the purpose of preventing a multiplicity of suits, and to protect plaintiff against the hazard of a double recovery. 77 N. Y. 219.

The case of Waterworks v. Yeomans, L. R. 2 Ch. App. 11, was this: A very large number of persons held separate claims against the waterworks company. The claims were for damages originating in an inundation resulting from the breaking of a reservoir. Under a special act commissioners were appointed to inquire into and assess these damages, and issue certificates upon the several claims. The waterworks claimed that the power of the commissioners had expired, and that a large number of these certificates were in consequence invalid. A bill by the company, against a few, as representing the whole number, was filed, and a demurrer sustained. The court held that as the rights of all

depended upon the same question, and that although the defense could be made at law, it was "a very fit case, by analogy, at least, to a bill of peace, for a court of equity to interpose, and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all persons depend." See, also, Black v. Shreeve, 7 N. J. Eq. 440.

The demurrer must be overruled.

One of the defendants has a suit pending in a state court against the complainant company upon matured coupons. The motion to discharge the injunction against the further prosecution of that suit is disallowed.

TOD et al. v. KENTUCKY UNION LAND CO. et al.

(Circuit Court, D. Kentucky. July 11, 1893.)

No. 6,116.

1. CORPORATIONS—POWERS—GUARANTYING ACCOMMODATION PAPER.
   A corporation, in the absence of an express grant, has no power to guaranty, for accommodation, the obligations of another corporation.
2. SAME—POWER TO EXECUTE NEGOTIABLE PAPER—GUARANTY OF PAPER.
   A corporation with power to execute negotiable paper may bind itself as indorser or guarantor of bonds received by it in due course of business, for the purpose of increasing the value of such bonds. Railroad Co. v. Howard, 7 Wall. 414, followed.
3. SAME—POWERS—RULE OF CONSTRUCTION — CONTRACTS BY WHICH CORPORATION HAS BENEFITED.
   The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co., 47 Fed. Rep. 22, followed.
4. SAME—ACCOMMODATION PAPER—BONA FIDE HOLDERS.
   A corporation empowered to issue bonds or execute promissory notes is liable upon its accommodation paper in the hands of persons without notice that such paper was not executed for value.
5. SAME—CONSOLIDATION OF CORPORATIONS—GUARANTY OF BONDS OF ANOTHER CORPORATION.
   A land company empowered to form a "temporary or permanent consolidation" with any railway company, in furtherance of its general powers, may purchase all the stock of a railway company, and thereby control the same, if such control is in furtherance of the general powers of the land company.
6. SAME—GUARANTY OF SECURITIES OF ANOTHER CORPORATION.
   A land company thus empowered was authorized to open and develop mining and timber lands, and to condemn a right of way for the export of its products. *Held*, that the land company had power to guaranty the bonds and the interest on the preferred stock of the railway company, in order to complete the railway, and thereby secure a market for the products of the land company.
7. SAME—AMENDMENT OF CHARTER—RETROACTIVE EFFECT.
   While this temporary consolidation existed, the railway company issued and delivered to the land company second mortgage bonds on account of its indebtedness to the land company. The clause in the charter of the land company permitting a consolidation with a railroad company was

subsequently repealed. Thereafter, the land company guarantied the bonds, and hypothecated or sold them to bona fide pledgees and purchasers. *Held*, that the repeal did not prohibit the land company from continuing its union with the railway company, or from binding itself by the guaranty.

8. GUARANTY OF DIVIDENDS—AMOUNT OF GUARANTOR'S LIABILITY.
A land company, in the lawful exercise of its powers, guarantied indefinitely a semiannual dividend of 2½ per cent. on the preferred stock of a railway company. Thereafter both companies became insolvent. *Held*, that the holders of such stock, in the absence of evidence showing the value of such security to be greater or less than par, were entitled to prove claims against the guarantor to the amount of the par of their stock.

9. INSOLVENCY—RIGHTS OF LIEN CREDITORS AND HOLDERS OF COLLATERAL.
In insolvency proceedings under Gen. St. Ky. c. 44, art. 2, creditors having liens or collateral securities (in all cases not expressly excepted by the statute) are entitled to dividends on their whole debts, and not merely on the balances after deducting the value of their securities.

10. FEDERAL COURTS—FOLLOWING STATE PRACTICE.
In the absence of special provisions in the insolvency laws of a state, a federal court is not bound to follow the state courts as to the right of a creditor holding collateral security to a dividend on the full amount of his debt.

In Equity. Bill by J. Kennedy Tod, Hugh Oliver Northcot, and William Stewart Tod, the Central Trust Company of New York, and the Columbia Finance & Trust Company against the Kentucky Union Land Company and others for the appointment of a receiver, declaring an assignment under the law of Kentucky, on account of the debtor having made preferences, and sale of respondents' property. Decree was rendered for complainants, and a reference ordered. The commissioner now submits to the court questions as to the validity and priority of certain claims.

Olin, Rives & Montgomery, Butler, Stillman & Hubbard, and Humphrey & Davie, for complainants.

St. John Boyle, for J. W. Gaulbert and others, holders second mortgage bonds.

William Lindsay, Dodd & Dodd, and Grubbs & Moraney, for general creditors.

Before LURTON, Circuit Judge, and BARR, District Judge.

LURTON, Circuit Judge. The Kentucky Union Land Company made a conveyance operating as a preference to certain of its creditors. This conveyance was assailed as a fraudulent preference in contemplation of insolvency, and prohibited by article 2, c. 44, of the General Statutes of Kentucky.

Under the proceedings instituted in this court a decree was entered December 1, 1891, adjudging the said conveyance to be a preference, within the meaning of the said act, and that the same operated as an assignment, as of the 6th of February, 1891, of all of the property and effects of the Kentucky Union Land Company for the equal benefit of all its creditors, according to the provisions of said act; and a receiver was appointed, as required by the

Kentucky act, and the cause referred to the master of this court to advertise and receive proof of debt against said company, and to report who were creditors of the said company on the 6th of February, 1891, and the amount of the debts due to them, respectively, whether such debts were matured, and whether absolute or contingent. He was also directed to report what, if any, securities are held by any of the creditors of the land company.

Among other creditors filing claims with the commissioner, or intervening by petition, were:

(1) The holders of the first mortgage bonds of the Kentucky Union Railway Company, the principal and interest of which had been guarantied by the Kentucky Union Land Company. These bonds amount to $2,625,000, and the owners and holders are represented by J. Kennedy Tod, who stands for and represents the class with respect to the questions arising as to the validity of the guaranty of the land company.

(2) The holders of $800,000 of second mortgage bonds of the Kentucky Union Railway Company, the principal and interest having been guarantied by the Kentucky Union Land Company. These bonds are represented by J. W. Gaulbert, in respect to the question made as to the liability of the Kentucky Union Land Company as guarantor.

(3) The claim of the Central Trust Company. The Kentucky Union Land Company guarantied a 5 per cent. dividend upon stock of the Kentucky Union Railway Company, to the extent of $500,000. The land company agreed that, if the railway company and the land company should both fail to pay said dividend, then the Central Trust Company should be authorized to sue for same, and distribute the recovery among the holders of the guarantied stock.

The commissioner, finding the validity of the guaranty as to both bonds and stocks challenged by the other creditors and by the land company, has submitted to the court the questions arising upon the defense interposed, and has also asked directions as to how a debt should be reported when the creditor has more than one security, or when the debt is due from more than one creditor.

The matters upon which the commissioner asks instruction are those stated by him in his report to the court, as follows:

"The questions which your commissioner has, after advising with and obtaining the consent of counsel in this case, determined to submit to the court in advance of making a complete report, are these:

"(1) Was the guaranty of the Kentucky Union Land Company of the principal and interest of the first mortgage bonds of the Kentucky Union Railway Company within the power of the Kentucky Union Land Company. And, if within its power, was such power executed in a legal and binding way, so as to make such guaranty an obligation of the Kentucky Union Land Company?

"(2) Exactly the same question as arising upon the guaranty of the second mortgage bonds of the Kentucky Union Railway Company by the Kentucky Union Land Company.

"(3) Was the transaction set out in the claim of the Central Trust Company herein, and which pertains to the guaranty by the Kentucky Union Land Company of dividends upon certain stock of the Kentucky Union Rail-

way Company, and an agreement executed by said Kentucky Union Land Company with others to the Central Trust Company, a contract which it was within the power of the Kentucky Union Land Company to make; and, if so, was such contract validly and legally executed by said Kentucky Union Land Company? And, if it could be lawfully executed, what is the proper basis for proof of such claim as to amount, or what means should be taken to ascertain the said amount?

"(4) Where a creditor of the Kentucky Union Land Company holds as security for his claim any part of the assets of the Kentucky Union Land Company, is such creditor to be required to surrender or exhaust such security before proving generally against the assets of the Kentucky Union Land Company? And, in the event he shall realize upon such security, upon what basis does his claim then stand? In other words, can he prove for the whole of said claim against the general assets, or for balance left unpaid, or is he forbidden to receive any further payment until all other creditors have been made equal with him?

"(5) In the event that any creditor of the Kentucky Union Land Company has personal or other security from a corporation or individual other than the Kentucky Union Land Company, upon what basis is the claim to be computed against the Kentucky Union Land Company? Is it to be credited by such amount as may be received from such other security, and only the balance proved against the Kentucky Union Land Company, or may the whole debt be proved against the Kentucky Union Land Company, or is such creditor to be forbidden to receive any part of the assets of the Kentucky Union Land Company until all other creditors of the Kentucky Union Land Company shall have received an equal pro rata amount?

"(6) Are corporations which were organized by the Kentucky Union Land Company, all of whose stock is owned by the Kentucky Union Land Company, and all of whose assets were supplied to them by the Kentucky Union Land Company, to be considered as corporations independent of the Kentucky Union Land Company, as respects the application of securities granted by them to a creditor who is also a creditor of the Kentucky Union Land Company, or as personally bound to creditors who are also creditors of the Kentucky Union Land Company, or is such liability or such security granted by such corporations to be treated as if granted by the Kentucky Union Land Company, and subject to the same rule?

"(7) What collateral security is to be allowed J. Kennedy Tod & Co. upon their claim?

"Respectfully submitted. Thos. Speed, Special Comr."

1. Did the Kentucky Union Land Company have the power to bind itself by its contract guarantying the principal and interest of the first mortgage bonds issued by the Kentucky Union Railway Company?

The question, as presented on this record, is a question, pure and simple, as to how far the authority to execute these contracts is sustained by the corporate powers which the law has vested in this company. No question arises as to the rights of bona fide holders of these bonds, for value, and without notice of the facts that the bonds had not been indorsed upon their sale and transfer by the guarantying corporation. The general doctrine may be taken to be well settled in the courts of the United States that the powers of a corporation are such, and such only, as are conferred by the law under which it is incorporated. The charter is the measure of the power of every corporation, and by this test must every corporate act be tried. This rule, however, concedes the usual propositions applicable to every legislative act,—that what is fairly implied is as much granted as if expressly enumerated. The cases

supporting this general doctrine are very numerous, and only a few need be cited: Pearce v. Railroad Co., 21 How. 441; Thomas v. Railroad Co., 101 U. S. 82; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 299, 6 Sup. Ct. Rep. 1094; Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 59, 11 Sup. Ct. Rep. 478; Maddox v. Graham, 2 Metc. (Ky.) 56; Davis v. Railroad Co., 131 Mass. 258; Marble Co. v. Harvey, 92 Tenn. ——, 20 S. W. Rep. 427; Miller v. Insurance Co., 92 Tenn. ——, 21 S. W. Rep. 39.

Mr. Justice Gray, in Central Transp. Co. v. Pullman's Palace-Car Co., after reviewing the decisions of the supreme court of the United States, concludes that they may be summed up thus:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its power, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The power to execute accommodation paper, or to guaranty for accommodation the obligations of another corporation, is not expressly conferred by the charter of the land company. Ordinarily, such power is not implied from the powers conferred upon corporations, and such contracts are generally in excess of the powers of corporations, and therefore void as ultra vires, in the true sense of the term.

This proposition rests upon two or more very evident reasons:

(1) The corporate funds belong to its shareholders, and, by the very terms of the law creating it, cannot be devoted to any other purpose than those indicated by its charter and constitution. Such obligations would violate the fundamental terms of the agreement between the corporators themselves.

(2) To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchises is for the purpose prescribed, and the execution of such obligations would be beyond the power conferred, and therefore a diversion of the corporate purposes, as well as of the corporate funds.

(3) Such obligations rest upon no consideration, and would not, therefore, be valid. They would amount to a donation of the corporate funds, and therefore an unlawful diversion. Mor. Priv. Corp. 423; Davis v. Railroad Co., 131 Mass. 258; Madison Plank-Road Co. v. Watertown Plank-Road Co., 7 Wis. 59; McClellan v. File Works, 56 Mich. 579, 23 N. W. Rep. 321; National Park Bank v. German-American Mutual Warehouse & Security Co., 116 N. Y. 292, 22 N. E. Rep. 567; Aetna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167.

But there is no inherent want of power in a business corporation, having the power to execute negotiable paper, to obligate itself

as a surety or guarantor. If such a corporation receive commercial paper or bonds in due course of business, we see no reason why, upon transferring such paper, it may not be lawful to obligate itself as indorser or guarantor. Such a contract would be a new and independent contract, and would rest upon a sufficient consideration, if entered into as a legitimate means of increasing the value of the security to be disposed of in ordinary course of business. In Railroad v. Howard the question arose as to the liability of a railroad company upon its guaranty of certain bonds issued by various counties and cities, and received by the railroad company in payment of subscriptions to its stock. Upon full consideration it was held that, inasmuch as the company had received the bonds in payment of stock, it had a right to obligate itself by its own bonds for the purpose of building its road; it might lawfully, and in furtherance of its authorized purpose, guaranty such bonds, as a means of augmenting their value on the market, thus producing funds to build its road. 7 Wall. 411, 412. The power of a corporation to bind itself by a guaranty, when it does so for its own benefit, and as a means of selling at an augmented value, is generally conceded by the authorities. "In such cases," says Mr. Randolph in his work upon Commercial Paper, (volume 1, § 334,) "the guaranty is an original contract of the corporation, for its own benefit; the consideration moving to itself, and not to the person whose debt is guarantied."

Where a corporation has power to issue bonds or execute promissory notes, it will be liable upon accommodation paper, though ultra vires, if such paper comes to the hands of a bona fide holder for value, without notice. Such a holder will be entitled to stand upon the presumption that the paper was executed for value, and for a lawful purpose. Mor. Priv. Corp. § 597; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Mechanics' Banking Ass'n v. New York & S. White Lead Co., 35 N. Y. 505. The principle has been thus stated:

"Where a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued under circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity, in the hands of such a holder, than any other commercial paper." City of Lexington v. Butler, 14 Wall. 296.

There being no absolute want of power in an ordinary business corporation to bind itself as a guarantor, we must next inquire as to the circumstances which will make such a contract lawful and obligatory. The cases already cited establish the proposition that if such a corporation has the power to issue bonds or other commercial securities, and becomes the holder of such bonds or securities issued by other corporations, it may indorse or guaranty them upon transferring them for the purpose of raising money to carry out any purpose for which it might borrow money.

The right of a corporation to do an act or make a contract is not always a question of law. What it may not do under some

circumstances, it may do under others. It may carry on the business it is authorized to do in the usual and customary manner that business of the same nature is carried on by individuals. "It is, therefore," says Mr. Morawetz, "impossible to decide abstractly that acts of a particular description are within or without the chartered powers of a corporation. The right of a corporation to perform an act depends, in every case, upon all the surrounding circumstances, and facts can be conceived which would render almost any act justifiable." Section 362. He further observes (and it is an eminently sensible observation) that "no rules can be framed which would be of any practicable value in determining cases of this character. * * * The application of the law to individual cases must always remain a matter involving the exercise of sound, practical judgment, and business experience." "Great caution," he says, "is therefore necessary in treating a decision that a corporation has or has not authority to do a particular act as a precedent to be followed in other cases." Sections 362, 392.

Another general principle seems properly to require a statement before we apply the law to the circumstances surrounding the transaction now to be considered: The general rule in regard to the construction of a charter is that it is to be construed strictly against the grantee; that all which is not clearly granted, either expressly or by reasonable implication, is to be held against the corporation. But, where a corporation is seeking to repudiate liability upon a contract fairly entered into, a slightly modified rule of construction was stated by Mr. Justice Brewer, which seems to be in accord with the rule of the English courts, and to have the support of natural justice. The distinguished justice said:

"The question as to whether a contract is ultra vires or not may arise in a controversy between the state and a corporation, or between the corporation and the party with whom it has assumed to contract, and it may well be that different rules of construction apply to the two cases. All grants, even grants of corporate franchises, are construed strongly in favor of the government, and against the grantee. So, when the state challenges the action of one of its corporate creations, it may insist on clear warrant for such action. It may say: 'Point to the letter of your authority. I abide by my contract, and protect you in the rights and franchises I have given. Abide by your contract, and assume to do no act in disregard of the duties I have imposed, or beyond the authority I have conferred.' The rule of strict construction exists in such a case. But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract, and then break it; to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporations: 'As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burden when it becomes onerous, unless it clearly appears that that which you have assumed to do is beyond your powers.'" Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co., 47 Fed. Rep. 22.

In the light of these principles, let us look at the facts connected with the contract under consideration.

The Kentucky Union Land Company was incorporated under a special charter granted by the legislature of Kentucky in 1880.

Its original corporate title was, "The Central Kentucky Lumber, Mining, Manufacturing, and Transportation Company." This name was by amendment of charter in 1890, and after these bonds had been guarantied, changed to "The Kentucky Union Land Company." The original title indicated very thoroughly the large power conferred by the charter, and the composite character of the business contemplated thereunder. Under the second paragraph of the charter the corporation was declared—

"Capable in law of purchasing, selling, holding, leasing, conveying, receiving, by gift or devise, and disposing of all real and personal property and estate, making all contracts and by-laws, and doing all lawful acts necessary and proper for the business and powers hereby conferred upon them, properly incident thereto; and of suing and being sued, and have a common seal, which they may alter, abolish, or renew at pleasure; and the said company as such, shall have perpetual succession and have, enjoy, and exercise all the rights, powers, and privileges which corporations may lawfully have; and the rights, privileges and franchises given said company under the charter, or any amendments thereto, shall be for the use and benefit of said company, and its successors by gift or purchase, forever; and said company may change its name, and any other person or persons, or corporation who may become the successors of said company, by purchase and conveyance from the same, or by consolidation therewith, shall be entitled to all the benefits, and bound by all the disabilities contained in this charter and its amendments."

By section 3, authority was conferred upon—

"The president and directors of said company, when authorized, so to do, by a vote of the shareholders holding a majority of the bona fide capital stock of said company, may borrow money on the credit of said company not exceeding in amount the capital stock of said company, and may issue the bonds of said company in such amounts, and payable when and where they may deem best, bearing such a rate of interest, payable annually or semi-annually, as they may determine on; and to secure said bonds and indebtedness they may mortgage the property of the said company; and upon foreclosure and sale of the same, the purchaser shall be entitled to all the rights, privileges, and franchises given in this charter, and any further amendments thereto; and said property may be purchased at said sale by any person, firm or corporation who shall by said purchase succeed to all the rights of said company as above provided."

The seventh section declares the powers of the company, and upon the proper construction of this section the validity of the guaranty in question depends. The whole section is here set out, and is as follows:

"The said company shall have the power to engage in the business of mining and manufacturing in any part of this commonwealth, and it may purchase and lease mineral and timbered lands, and contract for and purchase ore, timber, and machinery for manufacturing the same; and may open and develop mines of ore, coal, or other minerals; and may acquire by purchase or condemnation, the necessary right of way for exporting the products of the said mines and the same timber, either in their crude or manufactured state; and may establish and operate —— works, rolling-mills, saw-mills, and stove factories, and furniture factories, as may be expedient or necessary in the reduction and manufacturing of ores, and the manufacture of timber or implements for mining or cutting and preparing timber; and the said company may cut and prepare timber for market, and ship the same, either in logs, plank or manufactured articles; and shall have all rights, privileges, powers, and franchises necessary to the full use and enjoyment of the powers, herein granted; and may, in furtherance of the powers granted in this section, effect a temporary or permanent consolidation with any railroad or transportation

company, chartered or to be chartered, under the laws of this commonwealth; and the consolidated companies may have and exercise the powers of both companies, and act in the name of either of them, or in a joint name to be agreed upon in the articles or deeds of consolidation; but no such consolidation shall be effectual until the same shall have been ratified by a majority in value of the shareholders of the said company, at a regular or called meeting of said company."

The Kentucky Union Railway Company was organized under a special charter granted by Kentucky in 1854. Under its charter the stock might be subscribed for by "any individual or corporation." This company was authorized to build and operate a railway from a point on the Ohio river opposite Cincinnati to a point on the Virginia or Tennessee line at or near Cumberland Gap. By an amendment of charter it was given the discretion to make its northern terminus at Lexington, Ky. Prior to 1883 it built a road 14 miles long, connecting Clay City, in Powell county, with the line of the Newport News & Mississippi Valley Road.

Without undertaking to state the details as to how and under what circumstances, and upon what consideration, it is sufficient for the purpose of this case to say that, at the date of the contract of guaranty in question, shares of stock in the railway company to the amount of $1,800,000 were held and owned by the land company. This constituted the whole of the shares issued by that company, except, perhaps, nine, which were held by the directors of the railway company in order that they might be qualified to act. The land company at the same time had acquired the title to between 300,000 and 500,000 acres of mountain lands on the line of the projected continuation of this railway. In order to the development of these lands, and to the utilization of the timber and mines thereon, it became most essential that this railway should be completed. Did the land company have the power to aid in the extension and completion of this railway?

The powers expressly mentioned in its charter were: (1) To purchase and lease mineral and timbered land. (2) To purchase ore, timber, and machinery for manufacturing. (3) To open and develop mines of iron, coal, or other minerals. (4) To acquire by purchase or condemnation the necessary rights of way for exporting the products of the mines and the timber, either in crude or manufactured state. (5) To establish such works, rolling mills, sawmills, stove factories, and furniture factories "as may be expedient or necessary in the reduction and manufacturing of ores and the manufacturing of timber or implements for mining, or cutting and preparing timber." (6) It is given power to cut and prepare timber for market, and ship either in logs or manufactured articles. (7) It is finally declared that "it shall have all rights, privileges, powers, and franchises, necessary to the full use and enjoyment of the powers herein granted."

To make more plain the intent of the legislature that this company should have all the powers necessary to the full and beneficial use of the express powers and privileges granted, and in recognition of the fact that railroad facilities will be essential

to the utilization of the very wide and composite powers expressly conferred, the seventh section is concluded by adding these most significant words:

"And may in furtherance of the powers granted in this section, effect a temporary or permanent consolidation with any railroad or transportation company, chartered or to be chartered, under the laws of this commonwealth; and the consolidated companies may have and exercise the powers of both companies, and act in the name of either of them, or in a joint name to be agreed upon in the articles or deeds of consolidation. * * *"

Now, the case, as it was presented to the land company, was this: "We have purchased, as authorized by our charter, a vast body of timbered and mineral lands. We are authorized, expressly, to utilize these lands by developing their timber and mineral interest. The intention of the legislature was that this buried natural wealth shall be utilized by the erection of sawmills, iron works, rolling mills, furniture factories, iron furnaces, and by the opening and operating of iron and coal mines. It contemplated that transportation of the products of these mines, mills, and factories would be a matter of great concern. The right to condemn rights of way is conferred."

That railroad transportation would be essential to get to market these products, and for the necessary development of the towns which must spring up around enterprises so numerous, was also in contemplation of the state when the charter was granted, is evident from several considerations:

(1) The coal, iron, and timber, and the manufactured products of the contemplated mills and factories could not be profitably utilized without cheap transportation.

(2) That the company should engage in transportation is indicated by the original title of the corporation. It was to be a transportation company as well as a mining and manufacturing company.

(3) The power to consolidate with any railroad company, chartered or to be chartered, is expressly conferred.

(4) In case of such consolidation the companies were to exercise the powers of both, and act in the name of either, or in an agreed name. The power did not stop here. There might be a "temporary consolidation" with a railroad company. The meaning to be attached to the term "consolidation," as used in a law authorizing the consolidation of two or more corporations, is uncertain. It depends not often upon the particular terms of the act giving the power, and the legal effect resulting from "consolidation" will largely depend upon the character of the consolidation authorized by the permission, as well as upon the contract actually entered into by the consolidating companies. Generally, the merging of the companies into a new and distinct corporation is contemplated, and is the legal result. Not infrequently, the absorption of one corporation by the other is the consequence of consolidation. Railroad Co. v. Georgia, 98 U. S. 362, 363; Railway Co. v. Ham, 114 U. S. 595, 5 Sup. Ct. Rep. 1081; Mor. Priv. Corp.

§§ 942, 939. Mr. Morawetz states a third kind of consolidation as possible, "by preserving the legal identity of both companies. This may be done by issuing shares in the one company to the shareholders in the other company in exchange for their shares, thus making the one company the holder of all the shares in the other company, or by regarding the united shareholders of both companies as shareholders in each corporation; both corporations, however, acting under similar charters, and under the same management. These transactions would differ widely in their legal consequences. Whether the result be called a 'consolidation' or 'merger,' or 'amalgamation' is merely a matter of definition." Section 942. The power to consolidate a land, mining, and manufacturing company with a railroad company, and to make such consolidation either permanent or temporary, must enlarge the general scope of the powers of such a corporation. It contemplates the absorption of the railroad company by the land company, and the absolute assumption by the latter of the debts of the former. It also contemplates the acquisition of all the franchises of the railway company. The greater power, of entirely absorbing and extinguishing the railway as an independent entity, clearly includes the lesser power, of a union by which the railway company might retain its identity, and yet be in such connection with the land company as to amount to what the legislature defines as a "temporary consolidation." The case of Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. Rep. 495, is an instance of construction of charter powers much in point. There a power conferred on one railway company to incorporate its stock with the stock of any other company was held to so enlarge the powers of the company as to enable it to sell and dispose of a part of its line of said railway to another company. To consolidate so as to create a new company out of the old consolidating companies would inevitably operate to dissolve the old companies. To consolidate so as to bring about the absorption of one by the other would as inevitably dissolve the absorbed company. Clearly, neither of these consolidations could be "temporary." A dissolved corporation is an extinct corporation, and when, by the death of both, a new corporation is created, there cannot be, without new legislative birth, a resurrection of the dissolved and extinct factors. Yet the Kentucky Union Land Company was expressly empowered to consolidate with a railroad company in such a way as that the union should be "temporary." If a reasonable and useful meaning can be given to this alternative power, it ought to be done, rather than that the power to make a "temporary consolidation" be considered as an idle and useless term. The legislature has not used technical language in conferring this power, and we ought not to attach a technical meaning to the words unless such meaning is otherwise required in order to give effect to the legislative intent. There is nothing in this charter to indicate that only a technical consolidation was authorized. On the contrary, the power to make a "temporary consolidation," looking to all the four corners of this charter, clearly implies the

power to make such an alliance or bring about such a union and co-operation of interests between the land company and a railway company as shall be to the mutual interest of each, and place both under the same control and management. This could be done by the plan suggested by Mr. Morawetz in section 942, whereby the shares of one company should be held by the other, or by the same persons. This meaning seems reasonable and proper, looking to the objects and purposes of this corporation, and any steps which brought about unity of interest and co-operation in purpose as being legitimate and authorized. Under this power, we are of opinion that the Kentucky Union Land Company had the power to acquire the shares in the railway company, and the right to exercise control over the railway company through the ownership and control of those shares.

Undoubtedly, the general rule is that a corporation has no implied power to acquire shares in another for the purpose of controlling it. Marble Co. v. Harvey, 92 Tenn. ----, 20 S. W. Rep. 427. This would be contrary to the well-understood public policy concerning such companies. But this objection does not lie here:

(1) Because the charter of the railway company expressly provides that its shares may be owned by any other corporation.

(2) The express power in the charter of the land company removes all objections, based on grounds of public policy, to its control of a railway company by and through its shares.

What the legislature of Kentucky has expressly permitted cannot be void, as against public policy, in the absence of any violation of a constitutional provision. Under such circumstances it is not for the courts to say that what the legislature authorizes is unlawful, because contrary to public policy. Having authority to acquire this stock, the land company became the sole stockholder in the railway company. Each had express authority to borrow money and issue bonds to carry out the purposes of the organization. The completion of this railway was an object within the scope of its charter powers. It could do so by its own name, or by aiding the railway company to negotiate its securities, by guarantying their payment. The guaranty was not for the accommodation of the railway company. The guarantor being the sole shareholder of the railway company, it was a contract for its own benefit, and therefore rested upon a sufficient security. In addition, the land company was a creditor of the railway company, and was to, and did, receive the proceeds arising from sale of one-half million of these bonds. The remainder of the money thus raised was to be applied to the building of the railway line. The consideration was sufficient to fully support the contract.

A like question arose in Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co., 47 Fed. Rep. 16, where Mr. Justice Brewer held that:

"Where one railroad company owns substantially all the stock of another railroad company, a lease of the latter line for rent to be paid to the former company is not void for want of consideration, since it amounts merely to an agreement to pay the rent directly to the stockholders."

Upon appeal to the United States circuit court of appeals for the sixth circuit, this ruling was affirmed. 51 Fed. Rep. 329, 2 C. C. A. 242.

The directors of the railway company held the property of that company, including these bonds and their proceeds, when sold, in trust for the Kentucky Union Land Company, as holders of the shares in that company. To say that its guaranty of these bonds was a mere accommodation guaranty, when it was the cestui que trust in the proceeds of the bonds, and thereby enable it to defeat its responsibility, as a contract ultra vires, would be sticking in the bark, and result in manifest injustice. That at some future day this union may be dissolved by a sale of the stock owned by the land company is not of importance. The real and substantial owner of the railroad company at the time these bonds were guarantied was the land company. The guaranty was for the benefit of the guarantor. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. Rep. 310, 2 C. C. A. 174.

The case is not like that of Davis v. Railroad Co., 131 Mass. 258. That was a donation to support a musical festival. The benefit to the railroad company was in the supposition that it would profit by increased travel. This was altogether too remote, and the contract properly held void.

When the question is, as here, whether or not a particular act is ultra vires, decided cases are of little value. Each case must be largely a question of fact. Yet, by reference to a few of the decided cases, we can discover the principle upon which other courts have proceeded in deciding such questions. We will refer to a few cases: In Louisville & N. R. Co. v. Literary Society of St. Rose, 15 S. W. Rep. 1065, the court of appeals of Kentucky passed upon a question involving the implied powers of a corporation. It appeared that the Literary Society of St. Rose and the Literary Society of St. Catherine were corporations for educational purposes, existing in or near the town of Springfield, in Washington county, Ky. They had power to contract, and to buy and sell real and personal property, for the purpose of sustaining and carrying on said institutions of learning, and not otherwise. Each of them owned and operated a farm of about 1,000 acres, of very considerable value. This, in the language of the court, "created a large industry in the way of supplies furnished to them, and they, in turn, furnishing to others." Each of these corporations signed an obligation to pay a certain amount of money, by way of a donation, to a railroad company, to induce it to extend its line near their property. In an action upon these obligations it was contended that they were ultra vires. The court said:

"Corporations derive their powers from their charters. They are those which are expressly given, or, by fair implication, are necessary to the execution of their object. Cases may be found where the officers of a corporation have exceeded their powers, but the corporation, nevertheless, held liable, because the transaction was within the scope of its business, and it had received a benefit from it. The only trouble arose from a defect of power in the managers. This case is not within this class, however, because it ap-

pears, beyond all doubt, that the change of location, as to depot, was not to the interest of these institutions. The building of the road was calculated, however, to be highly beneficial to them, both as furnishing convenient access to them for persons coming and going, and also in furnishing them a means of obtaining their supplies, and sending their products to market. It was calculated to, and undoubtedly did, add greatly to the value of their properties, and the large industries which their charters had authorized them to create. It conferred a direct benefit. The power existed, by fair implication, to do anything reasonably calculated to add to this value. How far this power extended, we need not decide. Certainly, however, if, during a portion of the year, these institutions had been almost inaccessible, for the lack of a turnpike or a bridge, a subscription by them to build either would have been valid; and, while not authorized to enter into all manner of speculations, yet, in our opinion, a subscription by them to aid the building of this road was not, under all the circumstances, ultra vires, and therefore void."

Where a corporation owned a large body of wild lands, and had power by their charter "to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country," it was held that the building of sawmills and an hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation was within its powers. Watts' Appeal, 78 Pa. St. 370.

In Manufacturing Co. v. Clark, 32 Mo. 305, it was held that a company authorized to mine coal had authority to purchase and run a steamboat for the transportation of the coal to market.

One railway company, under authority of law, leased the line of another for a term of years. The consideration of the lease was an annual rental, and that the lessee company should guaranty the principal and interest of bonds to be issued by the lessor company. The contract of guaranty was challenged as ultra vires. The lessee company had no express authority to make such contract of guaranty, but did have power to make all such contracts as were usual and proper in the building and operation of a railway, and it likewise had power to lease the line of the lessor company. It was held that the consideration was sufficient, and the guaranty valid. The court was of opinion that it was as competent for the company to promise to pay conditionally as to promise to pay absolutely; that the validity of the agreement depended upon the sufficiency of the consideration. The right to take the lease being express, it was a good consideration for the conditional promise involved by a contract of guaranty. Low v. Railroad Co., 52 Cal. 53. See, also, Smead v. Railroad Co., 11 Ind. 104, and Zabriskie v. Railroad Co., 23 How. 381, where a general authority to aid a connecting railroad company was held sufficient to authorize the guarantying of the bonds of such road. Also, Mor. Priv. Corp. § 423.

Under the laws of Wisconsin, railroad companies were given power to make such contracts with railroads terminating on the eastern shore of Lake Michigan, within the state of Michigan, as would enable them to run their roads in connection with each other, etc., and to "build, construct, and run, as a part of their corporate property, such number of steam boats or vessels as they may deem

necessary to facilitate their business." Held, that under this power a railroad company could contract with a steamboat company to run in connection with its line, and might lawfully guaranty that their savings should not fall below a certain sum. Green Bay & M. R. Co. v. Union Steam-Boat Co., 107 U. S. 98, 2 Sup. Ct. Rep. 221. In that case, Mr. Justice Gray said:

"Whatever, under the charter or other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

A contract by a mining corporation to advance a specific sum of money to aid in the construction of a tunnel to drain its mine was held not to be ultra vires, and that such a contract came within the incidental and implied powers of a mining company. Sutro Tunnel Co. v. Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. Rep. 271. "Where a corporation was formed for the purpose of dealing in and speculating in real estate, and with the express power 'to buy, improve, sell, lease, and otherwise dispose of real estate,'" it was held that the term "improve" includes the performance of any act, whether on or off the land, the direct and proximate tendency of which was to benefit or enhance its value. It was therefore held that a subscription made by such a corporation to a railroad company for the purpose of increasing the facilities and lessening the cost of transportation on the same, "where the direct and proximate tendency of such increase of facilities is to enhance the value of its lands," was a valid and binding contract. Vandall v. Dock Co., 40 Cal. 84.

In the case of Whetstone v. University, 13 Kan. 320, (the opinion being delivered by Mr. Justice Brewer,) it was held that where a corporation was created for the purpose of locating and laying out a town site, and making improvements thereon, it was within the power of such a company to donate lands for the purpose of securing the erection and maintenance of a school upon property adjacent to that owned by the town-site company; "that the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town, and the enhanced value of the remaining property. The purpose of the corporation is to build up the town, * * * and this purpose is directly furthered by such a donation."

Upon evidence that it was customary and necessary, in the economical conduct of the business of iron furnaces, to conduct a supply store in connection therewith, it was held by the supreme court of Tennessee that debts created in the purchase of a stock of goods for such store were valid obligations of the furnace company. The power to conduct such a store, being clearly incidental to the business of making iron, was therefore within the corporate powers of the company, though not mentioned in the charter. Searight v. Payne, 6 Lea, 283.

A most important and instructive case, involving the circumstances under which a corporation may, under its implied powers, enter into a valid obligation as guarantor of the bonds of another

company, is that of Ellerman v. Stock-Yards Co., (N. J. Ch.) 23 Atl. Rep. 292.

2. The guaranty of a dividend upon the preference stock of the railway company stands upon the same footing as the guaranty upon the bonds. The "temporary consolidation" between the two companies, springing out of the ownership of the stock in the railway company by the land company, in view of the terms of the charter of the latter company, authorized it to aid the former in any usual way to build its line of railroad.

3. As to the guaranty of the second mortgage bonds issued by the railway company: Bonds to the amount of $800,000, secured by a second mortgage on the property of the Kentucky Union Railway Company, were issued and delivered to the Kentucky Union Land Company on account of indebtedness due by the railway company to the land company. A large part of these bonds were sold by the land company, and are now in the hands of various individuals, who hold same as bona fide purchasers for value. When sold, the payment of these bonds, principal and interest, was guaranteed by the land company. Others have been pledged as collateral security, and these, also, were guarantied by the land company. The bonds, having been received in payment of, or on account of, indebtedness, became the property of the Union Land Company. To augment their value when sold, or pledged as collateral, their payment was guarantied. It is true that when this guaranty was placed on the bonds the clause in the charter of the land company permitting a consolidation with a railroad company had been repealed. Inasmuch, however, as the connection between these two companies was authorized when the latter acquired the stock of the former, and paid or assumed its debts, and inasmuch as this alliance, union, or "temporary consolidation" was in force when this repealing act took effect, and when these bonds were guarantied, we think it was not prohibited by the repeal from continuing the union of the two companies, or obligating itself by this guaranty. The amendment should be construed as prospective, and not retrospective. Any relation which had theretofore been entered into with this railway company was not affected by the amendment, and all which could be lawfully done by reason of such existing lawful union might thereafter be done, so long as it continued. Irrespective of the particular power resulting from the "temporary consolidation," and the relations resulting therefrom, this obligation of the land company is valid, under the authority of the case holding that a corporation having the power to bind itself by commercial paper might indorse or guaranty commercial obligations received in ordinary course of business, and guarantied when sold to augment the price realized on their sale and transfer. Railroad Co. v. Howard, 7 Wall. 392, and cases heretofore cited.

4. The commissioner submits to the court the question as to the proper basis upon which the claims of the Central Trust Company shall be reported. In event of default of payment of dividends guarantied on stock of Kentucky Union Railway Company, the

Central Trust Company was authorized to sue and collect such dividend for the use of the holders of the guarantied shares. The dividends were not guarantied for any particular term. The guaranty is indefinite, and is an obligation so long as the stock is outstanding. The railway company and the land company are both insolvent, and the assets of each company are now to be distributed among creditors. The holder of stock so guarantied is a creditor of the guarantying company, and as such entitled to prove his claim, and share in the assets along with other creditors. The proper basis seems to be the value of his claim. That value in this case would be the value of stock upon which a semiannual dividend of 2½ per cent. was guarantied by a solvent guarantor. If the dividends were guarantied for only a limited number of years, then the value of the guaranty would be the present value of dividends payable at future dates, and this would require a calculation based upon the payment by anticipation of a recurring future liability. But here we are to deal with an indefinite and practically perpetual obligation. The obligation is not only breached with respect to past-due dividends, but the creditor is, in view of the winding up of this corporation, entitled to recover now the entire value of this future and perpetual obligation. An obligation to pay perpetually a dividend of 2½ per cent. semiannually must be valued, and a recovery had commensurate with the consequences to such a creditor of the total failure of this company to in any way hereafter fulfill its guaranty as to future as well as past dividends. The creditor's loss is the present value of an obligation bearing interest at the rate of 2½ per cent. semiannually. This must be ascertained upon the assumption that the guarantor is solvent. The insolvency that now in fact exists cannot be looked to in ascertaining the loss sustained by the holder of such a security. Such a security is not, as the court may judicially know, in the absence of evidence, worth less than the par of the stock. The Central Trust Company will therefore be entitled, in the absence of evidence showing a less or greater value than par of such a security, to prove its claim as trustee upon the basis of the par value of the stock so guarantied.

Instruction is asked as to the basis upon which a debt is to be reported:

(1) Where the creditor is otherwise secured, either by collaterals or by prior mortgage on property of the land company.

(2) Where the creditor has personal or other security from a corporation or individual other than the land company.

A payment made by the Kentucky Union Land Company to Kerr was held to operate as a fraudulent preference in view of insolvency, under the Kentucky statute, being article 2, c. 44, Gen. St. Ky. The decree pronounced in this cause December 1, 1891, adjudged that preference to be within the meaning of that statute, and the payment aforesaid "operated as an assignment and transfer of all of the property and effects of the said Kentucky Union Land Company owned by it upon the 6th day of February, 1891, and," so proceeds the decree, "it is hereby declared to have inured to the benefit of all the creditors of the said Kentucky Union Land

Company in proportion to the amount of their respective demands, including those which are future and contingent, subject, however, to the preferences declared, if any there be, in the distribution of the assets as provided by chapter 44, art. 2, § 7, of the General Statutes of Kentucky." Since that decree the supreme court of Kentucky have held that under an assignment by operation of law a creditor having a lien or other security cannot participate in the residue of the assets until the general creditors have received an amount equal, pro rata, with the lien creditors. Bank v. Laughbridge, (Ky.) 18 S. W. Rep. 1. The effect of this mode of distribution would be to compel all creditors to surrender any security before being permitted to share equally with unsecured creditors in the effects of an insolvent estate, or to postpone all such creditors in the distribution until unsecured creditors have received a dividend equal to the value of the security held by the lien creditors. This is contrary to the rule in equity relating to creditors having two or more securities. The general rule of equity, as administered in the courts of Kentucky, in case of an assignment made by the creditor himself, is that a creditor holding collateral, or secured by a prior mortgage or lien, is entitled to share in the general distribution for his whole debt, where the assets are not sufficient to pay all the creditors, and his security under such general assignment is not to be diminished by reason of any other security he may have. If the lien or collateral fails to pay the debt, the amount realized from it is not to be credited on the debt, and a pro rata given him on the balance, but his dividend is to be paid him on the basis of the entire debt. In Logan v. Anderson, 18 B. Mon. 92, the rule stated was established. In that case it was said:

"If a creditor has a mortgage on property of the debtor sufficient to pay 50 cents on the dollar, and then a subsequent mortgage is made to the same creditor, including other creditors, on other property sufficient to pay 50 cents on the dollar, the first mortgage creditor has the right to have his whole debt paid, while the several mortgage creditors get but 50 cents on the dollar, and for the reason that each mortgage is given to secure the whole debt of the first mortgagee; and the fact that the property last mortgaged fails to pay the last mortgagees is no reason for lessening the security of the first mortgagee, as he had the legal and equitable right to obtain both mortgages to secure his debt. So, if a creditor holds a mortgage on part of the debtor's estate, and the debtor then assigns his whole estate for the payment of all his debts, the debt of the mortgage creditor is embraced by the assignment,—not a part of it, but the whole,—and in the same manner and to the same extent as the debts of the creditors who have no liens. There are two funds, each of which is liable for the whole debt of the mortgage creditor; and, where both are necessary for the payment of the debt, equity refuses to interfere or marshal securities to the double fund."

This case, so clearly declaring the general rule of equity, has been repeatedly followed in Kentucky. Bank v. Jefferson, 10 Bush, 326; Bank v. Patterson, 78 Ky. 291; Spratt v. Bank, 84 Ky. 85. This rule is established as the equitable rule of distribution in cases of a double fund. Kallock's Case, L. R. 3 Ch. App. 769; Mason v. Bogg, 2 Mylne & C. 443; People v. E. Remington & Sons, 121 N. Y. 329, 24 N. E. Rep. 793; West v. Bank, 19 Vt. 403; Bank v. Kendrick, 92 Tenn. —, 21 S. W. Rep. 1070; Miller's Appeal, 35 Pa. St.

481; Brough's Estate, 71 Pa. St. 460; Miller's Estate, 82 Pa. St. 113; Morton v. Caldwell, 3 Strob. Eq. 162; Allen v. Danielson, 15 R. I. 480, 8 Atl. Rep. 705; Brown v. Bank, 79 N. C. 244; In re Bates, 118 Ill. 524, 9 N. E. Rep. 257; Bank v. Haug, 82 Mich. 607, 47 N. W. Rep. 33; Kellogg v. Miller, 22 Or. 406, 30 Pac. Rep. 229; Findlay v. Hosmer, 2 Conn. 350; Moses v. Ranlet, 2 N. H. 488. The learned Kentucky court recognize a distinction in the legal and equitable consequences resulting from an assignment voluntarily made by a debtor, and an assignment by operation of law. In the first case it abides by the rule so clearly stated in Logan v. Anderson. But in the second it reaches the conclusion that, while the statute which effected the assignment did not prescribe any other than an equal distribution, yet that rule of distribution prescribed by statute in regard to an insolvent decedent's estate should apply where the assignment was by operation of law. We do not understand that that court finds in chapter 44, art. 2, Gen. St. Ky., any express provision in regard to the rights of creditors having liens or collaterals, but that analogy to the decedent's statute made it right to prescribe a similar method of distribution. We do not consider that this court is bound to follow this decision. (1) We cannot, upon a fair construction of it, read the decision as holding that the statute prescribed any mode of distribution other than an equal one between all creditors, with a few limited exceptions, especially enumerated. The court, in our judgment, simply regarded itself at liberty to disregard the general rule, as laid down in its own well-considered opinions, and adopt a rule which would distribute an insolvent's property, while living, as the statute prescribed it should be if he were dead. (2) This statute had not been construed in this particular when the decree of this court was pronounced, holding that the preference given by the Union Land Company had operated as a general assignment. The question was res integra, and it was for this court to determine for itself the rights of creditors under such an assignment. It seems to us that the question is one of general law. Upon questions of this character, the federal courts administering justice in Kentucky have equal and co-ordinate jurisdiction with the courts of the state, "although they will lean 'towards an agreement of views with the state court, if the question seems to them balanced with doubt.'" Clark v. Bever, 139 U. S. 117, 11 Sup. Ct. Rep. 468; Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. Rep. 10; Railroad v. Lockwood, 17 Wall. 357; Dodge v. Tulleys, 144 U. S. 457, 12 Sup. Ct. Rep. 728.

Our conclusion is that each creditor is entitled to prove the whole of his debt, and to be paid a dividend thereon, without any abatement by reason of any other security, lien, or collateral, whether the same was given him by the Union Land Company or another. A decree will be drawn in accordance with these views, and the commissioner directed to report in accordance with this opinion.

BARR, District Judge, concurs.

JACKSONVILLE, T. & K. W. RY. CO. et al. v. AMERICAN CONST. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1893.)

No. 87.

1. APPEAL—TRANSCRIPT—SUFFICIENCY OF AUTHENTICATION.
Rule 14 of the circuit court of appeals for the fifth circuit requires "a true copy of the record, bill of exceptions, assignments of error, and all other proceedings in the case," (47 Fed. Rep. vii.,) to be sent up on appeal. *Held*, that an authentication stating that "the foregoing is a true, full, and complete record in the above-entitled cause" is sufficient. Pennsylvania Co. for Insurance on Lives, etc., v. Jacksonville, T. & K. W. Ry. Co., 5 C. C. A. —, 55 Fed. Rep. 131, 2 U. S. App. —, followed.

2. APPEAL—FINAL DECREE—ALLOWANCE OF ATTORNEYS' FEES
A decree by the circuit court, allowing $5,000 to the complainant's solicitors for services rendered and to be rendered, and directing payment of the same out of the funds in the receiver's hands, in a suit by a stockholder against a corporation, in which a receiver has been appointed and an injunction granted, is pro tanto a final decree, from which an appeal will lie to the circuit court of appeals. Hobbs v. McLean, 6 Sup. Ct. Rep. 870, 117 U. S. 567, followed.

3. ATTORNEYS' FEES—STOCKHOLDER'S SUIT—PREMATURE DECREE.
In a suit by a stockholder, in behalf of itself and of such other stockholders as may come in, against a railway company, alleging the making of an illegal and void contract by the corporation, and praying for an account, an injunction, and the appointment of a receiver, an allowance of compensation to the complainant for solicitors' fees pending an appeal from an order appointing a receiver and continuing a restraining order is premature.

4. SAME—APPEAL—REVERSAL.
The allowance of such compensation should be reversed, where, on appeal, the order appointing the receiver has been reversed, the injunction modified, and the property in controversy returned to the defendant.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill by the American Construction Company, on behalf of itself and such other stockholders as might come in, against the Jacksonville, Tampa & Key West Railway Company, for an account, a receiver, and an injunction. From an order granting H. Bisbee and C. D. Rinehart, complainant's solicitors, $5,000, as an allowance for services rendered and to be rendered, defendant appeals. The appellees Bisbee & Rinehart moved to dismiss the appeal on the ground that the transcript of the record was improperly authenticated. Motion to dismiss overruled, and order appealed from reversed.

The certificate of the clerk, annexed to the transcript of the record, stated "that the foregoing is a true, full, and complete record in the above-entitled cause."

For reports of prior decisions rendered in the course of this litigation, see 52 Fed. Rep. 937; 13 Sup. Ct. Rep. 758; and 55 Fed. Rep. 131.

Statement by the court:

On July 6, 1892, the American Construction Company, a corporation of Illinois, and a stockholder in the Jacksonville, Tampa & Key West Railway

Company, a corporation of Florida, engaged in operating a railroad in the state, filed a bill in equity, in behalf of itself and of such other stockholders as might come in, against the railway company, and against its president and directors, citizens of other states, alleging that they had made a contract in its behalf which was illegal and void, and unjust to its stockholders, and had declined to have an account taken, and praying for an account, a receiver, and an injunction. On the filing of the bill the district judge made a restraining order, by which, until the plaintiff's motion for an injunction and for the appointment of a receiver could be heard and determined, the railway company and its officers and agents were enjoined and restrained from remitting, sending, or removing any of its income, tolls, and revenues from the jurisdiction of the court, and from selling, disposing of, hypothecating, or pledging any of its bonds of a certain issue at less than their par value. On August 4, 1892, after a hearing of the parties, the court made an order appointing Mason Young receiver of all the property of the railway company; enjoining the railway company, its officers and agents, and all persons in possession of its property, from interfering with the possession, control, management, and operation of the property, and from obstructing the exercise of the receiver's rights and powers, or the performance of his duties; and continuing the restraining order of July 6th until the further order of the court. On August 5th, on a petition of the receiver, and after hearing him and the parties, the court made an order authorizing him to pay certain interest and obligations of the railway company out of the income and money coming into his hands as receiver, or, if those should be insufficient for that purpose, to issue receiver's notes in payment of such interest and obligations, or, at his discretion, to borrow money on such receiver's notes for that purpose, the amount of such notes outstanding at one time not to exceed $125,000. On August 27th the railway company prayed and was allowed an appeal from the orders of August 4th and August 5th to the United States circuit court of appeals for the fifth circuit, and gave bonds to prosecute the appeal.

All the foregoing proceedings were carried on contradictorily with the adverse parties, and the several orders made were vigorously resisted.

On October 12, 1892, Messrs. Bisbee & Rinehart, solicitors for the American Construction Company, filed the following petition: "Your petitioners, H. Bisbee and C. D. Rinehart, doing business under the firm name and style of Bisbee & Rinehart, respectfully show that they were retained for the complainant in the above-entitled cause about the middle of last June; that they prepared and filed the bill in said cause; that they made and argued the several motions for an injunction and receiver, and have represented the complainant in all other proceedings appearing of record, and have had several consultations with the representatives of the complainant during the pendency of the cause; that an appeal has been taken in the said cause, to the United States circuit court of appeals, from some of the orders granted therein, and demurrer has been filed by the defendant company to the complainant's bill; that the services required to represent properly the complainant on said appeal, and on the demurrer to the said bill, and the pending interventions and petitions on the part of the receiver, will necessarily occupy, in the immediate future, a very great portion of the petitioners' time. Your petitioners further show that in the suit of the Pennsylvania Company for the Insurance of Lives and for Granting Annuities against the said railroad company, for foreclosure of a mortgage, the said American Construction Company intervened, setting up the proceedings in the cause first above mentioned, and made a motion for a stay of proceedings therein, which, after argument, was granted, and that an appeal has been taken from said order in that case to the United States circuit court of appeals, which will also, in the immediate future, require your petitioners' attention and services. Your petitioners say that they received a retainer of $500 in the cause first above mentioned, and in view of the magnitude of the controversies in the above-stated causes, and in view of the fact that the litigation on the part of the American Construction Company, which your petitioners represent, has been commenced and is being prosecuted in the interest of all the stockholders of the said railway company, as well as in the interest of all the creditors of the said com-

pany, and in view of the magnitude of the litigation, and of the extensive professional labor required of your petitioners for some time to come, your petitioners respectfully pray for an order of this honorable court, upon the receiver heretofore appointed in the suit by the American Construction Company against the railroad company, to pay your petitioners such a reasonable sum of money as an allowance on account of services rendered and to be rendered in the said causes as to this honorable court may seem just and proper; and your petitioners will ever pray, etc."

The matter came on to be heard on the 14th day of October, the appellants filing the following answer: "The defendant, the Jacksonville, Tampa & Key West Railway Company, for answer to so much of said petition as it is advised it is necessary for it to make answer unto, respectfully shows that, as shown by the record, the petitioners represent only the complainant in said cause, which claims to be entitled to but a small minority of the stock of said company, as shown by the record; but defendant denies that said suit is prosecuted in fact or for the benefit of either the creditors or other stockholders of said railroad company, except the complainant and Mason Young, and that the other stockholders and all the creditors of said company, other than the said complainant and Mason Young, are opposed to the said litigation of said complainant, and the said litigation is against the interest of the other stockholders and creditors of this defendant company. Defendant, further answering, states that an appeal is now pending from the orders heretofore made in this cause to the circuit court of appeals, fifth circuit, and respectfully submits that no order should be made upon the said petition pending said appeal, for the reason that, in the event it is held by the said court of appeals that the complainant is not entitled to maintain the bill in this cause, an allowance to its solicitors would, in any event, be erroneous and improper; that the purposes of the bill, as shown by its prayers, do not look to any final and ultimate relief to any parties in interest in the cause, and relief prayed is not such as to make the case one in which complainant's solicitors are entitled to compensation out of the property involved in the cause, or its rents, issues, and profits; that in no event would such an allowance be made as prayed in the petition, except for services already rendered, after the usual references, and testimony taken as to the value of such services; that the property involved in the case, and its income, rents, issues, and profits, are subject to the several trust deeds or mortgages mentioned in the record, which are existing liens thereon, and no allowance or payment out of said fund should be ordered by the court until the said trustees and lienholders are made parties to this litigation, and have notice and an opportunity to be heard."

On the hearing, Mr. John E. Hartridge, a lawyer practicing in the circuit court for the northern district of Florida, testified that $20,000 would be a reasonable compensation for the completion of the present litigation; that $5,000 would be a fair compensation to be allowed in advance on what had been done up to the present time. He says on the cross-examination: "I think the services to date, exclusive of any argument on the appeal, or any expenses connected therewith, would be from seven thousand five hundred to eight thousand dollars." Mr. John E. Wurts testified as follows: "I have been a lawyer for eight years. I am familiar with the amount of compensation claimed and paid to lawyers in cases of importance in this state. * * * I think a moderate estimate of the professional services rendered up to, and the argument on, the appeal, to the time of filing the replication, would be ten thousand dollars, without any contingencies that may arise, and it would be below many fees that I have known to be charged for similar services." On cross-examination he said: "I think, in view of the magnitude of the interests involved, and of the responsibility incurred in the preparing of the bill, and the fact that practically all the questions that must be made on the appeal, and that can be raised upon the demurrer, have already been prepared for in the labor, and expended on the motion for receiver, that $7,500 has been reasonably earned up to date." On the 15th October the court ordered, adjudged, and decreed that the receiver, Mason Young, Esq., pay to the petitioners, or their order, the sum of $5,000, out of any moneys in his hands,

arising from the operation of the railroad properties included in the order appointing him receiver. From this order an appeal was prayed and allowed in open court, and the following was assigned as error: "That the court erred in making the order or decree dated October 15, 1892, whereby Bisbee & Rinehart were allowed the sum of five thousand dollars, as complainant's solicitors, to be paid out of the income and assets of the property in the hands of the receiver."

In this court the appellant assigned errors as follows: "(1) The order appealed from was wholly erroneous. (2) This was not a case in which the court was authorized to make such an allowance. (3) This is an adverse litigation between complainant and defendant, and not the case of a fund brought into court for the benefit of a class of persons, out of which counsel fees would be allowed. (4) The litigation has just begun, and this is not the proper time to make such allowance, for the court cannot anticipate the result of the litigation. (5) The granting of the order is, in effect, deciding, at this stage of the litigation, upon the merits of the cause, in favor of complainant. (6) At the time this order was made an appeal was pending in the United States circuit court of appeals from the orders upon which this allowance was based, and, if those orders are reversed, complainant's counsel will have been paid, out of defendant's property, for obtaining erroneous orders against defendant. (7) The record shows that there are several issues of bonds on this property and its income, and a large amount of indebtedness due from the company to other persons, and the trustees of the bonds and the creditors, who have rights in the incomes of the property prior to a stockholder, were not before the court, and were not consulted as to the expenditure of these funds. (8) The answer of defendant company to the petition shows that this use of the incomes of the property for paying complainant's counsel fees is against the wishes and protest of the stockholders, bondholders, and creditors. (9) There is no prayer in the bill for any relief which would authorize the allowance of counsel fees."

The appellees, Bisbee & Rinehart, move, in this court, to dismiss the appeal, on the ground that there is no properly authenticated transcript of record filed in this court, as required by the rules thereof, and this court has no jurisdiction to entertain an appeal from the order of October 15, 1892. Since the taking of this appeal in this case, this court has disposed of the main appeal in the case of Jacksonville, T. & K. W. Ry. Co. v. American Const. Co., reversing the decree of the circuit court appointing a receiver, modifying the injunction, and restoring the property in controversy to the Jacksonville, Tampa & Key West Railway Company. 55 Fed. Rep. 131.

C. M. Cooper, J. C. Cooper, and I. M. Day, Jr., for appellant.
H. Bisbee, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PER CURIAM. The certificate of the clerk, authenticating the transcript in this case, is sufficient. See Pennsylvania Co. for Insurance on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co., 2 U. S. App. 606, 5 C. C. A. 53, 55 Fed. Rep. 131.

"A decree by a circuit court of the United States, directing that the complainant be paid his costs and expenses out of the fund in court,—the fund in the mean time remaining in the court, in course of administration,—is, pro tanto, a final decree, from which, if the amount be sufficient, an appeal will lie." Trustees v. Greenough, 105 U. S. 527. "When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the

suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See Trustees v. Greenough, 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited, and Banking Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. Rep. 387. But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate." Hobbs v. McLean, 117 U. S. 567–582, 6 Sup. Ct. Rep. 870. The allowance of compensation to the appellees in this case, to be paid out of the fund in the hands of the court, was erroneous, because it was, in any event, premature, and because the adversary proceedings to take possession of the trust property for control, management, and possible distribution, failed in their purpose.

The motion to dismiss the appeal is overruled, and the order appealed from is reversed, with costs.

BRISTOL et al. v. SCRANTON et al.

(Circuit Court, W. D. Pennsylvania. June 19, 1893.)

No. 35.

CORPORATIONS—CONSOLIDATION—PERSONAL AGREEMENT OF OFFICERS—LIABILITY TO STOCKHOLDERS.

Pending negotiations for the consolidation of two steel companies, L. and S.,—which negotiations on the part of company S. were conducted by its president and vice president,—company L. insisted, as a condition precedent to the consolidation, that said officials enter into a personal covenant not to engage, individually, during the period of 10 years, in the manufacture of steel in any competing works then existing within a defined territory, for a money compensation to be paid them by company L., and, simultaneously with the execution by the two companies of the preliminary agreement of consolidation, such individual contract was entered into. The consolidation having been carried out, the money compensation was paid by company L. to said officials. The amount so paid them was not a bonus, but a fair equivalent for their personal covenant. It constituted no part of the consideration to which company S. was entitled, and the payment took nothing from that company. The transaction was free from actual fraud. The terms of consolidation were favorable to company S., and were approved by all its stockholders. Upon a bill filed by certain stockholders to compel said officials to account to company S. for the amount so paid to them:

Held, that as the transaction was honest in fact, and the plaintiffs had elected to retain the benefits of the consolidation, which was unattainable without the personal covenant of the defendants, neither company S. nor the complaining stockholders had any equity to take from the defendants the price of the personal covenant by which they were bound.

In Equity. Bill by Louis H. Bristol and others, stockholders of the Scranton Steel Company, against William Walker Scranton,

Walter Scranton, directors of the Scranton Steel Company, and the said company, for an accounting by defendants Scranton. Bill dismissed.

Henry Stoddard, Samuel Dickson, and Richard C. Dale, for complainants.

D. T. Watson and Johns McCleave, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. Under and in conformity with the terms of articles of agreement dated January 9, 1891, between the Lackawanna Iron & Coal Company and the Scranton Steel Company, corporations of the state of Pennsylvania engaged in the manufacture of steel at the city of Scranton, the business interests and plants of the two companies were consolidated, and transferred to a new corporation, styled the Lackawanna Iron & Steel Company. Contemporaneously with the execution of the preliminary agreement for this consolidation, a written agreement, bearing date January 9, 1891, between the Lackawanna Iron & Coal Company, party of the first part, and William Walker Scranton and Walter Scranton, parties of the second part, was executed, whereby it was agreed between these parties:

"First. That upon the complete execution of said contract between the Lackawanna Iron and Coal Company and the Scranton Steel Company the party of the first part will assign, transfer, and deliver to the parties of the second part $350,000.00 of the mortgage bonds of the Lackawanna Iron and Steel Company, described and provided for in said contract. Second. And in consideration thereof the said parties of the second part agree that they will not, nor will either of them, engage, directly or indirectly, in the manufacture of steel in any new competing works, not now existing in any of the northern states of the United States, including Maryland, Virginia, and West Virginia, for a term of ten years from and after the complete execution of said contract; that they will at once procure and deliver to said iron company the assent of the Scranton Gas and Water Company to the assignment of the contracts with that company, specified and described in said contract between the Lackawanna Iron and Coal Company and the Scranton Steel Company."

William W. and Walter Scranton are brothers. From the organization of the Scranton Steel Company, in 1881, they were directors of that corporation; and the former was the president, and the latter the vice president, of the company. The negotiations for the consolidation of the Scranton Steel Company with the Lackawanna Iron & Coal Company were conducted on the part of the former company by them, but principally by William. At the time of the consolidation, William held 1,845 shares of the stock of the Scranton Steel Company, and Walter held 920 shares.

This is a bill by Louis H. Bristol and others, stockholders of the Scranton Steel Company, holding 1,575 shares out of the total capital stock of 7,500 shares, against William Walker Scranton and Walter Scranton and the Scranton Steel Company, praying that William W. and Walter Scranton may be decreed to account for and pay over to the Scranton Steel Company the $350,000 of

bonds which they received from the Lackawanna Iron & Coal Company under the agreement last above recited, or the proceeds or value thereof. The bill charges that, in the year 1890, William W. and Walter Scranton devised and attempted to carry out a scheme to sell the stock owned by them and some of their immediate relatives and dependents, constituting a majority interest in the stock of the Scranton Steel Company, to rival concerns, so as to leave the stock of the plaintiffs and others a minority interest, subject to the control of such majority interest, in the hands of hostile competitors, and that accordingly they offered to sell 4,000 shares of stock for $1,000,000, and that this scheme and attempt were kept secret and hid from the plaintiffs. But this charge is not sustained by the proofs. It appears that an overture for the purchase of a controlling interest of the stock of Scranton Steel Company was made to the Scrantons by persons connected with the Lackawanna Iron & Coal Company, but the answer of the Scrantons thereto was on behalf of the whole body of stockholders of the Scranton Steel Company, and in the interest of all alike, according to their several holdings.

With reference to the proofs, the material allegations of the bill are as follows:

"And your orators further show that as part and parcel of the said arrangement by which the consolidation of the business interests and plants of said two corporations was to be effected, and the plant of said Scranton Steel Company was to be transferred to a new and single corporation, known as the Lackawanna Iron & Steel Company, said William Walker Scranton and Walter Scranton, while acting in said negotiations for and in behalf of said Scranton Steel Company, and as the directors and agents thereof, in violation of the duty which, as said directors and agents, they owed to said Scranton Steel Company, and to the stockholders thereof, including your orators, conspiring and confederating together to receive for themselves large sums of money or securities or bonds through and by means of the sale, conveyance, and transfer of, substantially, all the plant and property of said Scranton Steel Company to said proposed new corporation, secretly, and without the knowledge, assent, or concurrence of the other stockholders of said Scranton Steel Company, or any of them, stipulated that the sum of three hundred and fifty thousand dollars, in bonds of said new company, secured upon the property of said new company, should, upon the consummation of said consolidation, be paid to them, personally and individually, and for their own personal use and benefit, by the Lackawanna Iron & Coal Company, which stipulation and agreement was in the mean time agreed to be kept secret by such officers of said Lackawanna Iron & Coal Company, at the instance and request of said William Walker Scranton and Walter Scranton."

After reciting the consummation of the consolidation, and the delivery by the Lackawanna Iron & Coal Company to the Scrantons of said bonds, the bill proceeds:

"And your orators allege that the obtaining and procurement of said bonds by the said William Walker Scranton and Walter Scranton, for their personal use, benefit, and behoof, was in fraud of the rights of said Scranton Steel Company and of your orators, as stockholders thereof, and that in truth and in fact said bonds were, in substance, part and parcel of the consideration paid by the Lackawanna Iron & Coal Company for the transfer to said new company of the manufacturing plant of said Scranton Steel Company, pursuant to the terms of said written agreement, and that said bonds be-

long, in equity and good conscience, not to said William Walker Scranton and Walter Scranton, but to the said Scranton Steel Company and to the stockholders thereof, ratably, in proportion to their several holdings of the stock of that company."

Then, after stating that the plaintiffs are informed that the Scrantons allege that said securities were delivered to and received by them in consideration, upon their part, not to engage in business individually, or as officers of any other corporation, in competition with the purchaser, the bill declares:

"But your orators charge and aver that because and by virtue of the relation which the defendants then held to said Scranton Steel Company, of which they were then officers and agents, they were disqualified and prevented from taking or holding such personal benefit or advantage, and that the securities and bonds so received did in fact constitute a part of an entire consideration for the property and assets of said Scranton Steel Company, conveyed as aforesaid, and it was the duty of the defendants to turn over and account for the same, and that in fact said securities were given to and received by the defendants because they were officers and agents, as aforesaid, of said Scranton Steel Company."

In their answer, William Walker Scranton and Walter Scranton specifically deny every charge and averment of fraud or bad faith contained in the bill, and they allege that the bonds in question were paid to and received by them in good faith, in consideration of a personal covenant upon their part, whereby they bound themselves not to engage in the manufacture of steel in any new competing works, not then existing in any of the northern states of the United States, including Maryland, Virginia, and West Virginia, for a term of 10 years; that this covenant was demanded from them by the Lackawanna Iron & Coal Company, as a condition precedent to the consolidation, in the interest of the stockholders of that company, and also for the benefit of the new consolidated company; that the amount paid them was in no sense a bonus, but was a fair equivalent for their covenant; that the bonds which they received were altogether the property of the Lackawanna Iron & Coal Company; that they were no part of the consideration payable to the Scranton Steel Company for the consolidation, and the payment thereof to the Scrantons took nothing from that company; that the consolidation agreement and the agreement between the Lackawanna Iron & Coal Company and the Scrantons were two distinct contracts, independent of each other, except in this: that without the personal covenant of the Scrantons, which the Lackawanna Iron & Coal Company exacted, the consolidation could not have been effected; that the individual contract with the Scrantons was not secretly made, or the fact concealed; and that the same was explained to the stockholders of the Scranton Steel Company at the meeting held on February 6, 1891, which ratified the consolidation agreement.

It appears from the pleadings and proofs that at a meeting of the stockholders of the Scranton Steel Company on May 18, 1891, convened, at the instance of the plaintiffs, or some of them, to determine the course of action with respect to this matter, 4,818 shares of stock voted against bringing suit against the Scrantons

to recover the bonds, and 2,320 shares voted in favor of bringing such a suit. This majority of the stock vote, however, included the shares of William W. and Walter Scranton, amounting, together, to 2,765 shares.

At the outset of this discussion, it is to be noted that we regard it as a matter of no moment that the personal covenant of the Scrantons was taken to the Lackawanna Iron & Coal Company, instead of to the consolidated company, as the covenant is undoubtedly enforceable, and inures to the benefit of the new company. Nor, in view of the circumstances connected with the preparation and execution of the paper containing that covenant, do we attach any significance to its preamble or recitals. That contract was drafted by the counsel of the Lackawanna Iron & Coal Company in the city of New York, and was accepted by the Scrantons as written. The clause touching the assent of the Scranton Gas & Water Company to the assignment of certain contracts was wholly unnecessary, for the Scrantons had already procured that assent. Under the evidence, it is entirely clear that the real and only consideration for the bonds the Scrantons received was their individual covenant not to engage in new competing steel works within the named territory for the period of 10 years.

Upon the part of the Lackawanna Iron & Coal Company, the negotiations for the consolidation were conducted by E. T. Hatfield, the president, and Benjamin G. Clarke, the vice president, of that company. The plaintiffs called and examined Clarke. He testifies explicitly that the proposition to exclude the Scrantons, individually, from entering into competing business originated altogether with those representing the Lackawanna Iron & Coal Company, and was insisted on by that company as a condition of the consolidation. In the course of his examination in chief, speaking of the amount paid the Scrantons, he states:

"They at first asked a larger sum than was finally agreed upon, in consideration of the fact that we insisted on their staying out of business for a term of ten years, which he (William) thought was rather a hard thing, but he finally consented, in accordance with that agreement."

All this accords with the testimony on the part of the defendants; so that, upon the uncontradicted proofs, it must be accepted as a fact that the individual contract with the Scrantons was not sought or suggested by them, but originated with the Lackawanna Iron & Coal Company, and was insisted on by that company as a condition precedent to the proposed consolidation.

It is also a fact that the Scranton Steel Company had no beneficial interest in the $350,000 of bonds paid to the Scrantons. Those bonds were part of an issue of $600,000 by the consolidated company to the Lackawanna Iron & Coal Company. By the terms of the consolidation agreement the new company was to take the plant of the Scranton Steel Company incumbered by a mortgage for $600,000 and assume its payment, and for the purpose of equalization the new company was to issue bonds to the same amount to the Lackawanna Iron & Coal Company, secured by a mortgage

on its plant, and accordingly this was done. It is, then, plain that the bonds the Scrantons received for their personal covenant belonged exclusively to the Lackawanna Iron & Coal Company, which was free to dispose of them as it deemed best for the interest of its stockholders.

Mr. Clarke, testifying on behalf of the plaintiffs, states that what the Scranton Steel Company received, and the amount paid to the Scrantons, were two entirely separate considerations. All the positive evidence in the case is to the same effect. Having regard, then, to the direct proofs, together with all the collateral facts and circumstances, the fair conclusion, we think, is that the only connection between the two agreements was that the Lackawanna Iron & Coal Company made the personal covenant of the Scrantons a sine qua non to the consolidation.

Nor does it appear to us that the consideration to the Scranton Steel Company for the consolidation was diminished aught by reason of the other contract. It is, indeed, said that arrangements advantageous to that company were discarded because of the personal demands of the Scrantons. But, upon the most attentive reading and study of the proofs, we fail to discover a justification for such assertion. The basis for consolidation first discussed was the net earnings of the two companies for the previous four years, and this proposal came from William Walker Scranton. It was then, after he had made that proposal, that Hatfield first announced to him that his company would not consider any terms of consolidation unless the Scrantons, individually, would bind themselves to keep out of any new competing concern for a period of 10 years. William thereupon spoke of the hardship such a stipulation would impose upon him and his brother Walter, stating that he himself could not afford to go out of business for 10 years, which practically meant for life, as far as he was concerned, unless they would capitalize a fair salary at 5 per cent., and named as a compensation for each the sum of $240,000, which Hatfield said he thought was fair. Two or three days later, Mr. Hatfield reported to Mr. Scranton that his company was not willing to consolidate upon the basis of earnings, but no other objection was mentioned. Then Hatfield proposed a consolidation upon the basis of both companies putting in all their properties, the stock of the new company to be apportioned as follows: To the Scranton Steel Company, $750,000 of stock, and to the Lackawanna Iron & Coal Company $3,750,000 of stock. But no change was suggested as to the individual contract. With that proposition, Mr. Scranton expressed his satisfaction. Shortly afterwards, Mr. Hatfield stated to Mr. Scranton that his people wanted the Scranton Steel Company to retain its bills receivable, and discharge its bills payable. This modification was really favorable to the Scranton Steel Company, and Mr. Scranton promptly acceded to it. He then proposed that Messrs. Kingsbury, Wehrum and McKinney, old employes of the Scranton Steel Company, should be retained in the service of the new company, which Mr. Hatfield

thought was reasonable. No change with respect to the personal contract was yet suggested. Two days later, Mr. Hatfield reported to Mr. Scranton that his board had met, and that the whole thing was off, the points of objection, as he stated, being to the price named for the plant of the Scranton Steel Company, the dictation as to employes, and the sum asked by the Scrantons for their individual covenant. To obviate these objections the Scrantons offered to withdraw the suggestion as to employes, and to reduce their personal compensation to $125,000 each, but without avail. The negotiations for the time being were broken off, but upon the renewal thereof the terms of consolidation were settled eventually as expressed in the articles of agreement between the two companies. The sums to be paid for the individual covenant of the Scrantons were ultimately fixed at $200,000 for William, and $150,000 for Walter. The reason for the reduction in Walter's case was that the new consolidated company employed him as its sales agent in the city of New York for the period of five years at a yearly salary of $12,000. It is perfectly clear from the evidence that Walter was so employed only because he was esteemed a valuable man, and the new company wanted his services.

We are unable to perceive that in the course of the negotiations the Scrantons subordinated the interests of the Scranton Steel Company to their own private interests in any particular whatsoever. On the contrary, the evidence satisfies us that in "all things, both great and small," William Walker Scranton firmly asserted the rights of that company,—in some instances almost to the verge of stubbornness,—and with uniform success. That the consolidation, as effected, was highly advantageous to the Scranton Steel Company, is beyond contestation, under the proofs. The terms, as set forth in the written agreement, received the unanimous approval of the stockholders. Undoubtedly, consolidation upon those terms was greatly desired by the plaintiffs. Writing to William W. Scranton from New Haven, Conn., under date of January 22, 1891, Mr. Louis H. Bristol said: "I have explained, in more or less detail, the contemplated arrangement to our stockholders here, and they are all not only satisfied, but pleased." Under date of February 23, 1891, he wrote: "Up here, we shall all be much disappointed if consolidation should now fall through." Writing under date of March 11, 1891, he said: "I, as well as all the New Haven stockholders, am delighted to learn that the consolidation is now likely to be an accomplished fact." Nor has any stockholder of the Scranton Steel Company since objected to or regretted the consolidation as made. The truth is, the agreement which the Scrantons negotiated was a most favorable one for that company. Mr. Clarke, speaking from his subsequent knowledge, testifies that the Scranton Steel Company, unquestionably, was paid more than its plant was worth. There is no testimony to the contrary. It is possible that others might have done as well for the Scranton Steel Company as these defendants did, but it is entirely safe to say that none could have done better.

The plaintiffs insist that the compensation paid the Scrantons was unreasonable. But, if the bargain was honest in fact, it was for the Lackawanna Iron & Coal Company to determine the adequacy of the consideration which the Scrantons gave. It is, however, certain, from the evidence, that that company deemed it a matter of great pecuniary importance to its stockholders to get rid of the individual competition of the two Scrantons in new steel works. On the other hand, the Scrantons, and particularly William,—with whom it was a question of laying down his life work,—regarded the covenant which was demanded of them as involving great personal sacrifice. Now, Henry Belin, Jr., who was a stockholder and an active director of the Scranton Steel Company, testifies that William W. Scranton informed him that "his going out of business was a condition of the negotiations," and advised with him as to "what he ought to get;" and Mr. Belin states: "I suggested to him that the way to arrive at it was to capitalize his salary. That would give him the figure he ought to sell out at." Mr. Belin seems to be a business man of large experience, and a thoroughly reliable witness. William had been receiving an annual salary, as manager of the Scranton Steel Company, of $7,500, with a small contingent additional percentage, based on net earnings. Walter was receiving from that company, as its sales agent, a yearly salary of $9,000, with a like arrangement as to net earnings. William had formerly received from the Lackawanna Iron & Coal Company a yearly salary, as manager, of $10,000. The uncontradicted evidence is that the ordinary yearly salaries for expert managers and salesmen of such steel works ranged from $12,000 to $20,000. Under the proofs, and in view of all the circumstances, we cannot declare that the sums paid to the Scrantons, respectively, for their covenant to keep out of competing business, were extravagant or unreasonable.

One other matter deserves mention here: The whole project of consolidation, including the personal contract, was distasteful to the Scrantons, especially to William, who down to the last moment, by the most determined efforts to secure the additional working capital the Scranton Steel Company so sorely needed, sought to avert the union of his company with its old rival, the Lackawanna Iron & Coal Company.

The allegation of the bill as to an agreement, at the instance of the Scrantons, that the individual contract with them should be kept secret, is not sustained by the proofs. If anything at all was said by the Scrantons upon the subject of secrecy, (which is denied,) Mr. Clarke understood it only as a suggestion to withhold information from the public until the directors and stockholders of the respective companies had acted. In fact, previous to the meeting of February 6, 1891, William W. Scranton had freely mentioned the matter to at least the following named stockholders of the Scranton Steel Company, who have here so testified, viz.: Henry Belin, Jr., E. P. Kingsbury, Henry Wehrum, James A. Linen, John B. Smith, George B. Smith, and George L. Dickson; and it was known to, and openly dis-

cussed by, business men in the city of Scranton. The minutes of the meeting of the stockholders of the Scranton Steel Company held on February 6, 1891, at which the consolidation agreement was ratified, contain this entry:

"After a full explanation and understanding of the contract, the condition and prospects of the steel rail trade in the east, and the announcement of the fact the Lackawanna Iron and Coal Company had made it a condition of the agreement that the president and vice president of this company should agree not to engage in the manufacture of steel in any new competing works in the northern states for a period of ten years, for which they were to receive a compensation, the meeting proceeded, in due form, to vote upon the question."

The stockholders personally attending that meeting were W. W. Scranton, Henry Belin, Jr., Alfred Hand, G. L. Dickson, Arthur Scranton, E. P. Kingsbury, William T. Smith, and James A. Linen. None of the plaintiffs were personally present. Most of them had sent their proxies to William W. Scranton, who voted their stock. The votes cast in favor of the consolidation were 6,892, and none against it. Whether the amount of compensation was mentioned by William at that meeting is open to question, under the testimony; but certainly he announced all that is recorded on the minutes, and the particulars seem to have been already known to all who were there. It was unfortunate, and we think a mistake, that the Scrantons did not give the plaintiffs full information with respect to their individual contract before the stockholders' meeting, but in our judgment they are not justly chargeable with intentional concealment. Looking at the whole transaction in the light of all the evidence, our conclusion is that it was free from actual fraud. The contract between the Lackawanna Iron & Coal Company and the Scrantons, we are satisfied, was conceived, made, and carried out in perfect good faith.

But it is contended, and many authorities supposed to sustain the proposition are cited to show, that, aside altogether from the question of positive fraud, and without regard to the actual motives or intentions of the parties, the personal contract here made is condemned by the policy of the law, which requires that the Scrantons should turn over to the Scranton Steel Company the bonds, or their proceeds. Is this position maintainable? Undoubtedly, the rule is that one acting in a representative or fiduciary capacity is not allowed so to deal with the subject-matter of his agency or trust as to benefit himself privately, and an agent or trustee who thus makes a profit out of his agency or trusteeship must account for the same to his principal or cestui que trust; and it may be conceded that the rule applies, as a principle of public policy, without regard to the actual fairness of the transaction, or the merits of the services rendered, or the price paid in case of a sale or purchase. Sugden v. Crossland, 3 Smale & G. 192; Colly. Part'n, §§ 179, 186; McKay's Case, 2 Ch. Div. 5; Pearson's Case, 5 Ch. Div. 336; Parker v. McKenna, L. R. 10 Ch. App. 96; Iron Works Co. v. Grave, 12 Ch. Div. 738, 746; Railway Co. v. Blakie, 1 Macq. 461; Wardell v. Railroad Co., 103 U. S. 651, 658. But we think the rule

is not applicable to the present case. In no proper sense were the bonds in controversy a profit made out of the agency or fiduciary relationship which here existed. They were not a gratuity, nor were they paid to the Scrantons because of their fiduciary position. They were paid and received upon a valuable consideration moving wholly from the Scrantons individually. The Scranton Steel Company had no claim to the future services of the Scrantons. Their time belonged to themselves. The bonds were no part of the consideration to which the Scranton Steel Company was entitled. The two contracts were distinct in parties, subject-matter, and consideration. The bonds were not paid to the Scrantons to influence their action adversely to their principal. Neither was the Scranton Steel Company injured by the individual contract. In very truth, the company was profited thereby, for without the personal covenant consolidation could not have been effected at all. In its facts this case differs essentially from every case relied on or cited by the plaintiffs. It is well exemplified by the hypothetical instance put by the defendants' counsel, of an agent including his own property in a sale of his principal's property. Would it be pretended that the principal could rightly claim the price of the agent's property as well as the price of his own, if the two things were clearly separable, and the transaction bona fide? Yet wherein would that case differ from this? It might, indeed, in the supposed case, be good cause for rescission that the agent, by putting in property of his own without the consent or knowledge of his principal, had disqualified himself from acting, by reason of a possible conflict between his duty as agent and his self-interest. And so, here, if the plaintiffs were proceeding for a rescission of the consolidation agreement, they might have tenable ground. But the plaintiffs propose to hold onto the consolidation agreement. So electing, and actual fraud being eliminated from the case, can they take from the Scrantons the price of their personal covenant, without which the consolidation was unattainable? Surely, in a court of equity, the question admits of but one answer. The transaction being in fact honest, the consolidation itself unchallenged, and the Scrantons bound hand and foot by their personal covenant, their title to the consideration paid to them by the covenantee is unimpeachable by the Scranton Steel Company, or the complaining stockholders of that company. This view makes it unnecessary to consider the effect of the action of the stockholders' meeting of May 18, 1891.

Let a decree be drawn, dismissing the bill, with costs.

BUFFINGTON, District Judge. After a thorough consideration of the case, I unreservedly concur in the conclusions of fact and law expressed in the foregoing opinion.

GASQUET et al. v. FIDELITY TRUST & SAFETY VAULT CO.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 119.

WRITS—SUBSTITUTED SERVICE — MORTGAGE FORECLOSURE — INTERVENTION BY BONDHOLDERS.

A suit brought by the trustee under a mortgage to foreclose the same for the benefit of the bondholders secured thereby is a suit for the settlement of a trust, and where the bondholders intervene by a petition in the nature of a cross bill, alleging misconduct on the part of the trustee whereby the value of their security is diminished, the matters thus arising are so connected with the subject-matter of the original suit as to entitle the bondholders to substituted service on the trustee's attorneys, the trustee itself being a nonresident.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

In Equity. Bill by the Fidelity Trust & Safety Vault Company, a corporation organized under the laws of Kentucky, against the Mobile Street-Railway Company, to foreclose a mortgage. A petition in the nature of a cross bill was filed by F. J. Gasquet and others, bondholders under the mortgage, alleging misconduct on the part of the trust company in the execution of the trust. By leave of court, substituted service of the petition was had on the trust company's attorneys, and also upon its president while temporarily in the state. Subsequently a motion to set aside such orders of service was granted, (53 Fed. Rep. 850,) and from this action of the trial court the interveners appeal. Reversed.

For opinions rendered in the litigation under the original bill, see 53 Fed. Rep. 687, and 54 Fed. Rep. 26.

Statement by LOCKE, District Judge:

This is an appeal from an order of the United States circuit court for the southern district of Alabama, setting aside service of notice and process (upon the intervention of the appellants) made on the appellee's solicitors and on the appellee, respectively. On August 15, 1887, the Mobile Street-Railway Company, an Alabama corporation, owned and operated certain street-railway property in the city of Mobile, and also owned 900 shares, of the par value of $90,000, of the capital stock of the Mobile & Springhill Railroad Company, another street-railroad corporation in the city of Mobile. On that date the Mobile Street-Railway Company, to secure an issue of its coupon bonds aggregating $500,000 par value, executed and delivered to the appellee, the Fidelity Trust & Safety Vault Company, a Kentucky corporation, a deed of trust or mortgage upon its property, including the said 900 shares of stock. The sixth article of the deed of trust provided that this stock should be transferred on the books of the Mobile & Springhill Railroad Company to the trust company, though the voting power and the right to dividends thereon should be retained by the Mobile Street-Railway Company until default in the payment of the said bonds and coupons. The seventh article of the deed of trust provided that, in case of default in the payment of interest on the said bonds continuing for three months, the principal of the bonds should forthwith become due and payable, and the trustee should thereupon have the right to enter into possession and foreclose, and, "with or without the aid of proceedings in equity, as it may be advised, proceed to sell" the mortgaged property, including the 900 shares of stock; the net proceeds of the property to be applied to the payment of the principal and interest due on the said bonds. The appellants duly purchased and

became the owners of more than $400,000 par value of the said bonds, or nearly the entire issue. The Mobile Street-Railway Company failed to pay the interest due on July 1, 1891, and January 1, 1892. On January 20, 1892, the appellee filed its bill of complaint in the United States circuit court for the southern district of Alabama against the Mobile Street-Railway Company alone, setting up the issuance of said bonds, the execution of the deed of trust, and the default in the payment of taxes and of the said interest. The substance of the deed of trust is set out in the bill of complaint, and a copy of it is attached to and made a part thereof. The prayer of the bill of complaint is as follows, viz.: "Wherefore, the premises considered, orator prays your honor to take jurisdiction of the subject-matter of this bill, and to decree that there is a default in said mortgage, and that said principal and accrued interest on said bonds are presently due and payable, and will ascertain the amount thereof, and will decree that on default of payment thereof within a reasonable time to be fixed by the honorable court, the said railroad property and franchises and other property described in said deed of trust, and the said hypothecated stock of the Mobile and Springhill Railroad Company, may be sold in such manner as may seem to be best for the interest of the trust represented by orator, and that the said railway company may be required to join in such conveyance of said property to the purchaser thereof, if deemed proper. Or that your honor may grant to your orator such other, further, or different relief in the premises as in equity and good conscience it ought to have."

Upon the filing of the bill of complaint, a receiver was moved for and appointed and put in charge of the mortgaged property. A decree pro confesso was subsequently rendered against the railway company, and a decree rendered upon the pleadings, ascertaining and decreeing that default had been made in the payment of the interest upon the bonds; that the complainant was entitled to relief, and the foreclosure of the deed of trust, and a sale of the property described therein. A reference to a special master was ordered, to ascertain and report the amount of the bonds and coupons secured by the deed of trust; the amount of the debt and interest thereon; what property came into the hands of the receiver, and what property was covered by the description contained in the deed of trust; what allowances should be made to the trustee for compensation and disbursements; what allowances should be made to the receiver and his attorneys; what allowances should be made to the trustee's attorneys for services in this proceeding and as advisory counsel in the matters relating to the trust; the amount of costs and expenses accrued and likely to accrue in the cause; the names of the various bondholders, and the number of bonds held by each; and what amount of the purchase money should be paid in cash upon the sale of the property.

The master made his report upon these matters, and the court then ordered the sale of the property, including 900 shares of stock. Before the property was actually sold, and before the report of the master was confirmed, the appellants, on behalf of themselves and of all other holders of bonds secured by the deed of trust, presented to the court a petition to be allowed to intervene in the cause, and to file their petition in the nature of a cross bill against the trustee, seeking to require it to account to the bondholders for a diminution in the value of the trust property, caused by a willful breach of trust on the part of the trustee, in accepting and attempting to execute a subsequent and conflicting trust upon the property represented by the 900 shares of stock, by allowing a mortgage to be placed upon that property for the benefit of other persons, and by actually agreeing, as trustee thereunder, to enforce that mortgage, and thus to nullify the security afforded by the 900 shares of stock.

The petition alleges the execution of the deed of trust by the Mobile Street-Railway Company to the appellee, its acceptance, the issuance of bonds thereunder, and the purchase of part thereof by the appellants in the usual course of business, before maturity, for a valuable consideration, and in good faith, and upon the faith and confidence that the railway company would deal in good faith with the property covered by the deed of trust, and that the trust company would faithfully observe and perform all of the duties, trusts,

and obligations thereby assumed and imposed upon it. The petition further sets forth the pledge of the 900 shares of stock, and the right to vote thereon reserved to the railway company until default; that the railway company held this voting power under an implied trust not to use it in such manner as to destroy or depreciate the value thereof, or to convert the lien of the bondholders from a first to a second lien, or to hinder or embarrass the enforcement of such lien, or to cast a cloud upon it; that it was the duty of the trustee not to accept any trust in conflict with that which it had already accepted, and not to participate in or encourage the railway company in any effort which the latter might make to vote, use, or control the said stock in any such manner as to impair its value, either directly or indirectly, but to oppose actively any such effort; that the trustee not only allowed the railway company to vote the said stock in such manner as greatly to depreciate its value, but also allowed a mortgage to be placed upon the property represented by the stock, and actively encouraged and participated therein, accepting the trusteeship thereunder, and was, at the time of the filing of this petition, proceeding to enforce such subsequent and conflicting trust, and was at the same time claiming more than $5,000 of the proceeds of its prior trust as compensation for the proper performance thereof; that the stock, except for such breaches of trust, would have been worth its par value; but by reason of these breaches it was rendered practically worthless, the appellants thereby losing nearly $90,000.

The petition sets out in detail the fraudulent character of the deed of trust made by the Mobile & Springhill Railroad Company to the appellee; the participation, both by the Mobile Street-Railway Company and by the appellee, in the issuance of bonds thereunder, and the acts of the trust company in enforcing this deed of trust to the detriment of the appellants.

Upon the presentation of this petition the court, on November 9, 1892, made an order, allowing the petition to be filed, and notice thereof to be given to the trust company, by service thereof upon its solicitors of record; and notice was, on the same day, accordingly served upon the solicitors of record. On November 9, 1892, a further and similar order was made, ratifying and confirming the previous order. On November 14, 1892, the property covered by the deed of trust of the Mobile Street-Railway Company was sold under the decree of the court for $231,300, the 900 shares of stock realizing only $6,300. By the decree of the court the sales were ordered to be made by the trust company; and, for the purpose of making this sale, the trust company sent its president, John D. Taggart, to Mobile, who, on behalf and in the name of the said trust company, made the sale. On the same day a subpoena in equity was issued upon the petition previously filed by the appellants, and was duly served on Taggart as such president.

The Fidelity Trust & Safety Vault Company is a Kentucky corporation, but is, and was prior to the time herein above mentioned, authorized by its charter to perform such trust as that created by the deed of trust of the Mobile Street-Railway Company, and is and was duly authorized to accept and manage trusts involving acts to be done on its part outside of the state of Kentucky and in the state of Alabama. In fact, it accepted the trust created by the deed of trust of the Mobile Street-Railway Company, and in the performance of the duties thereof it sent its said president to the city of Mobile to examine the property to be taken possession of under the deed of trust. It further actually took possession of the capital stock of the Mobile & Springhill Railroad Company, and, through its attorney in fact, attended one or more meetings of the stockholders of that company, held in Mobile, Ala. It claimed and had allowed to it for its services in the management of the trust more than $5,000, and it sent its president to Mobile to sell the property, as already stated; and while he was so in Mobile on such business the process of the court was served upon him.

The appellee made two motions,—one to set aside and vacate the services of notice upon its solicitors and to vacate the orders made respectively, authorizing such service; and the other to set aside the service of process upon Mr. Taggart, as president. The former motion was based upon the ground that the trust company was an ordinary trust company, domiciled in Ken-

tucky, and had not been engaged in the conduct of any business in Alabama, and had no officers or agents therein, and that the solicitors upon whom the service was made were employed only for the purpose of representing the trust company in the case of two foreclosure proceedings in Alabama, and that they were not employed or authorized to represent the trust company in any other business whatever. The other motion was made upon the ground that the trust company was a Kentucky corporation, not engaged in any business in Alabama, and that its president was in the southern district only for the purpose of making a sale of the property of the Mobile Street-Railway Company under the orders of the court. The court granted both motions, and made an order setting aside the service, both upon the solicitors and upon Mr. Taggart, and also vacating the orders made allowing the petitioners to intervene. The order thus made is appealed from, and it is assigned as error under eight different heads that the court erred in setting aside and vacating the orders allowing appellants to intervene, and in setting aside and vacating the service of process upon the attorneys of record and John D. Taggart, president of said company.

E. Howard McCaleb and Gregory L. Smith, (H. T. Smith, George F. Lapeyre, and Sherman & Sterling, on the brief,) for appellants.

D. P. Bestor, Gaylord B. Clark, (Frank B. Clark, Jr., on the brief,) for appellee.

Before McCORMICK, Circuit Judge, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) Although the language of the bill in this case, and the direct prayer for a foreclosure and sale of the mortgaged property, might lead to the conclusion reached by the court below, that the purpose intended was simply such foreclosure and sale, a more careful examination of its representations, and of the record of the subsequent proceedings, the decree pro confesso, the questions submitted to the special master, and findings by him, (all of which are plainly within the original purpose of the bill, and supported by the prayer for further relief,) and the representations of the bill that complainant was acting in the capacity of a trustee, and praying that the bondholders might be brought in, show plainly that it was a bill for the final settlement and disposition of a trust fund. Such creditors as the bondholders in this case, who are allowed to prove debts, belonging to a class on whose behalf a suit is brought, are regarded as quasi parties, and may have a standing in court, and be heard by intervention or cross bill upon anything touching their rights in the disposition of the trust. Anderson v. Railroad Co., 2 Woods, 628; Carter v. City of New Orleans, 19 Fed. Rep. 659; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. Rep. 638. Had the trustee, in selling the trust property, by collusion with a purchaser at the sale, or by any other improper or fraudulent proceedings, diminished the funds, the cestuis que trustent, the actual parties in interest, could certainly be heard upon the question as to the amount to which they were entitled; and we consider the same principle will apply in any suit to protect the funds from loss from any act prior to the origin of the foreclosure proceeding.

In the numerous cases found reported upon this subject the question has been, did or did not the matter of the cross bill grow out of, and did the relief demanded therein depend upon, the subject-

matter of the original bill? Wherever the conclusion has been in the affirmative, the cross bill has been sustained, and, where not so relating or dependent, it has been dismissed. The very object and purpose of a cross bill is to allege and set up new matters not alleged in the original bill, and the only measure of its validity as the foundation of an ancillary suit is the connection which the relief prayed for under it has to the subject-matter of the original bill. In a bill intended for the final settlement and determination of a trust no question can be of greater importance, or more clearly the subject-matter of the suit, than the ascertaining of the amount of the trust fund; and it would appear to us that any cross bill alleging the wrongful diminution of such fund would be entitled to a hearing in the same case before the rights of the parties were finally adjudicated. The questions raised by appellants in their cross bill are directly connected with the administration of the trust, and it charges that the value of said trust fund has been reduced by the conduct of the trustees. The hearing and determining of the validity of such allegations we consider directly connected with the administration and final settlement of the trust, which is the subject-matter of the original bill, and that the petition or cross bill filed for that purpose makes an ancillary or dependent cause, in which substituted service should have been sustained.

The position taken and strongly urged by the appellee, that the matters and things presented by appellants were fully heard and determined by the decree of December 12th, from which no appeal has been taken, and are therefore res adjudicata, cannot be accepted, as in that decree the settlement with the trustee is especially reserved. Also in the agreement of January 3d, by which it is urged appellants are estopped, it was specially stated that it should not be construed so as to bar appellants from the right to assign as error any action of the court upon the petition. We are not called upon to determine the sufficiency of the allegations of the petition or cross bill, or how far affirmative relief, if any, under it might extend, but whether the matter of such allegations is so connected with and relates to the subject-matter of the original suit as to constitute the foundation of such ancillary or dependent suit as would justify a substituted service, and this question we answer in the affirmative.

It is ordered that the decree of January 4, 1893, which set aside the orders of the 7th and 9th of November, 1892, authorizing services to be made on solicitors of record of appellee herein, be reversed, and the cause be remanded to the circuit court, with directions to re-establish such orders and such service, and take such proceedings in said cause as, according to right and justice, ought to be had, and that the appellee pay the costs herein.

WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

No. 143.

CIRCUIT COURT OF APPEALS — REVIEW OF ORDER GRANTING TEMPORARY INJUNCTION.

The circuit court of appeals will not reverse an interlocutory order granting or continuing a temporary injunction unless it is clearly shown that the same was improvidently granted, and is hurtful to the appellant.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Suit by the United States against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. An order was made in the court below granting a temporary injunction, (54 Fed. Rep. 994,) and defendants appeal therefrom. Affirmed.

M. Marks, (A. H. Leonard and Evans & Dunn, on the brief,) for appellants.

F. B. Earhart, for the United States.

Before McCORMICK, Circuit Judge, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. November 10, 1892, the district attorney for the eastern district of Louisiana, acting under the direction of the attorney general, in the name of the United States, exhibited in the circuit court for said eastern district of Louisiana a bill for injunction under the act of congress to protect trade and commerce against unlawful restraint and monopolies. 26 Stat. 209. The circuit court exercised just caution, and gave respondents ample time to show cause why the preliminary injunction sought should not be granted. Respondents improved the time thus allowed them, and, in all the forms in use in such proceedings, submitted matters of law and fact in opposition to the granting of the temporary injunction. The motion for the temporary injunction continued pending, and the hearing of it was adjourned from time to time until the 27th March, 1893, when the circuit court passed the decree granting the temporary injunction, as prayed for in the bill, as to the appellants, and the respondents appealed.

The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinion of the judge of the circuit court who passed the decree now sought to be reversed. The matters of law presented to and considered by him were not well taken by the appellants, respondents below, and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as

to require the refusal of the prayer for a temporary injunction. The volume of assisting and counter affidavits was large, and the conflict of this testimony sharp and emphatic, such as must, in the nature of the case, make variant impressions on the minds of different judges as to the facts shown. The summary of the proof made in the opinion of the judge of the circuit court is fairly supported by the record, and shows that there was proof tending to support the allegations of the bill. The providing by law for an appeal from an interlocutory order granting an injunction certainly clothes the court of appeals with the power and charges it with the duty of reviewing, and in a proper case reversing, the action of the trial court in granting such injunctions; but as to issues of fact, presented as they only can be presented in such cases, the findings of the facts expressed or implied in the action of the trial court should be given due weight, and its action, so far as it rests on, or is affected by, the state of facts proved, should not be reversed unless it is made clearly to appear that it was improvident and hurtful to the appellant. In this case the most that can be urged against the order having relation to the state of the proof is that it was unnecessary. It only enjoined the appellants from doing, pending this suit, what the statute forbids and provides may be prevented by injunction. On this appeal from an interlocutory order, which we affirm, we deem it unnecessary to anticipate the further progress and final hearing of this case by an expression of our views as to the full scope and sound construction of this recent and important statute. The order of the circuit court is affirmed.

BARR v. PITTSBURGH PLATE-GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. August 15, 1893.)

1. CORPORATIONS—DIRECTORS—INDEPENDENT BUSINESS.
   Directors, who are also officers, of a manufacturing corporation, if acting in positive good faith to the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business, (here the manufacture of plate glass;) and they do not stand, in respect to said works, in any trust relation to the corporation. 51 Fed. Rep. 33, affirmed.

2. SAME—EQUITY—CONTRACT WITH DIRECTORS.
   A stockholder and a director of a plate-glass manufacturing company built other plate-glass works, and at the solicitation of other stockholders sold them to the company. They refused to state the cost of the works, and the consolidation was made on the basis of capacity in production. This arrangement was ratified by unanimous vote at a stockholders' meeting, and no stockholder not present at such meeting ever objected thereto. Objection was thereafter made by a stockholder who had been present, on the ground that the price paid for the new works had been excessive. Thereupon the former owners of said works offered to rescind the sale, but a committee appointed by the stockholders not interested in said works reported adversely thereto, which report was ratified by 7,357 out of a total of 7,988 of such disinterested shares. *Held*, that a stockholders' bill, praying relief on the ground of fraud in this transaction, should be dismissed. 51 Fed. Rep. 33, affirmed.

3. SAME.
The directors and one other stockholder of a manufacturing corporation, owning among themselves a majority of the stock, conceived that the demands of trade required the erection of additional works, which they desired the corporation to build, but the project was defeated by minority stockholders. The projectors then proceeded with their own funds to build independent works. Bad faith to the corporation was not imputable to any of them. When the works were nearing completion the corporation bought them upon terms not unconscionable in themselves, and which had been approved by a stock vote of 16,706 to 1,174 shares. The vendors, desiring to have the question decided by the minority stockholders, withheld their own votes until a large majority of the other stockholders had voted in favor of the purchase, and then cast their votes with the majority of the minority. The plaintiff, a minority stockholder, by his bill sought to reduce the vendors' profit. *Held*, that he was not entitled to relief. 51 Fed. Rep. 33, affirmed.

4. SAME—DIRECTOR'S CONTRACTS.
A director of a joint-stock company may make a valid contract with the company, if in so doing he deals fairly and honestly with the stockholders who have appointed him their agent. Oil Co. v. Marbury, 91 U. S. 587, followed.

5. COSTS—PLAINTIFF'S FAILURE TO PROVE FRAUD—LIABILITY.
A stockholders' bill, charging certain directors with fraud in contracts made by them with the corporation, and seeking to enforce the restitution of exorbitant profits made by them in such contracts, was dismissed for want of equity. *Held*, that plaintiff must pay the costs.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. This is a stockholder's bill, filed by Samuel F. Barr, a citizen of the state of Maine, against the Pittsburgh Plate-Glass Company, a corporation of Pennsylvania; Edward Ford, Artemus Pitcairn, Emory L. Ford, and John Pitcairn, Jr., officers and directors of the said corporation; J. B. Ford, Edward Ford, Emory L. Ford, Artemus Pitcairn, and John Pitcairn, Jr., associated together under the firm name of J. B. Ford & Co. The bill was filed against the above-named officers and directors on the ground that they controlled the corporation and prevented a suit by the latter. The bill charges combination and conspiracy, on the part of the persons named as respondents, to defraud the corporation, and seeks to charge them as trustees, and to compel a restitution of illegal profits made by them out of contracts with the corporation. A demurrer to the bill was overruled, and a decree thereafter rendered for the respondents. Complainant appeals.

The bill alleges, in substance:

(1) That J. B. Ford, Edward Ford and Emory L. Ford, sons of J. B. Ford, were the promoters of an organization known as the New York City Plate-Glass Company, organized under the laws of New York, with a capital stock of $600,000, all of which said Fords took in consideration of a plate-glass works plant about to be by them constructed. (2) That the plaintiff was an owner of shares of stock in that company. (3) That the New York City Plate-Glass Company was reorganized under the laws of Pennsylvania, under the name of the Pittsburgh Plate-Glass Company, in August, 1883, taking over to itself all the assets of the former corporation, and having the same capital stock. (4) That the said John Pitcairn, Jr., Edward Ford, Emory L. Ford, and Artemus Pitcairn, being directors of the Pittsburgh Plate-Glass Company, and J. B. Ford, entered into a conspiracy and combination to erect and build similar plate-glass works of larger capacity at Tarentum, in Alle-

gheny county, Pa., about a mile distant from the works of the Pittsburgh Plate-Glass Company, and to compel the said Pittsburgh Plate-Glass Company to purchase the same, to prevent a dangerous and destructive competition therefrom, for the price of 10,000 shares of the capital stock of said company, of the par value of $1,000,000, worth then in the market $155 per share, making the real consideration $1,550,000; and that at the time the said John Pitcairn, Jr., Edward Ford, Emory Ford, Artemus Pitcairn, and J. B. Ford held together 4,350 shares out of 6,000 shares of the capital stock; that said sale was consummated; that any information as to the actual cost of the works was refused to stockholders; and the bill avers that the actual cost of the said works did not exceed $647,000. (5) That thereupon the capital stock of the Pittsburgh Plate-Glass Company was increased to the amount of $2,000,000, and purchase-money shares, as aforesaid, were issued to the vendors; and that, a division of the purchase-money stock having been made, the said J. B. Ford was made to appear as the owner of 4,000 shares, John Pitcairn, Jr., of 8,212 shares, Emory L. Ford of 500 shares, and Artemus Pitcairn of 200 shares. That the board of directors at that time consisted of John Pitcairn, Jr., Edward Ford, Emory L. Ford, Artemus Pitcairn, and John Scott, (since dead,) Edward Ford being the president, Emory L. Ford, secretary, and John Pitcairn, Jr., having resigned the vice presidency, Artemus Pitcairn succeeded him in that office. (6) The bill further avers that the said John Pitcairn, Jr., Edward Ford, E. L. Ford, and Artemus Pitcairn, directors of said company, entered into a conspiracy with J. B. Ford to erect another and additional plate-glass works at Ford City, Armstrong county, Pa., and to compel the Pittsburgh Plate-Glass Company to purchase the same, at such price as they might see fit to exact, by reason of the menace which said works so constructed would present of disastrous or ruinous competition should the Pittsburgh Plate-Glass Company not make the purchase of the same; and that these persons formed a conspiracy, under the name of J. B. Ford & Co., to construct such works, and at the date of the filing of the bill had proposed to sell them to the Pittsburgh Plate-Glass Company for $750,000 of first-mortgage bonds and $750,000 of the capital stock of the company, to be issued at par, the bonds to mature in three, four, and five years, with interest at 6 per cent.; and that the capital stock of the company at that time commanded a premium of $62.50 per share, so that the price aforesaid in reality amounted to $1,968,750; and that the said works when completed would not cost more than $1,000,000. (7) That said directors and J. B. Ford claimed the right to build competitive works for their own benefit, to be operated by themselves, or to be sold to others for that purpose; and that said Ford City works were then in partial operation, and constituted a direct threat and menace to the Pittsburgh Plate-Glass Company to compel them to accede to the demands of the syndicate: and that said syndicate controlled about seven-tenths of the capital stock of said company, upon the then capitalization of the company. (8) That the directors, together with J. B. Ford, in pursuance of such conspiracy, by their undue influence and efforts, had procured a vote authorizing the acceptance of said offer to sell said Ford City works, and to that end had taken steps to procure an increase of the capital stock of the company to $2,750,000, and to procure the amendment of their charter powers to enable them to carry on their corporate business in other counties than the county of Allegheny. (9) That all the members of the board of directors of the Pittsburgh Plate-Glass Company, and all the officers thereof except the treasurer, were members of the syndicate firm of J. B. Ford & Co., and were interested in the consummation of the proposed sale of the Ford City works, and that seven-tenths of the capital stock of the company were held by them.

The bill then proceeds to aver that the said directors, acting in concert with the said J. B. Ford, he, the said J. B. Ford, knowing their official and trust relation, are prohibited from acting in derogation of the interests they represent as officers and directors to the prejudice of the Pittsburgh Plate-Glass Company, and that the works so erected by them were equitably the property of said Pittsburgh Plate-Glass Company, for the construction of which they, said corporation, should pay the actual cost thereof, with such reasonable profit as the court might allow to the constructors thereof.

A demurrer was filed, which was overruled, and thereafter the defendants made answer, admitting the building and sale of the Tarentum works, and the proposed sale of the Ford City works, and also admitting the withholding of information from the stockholders as to the cost of either of those works, and deny that the cost of the Tarentum works was only $650,000, or that the cost of the Ford City works was only $1,000,000. They admit that the stock of the company bore a premium in the market at the time of these transactions, but deny that the premium was as much as is averred in the bill. They also deny that Edward Ford, Emory L. Ford, and Artemus Pitcairn were interested in the building or in the profits derived from the sale of the Tarentum works, but they admit that the Ford City works were built by a partnership consisting of all the directors of the Pittsburgh Plate-Glass Company then living, including therein the president and vice president of said company. The answers set up as justification for the purchase of the Tarentum works that such purchase was the unanimous vote of the stockholders, at a meeting called to consummate the purchase thereof, and, as respects the Ford City works, that the stockholders had refused to build such works; and aver good faith to the minority stockholders in both transactions, and also aver their legal right to act as they did.

The bill was filed to May term, 1889, prior to the meeting called for the purpose of increasing the capital stock and the indebtedness of the company to provide means for the purchase of the Ford City works, but that meeting was subsequently held, and a vote taken, and the property conveyed, with full notice of the pendency of this bill.

A replication having been filed, testimony was taken before an examiner. The case was argued upon the testimony and the law involved before the circuit judge, presiding in the circuit court of the United States for the western district of Pennsylvania, who adjudged that the bill should be dismissed, at the cost of the plaintiff; and in his opinion filed held that the plaintiff was not entitled to the relief prayed for as to either of the properties; that the defendants in the various transactions had a right to build the two works specifically described, and that their action in the premises was in good faith, and that the said purchase had been duly ratified by the stockholders, and that offers of rescission made by the vendors of said works to the stockholders had been refused.

S. Schoyer, for appellant.

D. T. Watson, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge, (after stating the facts.) The charges of conspiracy and fraudulent combination made against the defendants, and which are specifically set forth in the plaintiff's bill, involve questions of fact which are to be decided on the proofs. These charges cover two distinct and separate transactions, which will be considered in the order of their occurrence.

1. The sale and purchase of the Tarentum works. It is very clear that J. B. Ford was the original and sole projector of these works, and that he had made all the preparations for building them, by the purchase of land and materials, on his own responsibility, without the knowledge or aid of any one of his codefendants, and that as soon as his design became known to them they immediately opposed its further prosecution. At this time—in the year 1885—the defendants owned a majority of the stock of the Pittsburgh Plate-Glass Company, and, with the exception of J. B. Ford, were directors of the company. Edward and Emory L. Ford, the sons of

J. B. Ford, opposed the erection of the Tarentum works by their father on account of his advanced age, and for fear that he would become embarrassed financially; and the other defendants saw in the new enterprise a serious rival to the works already in successful operation at Creighton; but, finding their remonstrances to be unavailing to deter J. B. Ford from the prosecution of his plan, it was proposed by John Pitcairn that the Tarentum works should be built by the Pittsburgh Plate-Glass Company, which would thus have the control of them and prevent competition. In this measure, however, he had no support from any of his fellow stockholders. The junior Fords were unwilling to embark on such an undertaking, because it might stop dividends on their stock, and run the company in debt. The majority of the stockholders were opposed to the company assuming the work for various reasons. Finally, at the instance and on persuasion of the Ford brothers and others, who together owned nearly five-sixths of the outstanding shares of the company, John Pitcairn formed a partnership with J. B. Ford by purchasing with his own money one-half of the latter's interest in the Tarentum works as far as they had progressed, and the partnership thus formed, under the name of J. B. Ford & Co., carried on the works to completion, without further objection or opposition from any member of the Pittsburgh Plate-Glass Company. Under the terms of the partnership agreement between J. B. Ford and John Pitcairn, dated the 6th of October, 1885, John Pitcairn was to contribute $65,000 to the capital of the firm on the understanding that after that sum had been expended all additional amounts required should be furnished in equal shares by the partners. One, if not the principal, object in view in forming this partnership was to keep the Tarentum works in friendly hands, and to prevent them from being operated to the prejudice or injury of the Pittsburgh Plate-Glass Company. In the spring or summer of 1886, the new works being nearly completed, and it being evident that they were of larger capacity, and would manufacture plate glass cheaper and in greater quantities than could be done at Creighton, Mr. John Scott, then a large stockholder and a director of the Pittsburgh Plate-Glass Company, considered that it would be greatly to the advantage of the company to acquire Tarentum. There was some difficulty at first in bringing about that result, and it encountered the opposition of each of the partners of J. B. Ford & Co. John Pitcairn was on the eve of going abroad, and J. B. Ford thought it would be more advantageous to his interests not to sell. Application, however, being made to J. B. Ford & Co. to state on what terms a sale or consolidation could be effected, the firm thought that the relative capacity of the two works should be the basis of the union, and that, as the Tarentum works had double the capacity of those at Creighton, the same proportion should be observed in providing for the union of the two concerns, a reasonable allowance being made for the unfinished condition of the Tarentum works. The first plan of consolidation, consented to by J. B. Ford & Co., was that the capital stock of the

Pittsburgh Plate-Glass Company should be increased from $600,000 to $1,920,000, to be divided as follows: To J. B. Ford & Co., for Tarentum, $1,120,000; to the stockholders of the Pittsburgh Plate-Glass Company, $200,000; the Tarentum works to be finished by J. B. Ford & Co. A meeting of the board of directors of the Pittsburgh Plate-Glass Company was held on July 2, 1886, at which this proposed arrangement was submitted, and on motion a stockholders' meeting was called for September 6, 1886, to consider the proposal, and the board recommended its acceptance. At the directors' meeting held on July 2, 1886, John Pitcairn asked to be and was excused from voting on account of his personal interest in the transfer of the property. Notice of the stockholders' meeting to be held on September 6, 1886, and of its purpose, was given by public advertisement, and by a circular directed to each stockholder; and on the day appointed for the meeting 5,515 shares out of the whole issue of 5,950 shares were represented. Mr. Barr, the plaintiff, presided at that meeting, and announced to the stockholders present that they had the power to "amend, alter, reject, or affirm the proposition" recommended by the directors. After some discussion J. B. Ford & Co. were requested to state the cost of the Tarentum works, which they refused to do, for the reason that the basis of the proposed transfer was the relative capacity of the two works. Finally, J. B. Ford & Co. submitted the following terms of consolidation, namely: That the capital stock of the Pittsburgh Plate-Glass Company should be increased from $600,000 to $2,000,000, of which Creighton should represent $800,000, subject to a mortgage of $134,000, and Tarentum should represent a capital stock of $1,000,000; that of this stock increase $200,000 should be distributed among the Creighton stockholders at that date as dividend, and that $1,000,000 in stock at par should be issued to J. B. Ford & Co., leaving $200,000 to be issued and sold to the stockholders on September 6, 1886, at par, for a working capital. These terms were approved and accepted by the unanimous vote of the stockholders present, and there is no evidence to show that any shareholder who was not represented at the meeting has ever disapproved of its action. On October 27, 1886, J. B. Ford & Co. conveyed the Tarentum works to the Pittsburgh Plate-Glass Company, and received from the latter the entire purchase consideration, $1,000,000 of its stock at par; but, as the Tarentum works were still incomplete, J. B. Ford & Co. pledged $200,000 of the stock at par with the treasurer of the Pittsburgh Plate-Glass Company as security for the completion of Tarentum. The Pittsburgh Plate-Glass Company took possession of Tarentum, and have operated the same ever since. The Tarentum works were completed by J. B. Ford & Co. in the spring or summer of 1887, but it was not until April 17, 1888, that the firm made a formal demand on the Pittsburgh Plate-Glass Company for the return of the pledged stock, whereupon, at a meeting of the board of directors, a resolution was adopted instructing the treasurer to deliver the stock. This resolution was passed over the protest of Mr. John Scott, one of the directors, and the

treasurer refused to obey the instructions of the board. At a subsequent meeting of the board of directors, held on November 20, 1888, a protest signed by several of the stockholders was presented, stating in substance that J. B. Ford & Co. had, in violation of the duty they owed to the company and its stockholders, voted to themselves and received a price for the works at Tarentum grossly in excess of the cost and value thereof, and have no claim either in law or conscience to the stock now demanded by them; and the protestants requested that a meeting of the stockholders should be called, to have a full and fair investigation of the whole matter. Accordingly, a meeting of the stockholders was held on December 5, 1888, the proceedings of which disclosed much dissatisfaction on the part of several who were present with the alleged excess of price received by J. B. Ford & Co. for Tarentum, whereupon Mr. John Pitcairn stated that, if the stockholders repented the acquisition of Tarentum, his firm would agree to a rescission of the contract of sale, and he submitted a written proposition to that end. In that paper the whole transaction is reviewed, and it concludes with the promise that J. B. Ford and John Pitcairn, who owned a majority of the stock, would refrain from voting on the question of rescission, and leave its settlement to the minority stockholders. At this stage of the proceedings, on motion of a minority stockholder, a committee of five was appointed "to thoroughly investigate all the circumstances connected with this complaint, and this proposition of Mr. Pitcairn's, and also to recommend a course of action for the minority stockholders, and that their report be made at the next regular annual meeting of the company, to be holden in January." This committee consisted exclusively of minority stockholders, who at once entered on the discharge of their duties, and called before them several witnesses, whose testimony is fully reported in the record. The investigation by the committee appears to have been conducted with considerable zeal and industry, and on January 22, 1889, at the annual stockholders' meeting, they presented a unanimous report, stating that by the delay of J. B. Ford & Co. in completing the Tarentum works the company had suffered no estimable damage; that the committee was unable to decide whether J. B. Ford & Co.'s profits were more than they were entitled to or not, as they could not ascertain the cost of the works. The report observes that the building of plate-glass works by the principal stockholders or officers of the Pittsburgh Plate-Glass Company that may hereafter be in competition with the company is, at least, questionable as to the good faith of such transactions; but in the judgment of the committee the acquisition of the Tarentum works has been on the whole favorable to the general interests of the company, and the transaction should not be disturbed; and that the proposition for rescission should not be entertained. This report was adopted by a vote of 19,369 shares out of a total of 20,000 shares represented. J. B. Ford and John Pitcairn then held 12,012 shares, leaving in the hands of the other stockholders 7,988 shares, of which last number 7,357 voted to adopt the report. With the adoption

of this report it would seem that the manner and the terms of the sale of Tarentum had been ratified by the stockholders. The proofs show that the estimated value of Tarentum at $1,000,000 was no greater, proportionately, than the estimated value of Creighton at $800,000, subject to a debt of about $134,000; that, after the consolidation of the two works, the dividends of the Pittsburgh Plate-Glass Company were largely increased, and that there was a marked advance in the price of its stock. These facts have not been controverted.

The real ground of complaint against the defendants is that they made excessive profits on the sale of Tarentum; otherwise there would have been no charge of conspiracy and combination to compel the Pittsburgh Plate-Glass Company to buy a property which has proved to be so advantageous to the stockholders. But if Tarentum was estimated beyond its cost, so also was Creighton. If Creighton was worth $800,000, subject to a debt of $134,000, Tarentum, with its improved machinery and large capacity for production, was equally worth $1,000,000. All this was known to the stockholders of the Pittsburgh Plate-Glass Company on September 6, 1886, when the manner and terms of the sale were agreed upon, and the stockholders subsequently received the very large profits arising therefrom in stock and cash dividends. Two years after the sale a protest was made by some of the minority stockholders against the delivery of the stock which had been pledged by J. B. Ford & Co. for the completion of Tarentum, because of the exorbitant price paid to that firm, and a thorough investigation of the whole matter was demanded by the protestants, under the threats of legal proceedings. The result of that investigation was a reluctant admission, on the part of the committee who conducted it, that the acquisition of Tarentum had been advantageous to the Pittsburgh Plate-Glass Company, and a recommendation that the transaction should not be disturbed, which was approved by an almost unanimous vote at a general meeting of the stockholders. In the light of such evidence it is impossible to sustain the charge of conspiracy and fraudulent combination made against the defendants. Three of the defendants, indeed, had no direct interest in the affairs of J. B. Ford & Co., not being members of the firm. J. B. Ford was personally interested in the property and success of the Creighton works, which were doing a highly lucrative business, and could not fill their orders. He desired to establish other works, for the purpose of extending the business which produced such profitable returns, to be operated in harmony with Creighton, and not to its injury; and being a stockholder of the Pittsburgh Plate-Glass Company did not deprive him of the right to do this. His two sons were also stockholders, and it would be unreasonable to suppose that he intended to defraud or injure a company in which he and his sons were so largely interested. John Pitcairn formed a partnership with J. B. Ford for building the Tarentum works, at the suggestion and with the knowledge and approval of some of the minority stockholders of the Pitts-

burgh Plate-Glass Company, for the express purpose of protecting the interests of the company; and there is no proof that the firm of J. B. Ford & Co. intended to operate the Tarentum works in competition with or to the prejudice of Creighton. The proposal to consolidate the two works came from the Pittsburgh Plate-Glass Company, and not from J. B. Ford & Co. In fact the firm did not at first appear to be inclined to entertain the proposal, Mr. Pitcairn being on the eve of going abroad for his health, and Mr. J. B. Ford preferring to have the Tarentum works operated independently of any other. However, an offer being invited from J. B. Ford & Co., negotiations were begun, and terminated as already stated. There is no proof of fraud in the transaction, or of misrepresentation. J. B. Ford & Co. refused to disclose the cost of Tarentum, because they might want to sell it, or organize another company. This refusal, and the reasons for it, were publicly made at the stockholders' meeting of September 6, 1886, and the request for a statement of the cost was not pressed. No facts are proved by which a resulting trust can be established in favor of the Pittsburgh Plate-Glass Company. J. B. Ford & Co. built the Tarentum works with their own money, and on their own credit and risk; nor did they make themselves trustees by any wrongful acts of their own. They did not use the property or the credit of the Pittsburgh Plate-Glass Company, nor were they under any obligation, legal or equitable, which prohibited them from erecting the new works, and consolidating them with the Creighton works, on terms which have proved to be equally beneficial to all the parties concerned. The purchase of Tarentum appears to have been ratified and settled, and no further objection was made in reference to it until the negotiations were set on foot for the acquisition of what are known as the Ford City works.

2. The purchase of the Ford City works. In the summer of 1887 the defendants, being then stockholders, and, with the exception of J. B. Ford, directors, of the Pittsburgh Plate-Glass Company, in view of the existing and prospective condition of the plate-glass business, concluded that additional works for its manufacture were needed. Creighton and Tarentum were behind with their orders, and could not supply the demand for their products. The making of plate glass in the United States was a comparatively new enterprise, and the home production did not equal one-half of the home consumption. J. B. Ford had been a pioneer in the business, and he and his codefendants, seeing the impossibility of the Pittsburgh Plate-Glass Company retaining a monopoly of the business, and the certainty of an increased importation of the foreign article, were of the opinion that additional works should be erected. The profits which had been already realized by the company on a watered stock of several hundred thousands of dollars would, the defendants thought, be sure to excite competition, and that it would be wise for the company to make provision for meeting such competition by adopting new machinery and appliances for reducing the first cost of production. So strongly convinced

were the defendants of the necessity of extending the company's works that they began to look around for a suitable location for the buildings, and had selected a place in Armstrong county, Pa., and secured options for the purchase of several hundred acres of land. It had already come to the knowledge of John Pitcairn that certain parties in Philadelphia and Pittsburgh had contemplated the organization of glass works near the latter city, which would come into direct competition with the Pittsburgh Plate-Glass works. Such being the condition of things, a special meeting of the board of directors of the company was held on September 8, 1887, at which the following preamble and resolution were adopted, and a special meeting of the stockholders was called for the 20th of September, 1887, to consider the same:

"Whereas, in the judgment of the board the present condition and prospects of the plate-glass business, and the position of this company in relation thereto, are such as to render it expedient that the company should as quickly as possible erect additional works at such point as shall be determined, and with this view inquiries have been made looking to the securing of an eligible location:

"Resolved, that the board recommend to the stockholders the erection of additional works, of a capacity not less than 300,000 feet per month, at such point as shall be selected by the stockholders or directors."

In pursuance of the call a special meeting of the stockholders was held on September 20, 1887, at which the recommendation of the board was fully discussed and rejected, the plaintiff being most earnest in his opposition thereto, and pointing out that under its charter the company had no power to manufacture plate glass outside of Allegheny county. At this meeting, and before the vote was taken, the defendants, being the owners of a majority of the stock, notified the stockholders present that they would not vote their stock, but leave the adoption or rejection of the recommendation of the board to the decision of the minority stockholders, as the defendants did not wish to compel a compliance with their own opinion against a majority of the minority. The proceedings of this meeting, and the good faith of the defendants in calling it, have been severely criticised by the counsel for the plaintiff, but the weight of the testimony satisfactorily proves that the question of building the new works by the company was fairly left to the minority stockholders, and that the recommendation of the defendants was honestly made. The advice of the board having been refused, J. B. Ford and John Pitcairn determined to go on with the Ford City works, and took into partnership with them their three codefendants, Edward Ford, Emory L. Ford, and Artemus Pitcairn, assigning to each of the last three a one-ninth interest, and taking for each of themselves three-ninths interest in the undertaking. The interests of the defendants in the Pittsburgh Plate-Glass Company were so large at this time as to exclude all idea of their intention to depreciate their value or to diminish their profits. On the contrary, they had the strongest motive to protect their interests, to make them still more profitable, and to ward off competition as long as possible. Having purchased the

required land, they proceeded to build the works with their own capital and on their own credit, with the knowledge of and without objection from the plaintiff or any other minority stockholder. At the stockholders' meeting on January 22, 1889, after the Tarentum and other business had been disposed of, a committee was appointed, consisting of the same five members who had acted on the Tarentum committee, and who were adverse to the further extension of the company's works, "to negotiate with J. B. Ford & Co. for a transfer of the plate-glass works located at Ford City," and to report the terms at a special meeting of the stockholders to be called by the president of the company at the request of the committee. This committee held several sessions to consider the subject referred to them. The first offer of J. B. Ford & Co. was to sell the new works for $1,500,000 in the glass company's stock at par, with the condition that they would sell the one-half of this stock to the stockholders of the company at par. As they had done in the sale of Tarentum, J. B. Ford & Co. refused to give the committee a statement of the cost of the Ford City works, and for similar reasons, but they did finally impart to the committee in confidence the best estimate of what the works would cost when finished. Subsequently this offer was modified to this effect: that the defendants would sell the works completed for $750,000 in stock of the company at par, and $750,000 in bonds secured by a mortgage, and payable in three, four, and five years, which offer was reported favorably by the committee to a special meeting of the stockholders held on April 9, 1889, which, after a prolonged discussion on the report, adjourned to meet on the 16th of April, 1889, when the report was accepted, and a resolution was adopted to have the charter of the company amended, authorizing it to manufacture its products in other places than Allegheny county. Before the vote was taken on the adoption of the report, the announcement was made that J. B. Ford & Co. would refrain from voting their stock, which constituted a majority of the whole issue, until the result of the vote by the minority stockholders should be known, when it would be cast with the majority of the minority, in order to constitute a legal vote. The total vote cast was 17,880, of which number 16,706 were in favor of the resolution to adopt the report of the committee, and 1,174 opposed; 2,120 shares not voting. At this meeting J. B. Ford & Co. agreed that $750,000, received by them in part payment of the Ford City works, should not participate in the profits of the Pittsburgh Plate-Glass Company for the year 1889.

On April 17, 1889, a stockholders' meeting was called by the board of directors to be held on June 18, 1889, for the purpose of voting on the increase of the capital stock of the company and the issuing of bonds for the purchase of the Ford City works. In the mean time—May 8, 1889—the plaintiff had filed his bill, and before the day appointed for the next meeting of the stockholders J. B. Ford & Co. addressed a letter to each stockholder, stating, in substance, that they were willing to rescind the contract for the purchase of the Ford City works if a majority of the minority stockhold-

ers sympathized with, or were in favor of, prosecuting the plaintiff's suit. At the stockholders' meeting, on June 18, 1889, the vote in favor of increasing the capital stock was 17,205, and no votes were cast in the negative. The Pittsburgh Plate-Glass Company took possession of the Ford City works on July 1, 1889, and have remained in possession since that date.

The purchase of the Ford City works, up to the close of the evidence as set out in the record, has been highly advantageous and remunerative to the Pittsburgh Plate-Glass Company. Notwithstanding the great increase in the number of shares issued to pay for Tarentum and Ford City works, their market price continued to advance until it had reached the figure of $200 per share. The cost of the Ford City works was about $1,200,000, and when it is considered that, in addition to the outlay of money, the defendants also contributed their time, practical experience, and intelligent personal supervision from the beginning to the completion of the works, and were also subjected to the risks of failure, the price ultimately received by them does not appear to be excessive. It is true that the stock paid to them at par had been selling at a premium, but it does not follow that, if the new issue had been thrown on the market in bulk, the premium would have been maintained. The defendants assumed the risk and labor of the enterprise, and were entitled to a reasonably liberal profit.

The proofs fail to sustain the charge of conspiracy and combination. The defendants acted openly, and made no false representations. They afforded the company the opportunity of building the works, and advised them of the necessity of doing so, and gave notice that if the company did not build they would. As majority stockholders of the Pittsburgh Plate-Glass Company the defendants were more deeply concerned in the prosperity of that company than were the plaintiff and those who agreed with him. The defendants did not use any of the property of the company or employ its credit in the erection of the Ford City works, and here, as in the case of the Tarentum purchase, the proof does not establish a resulting trust, or a trust ex maleficio. There was no conspiracy or combination to compel the purchase of the defendants' works, either at Tarentum or in Armstrong county; nor was the price paid for either one of the properties so large as to give the defendants an excessive or exorbitant profit on their actual outlay of money, time, and labor. There has been no proof of fraud in these transactions, nor of a misuse of the power and influence of the defendants, as majority stockholders, to deprive the minority stockholders of any right.

It has been settled that a director of a joint-stock corporation may make a valid contract with the corporation of which he is a member, provided that, in doing so, he deals fairly and honestly towards the stockholders who have appointed him their agent. Oil Co. v. Marbury, 91 U. S. 587; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 10 Sup. Ct. Rep. 708. The Tarentum and the Ford City works were the property of the de-

fendants, and were bought by the Pittsburgh Plate-Glass Company with a full knowledge of all the circumstances under which they had been erected, and it is evident that the company has not been injured, but has been greatly benefited, by their acquisition. It must not be overlooked, too, that in reference to the purchase of Tarentum the proceedings to set it aside, or to alter the terms thereof, were not taken until after the lapse of more than two years from the execution of the contract,—a delay which, of itself and unexplained, might be fatal to that portion of the plaintiff's complaint. Oil Co. v. Marbury, supra.

The plaintiff's solicitor now asks that his client shall be relieved from the payment of costs in the event of the decree below being affirmed, on the assumption that he has made an honest effort to redress what he considers to be wrongs against his company, and to enforce a restitution of enormous profits made by the defendants out of the company. The authorities cited in support of this request are Trustees v. Greenough, 105 U. S. 527; Warrell v. Railroad Co., 130 Pa. St. 600, 18 Atl. Rep. 1014. These were cases, however, in which a fund had been recovered, or property had been saved by the litigation, and the court allowed the expenses as between solicitor or attorney and client to be paid out of the fund. In each case the statutory costs had been given to the prevailing party. But here the plaintiff has not succeeded in proving his charges, and the rule appears to be settled that, where a bill charges fraud, and the bill is dismissed, the plaintiff must pay the costs. Fisher v. Boody, 1 Curt. 206.

The decree of the circuit court is affirmed.

SOUTHERN PAC. R. CO. v. ARAIZA.

(Circuit Court, S. D. California. July 24, 1893.)

No. 181.

1. PUBLIC LANDS—SOUTHERN PACIFIC GRANT — INDEMNITY LANDS—HOMESTEAD ENTRY.
   Under Act July 27, 1866, (14 Stat. 292,) granting lands to the Southern Pacific Railway Company, public land without the primary limits, but within the indemnity limits of the grant, was not open for homestead entry after an order was issued from the general land office directing the withdrawal of such lands from entry. Buttz v. Railroad Co., 7 Sup. Ct. Rep. 100, 119 U. S. 72, followed. Railroad Co. v. Tilley, 41 Fed. Rep. 729, overruled.

2. SAME—REMEDY AGAINST HOMESTEADER.
   A homesteader who has made such an entry and received a patent therefor against the opposition of the Southern Pacific Railway Company is subject to have his title decreed to be held in trust for said company, when it appears that the lands within the indemnity limits will not make up to the company the loss of lands within the primary limits.

In Equity. Bill by the Southern Pacific Railroad Company against Juana C. Araiza to recover lands wrongfully patented to respondent. Heard on demurrer to bill. Demurrer overruled.

Joseph D. Redding and Creed Haymond, for plaintiff.
Del Valle & Munday and J. H. Call, for defendant.

ROSS, District Judge. The land in controversy in this suit having been entered by the defendant, Araiza, as a homestead, and a patent therefor having been issued to her by the government, the complainant seeks to obtain a decree that the title thus conveyed is held in trust for it. The source of the complainant's alleged right rests in a congressional grant. Section 23 of the act approved March 3, 1871, (16 Stat. 579,) reads:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized, subject to the laws of California, to construct a line of railroad from a point at or near Tehachapai pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

By the act of July 27, 1866, (14 Stat. 292,) the Southern Pacific Railroad Company was authorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the state of California as they should deem most suitable for a railroad line to San Francisco, and, subject to certain conditions, exceptions, and limitations, was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such road should be designated by a plat thereof filed in the office of the commissioner of the general land office; and where, prior to said time, any of said sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections, and not including the reserved numbers." The exceptions contained in the act are not applicable to the present case, and need not, therefore, be referred to.

By the sixth section of the act of July 27, 1866, it was enacted—

"That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same

are hereby, extended to all other lands on the said line of said road when surveyed, excepting those hereby granted to said company."

The bill, to which a demurrer is interposed, shows upon its face that the Southern Pacific Company accepted the grant, complied with the conditions contained in it, and in subsequent acts upon the subject, and earned the granted lands. It is, among other things, alleged that between the 3d day of March, 1871, and the 3d day of April, 1871, its engineers actually surveyed and marked upon the ground the line or route of its road from a point at or near Tehachapai pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river; that they made a topographical map of the country through which the route ran, on which the government surveys and the said line or route were delineated, so that its exact location appeared thereon, with reference, as well to the sections of public lands as to the towns, counties, and rivers in said region, which map was, on the 3d day of April, 1871, filed with the secretary of the interior, who duly accepted the same, and who, on the same day, transmitted the map to the commissioner of the general land office, to be filed in that office, which was done on that day; that on the 11th day of April, 1871, the action of its officers in filing the map was ratified and approved by the board of directors of complainant; and that on the 21st of April, 1871, the commissioner of the general land office transmitted a copy of the map to the register and receiver of the land office at Los Angeles, in which district the land in controversy is situate, and on the same day, by order of the secretary of the interior, the commissioner addressed to the register and receiver of the Los Angeles land office the following letter:

"Department of the Interior.

"General Land Office, April 21, 1871.

"Register and Receiver, Los Angeles, California—Gentlemen: By the act of March 3, 1871, section 23, the Southern Pacific Railroad Company is authorized to construct a railroad from a point at or near Tehachapai pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same grant of lands, etc., as were granted to said company by act of July 27, 1866. The company having filed a diagram designating the general route of said road, I hereby transmit a map showing thereon the line of route, as also the twenty and thirty mile limits of the grant, to the line of withdrawal of the Southern Pacific Railroad under the act of 1866; and you are hereby directed to withhold from sale, or location, pre-emption, or homestead entry, all the odd-numbered sections falling within those limits. The even-numbered sections within the limits of twenty miles you will increase in price to $2.50 per acre, and will dispose of them at that price, but only under the pre-emption and homestead laws. When pre-emption or homestead entries have had legal inception prior to the receipt of this order, the settlers may, of course, prove their claims, either upon odd or even-numbered sections, at the rate of $1.25 per acre. This order will take effect from the date of its receipt by you, and you will please acknowledge receipt by date. The even-numbered sections between the twenty and thirty mile or indemnity limits are not affected by this order.

"Very respectfully, Willis Drummond, Commissioner."

The bill alleges that this order of withdrawal has ever since remained in force. It alleges that the land in controversy in the

suit is more than 20, but within 30, miles of the said railroad, and that it had not been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of by the United States for any purpose at the time the line of the complainant's road was definitely fixed, and that the United States then had full title thereto. It is alleged that the entire indemnity limits fixed in the grant are insufficient to supply the loss sustained by complainant within the granted limits, and that the commissioner of the general land office, in his annual report for the year 1883 to the interior department and to the president of the United States, "attested and certified to the fact that the land within the indemnity limits, under said act of March 3, 1871, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act." It is alleged that on or about the 24th day of June, 1877, the defendant entered upon the tract of land in controversy, and that subsequently she was permitted to enter the land as a homestead, and that on the 9th day of July, 1889, a patent therefor was issued to her by the land department. The bill alleges that every step in the land department culminating in the issuance of this patent was contested by the complainant; that when the president approved the construction of the section of the Southern Pacific Railroad opposite the land in controversy,—that is to say, on or about the 25th day of May, 1883,—complainant embraced the land in question in its indemnity list No. 5, and tendered to the officers of the local land office all proper fees for selecting and listing the land, and securing the patent therefor, but that the officers of the land department refused to approve the selection; the reason, doubtless, being that the defendant, Araiza, had theretofore been permitted to enter the land as a homestead, upon which entry a patent had been issued.

From this statement of the averments of the bill it will be seen that at the time the line of complainant's road was definitely fixed the land in controversy, which was without the primary, but within the indemnity, limits of the grant, was public land, to which the United States had full title, and that at the time the defendant first went upon the land the order withdrawing it from sale, preemption, or homestead entry was in force; and, further, that at the time of the defendant's entry upon the land, and at the time it was awarded to her by the officers of the land department, there had been no attempt on complainant's part to select it in lieu of any land lost to it within the primary limits of the grant, or at all, although complainant had contested defendant's entry in the land department.

The question involved has twice before arisen in this circuit,—once in this district, in the case of Railroad Co. v. Tilley, reported in 41 Fed. Rep. 729, and subsequently in the northern district of California, in the case of Railroad Co. v. Wiggs, 43 Fed. Rep. 333, in which the circuit judge reached a different conclusion from that announced in the previous case decided here, without, however, making mention of it. Indeed, it is evident that the learned judge

who decided that case did not at the time know of the decision here, for in his opinion it is stated that, so far as he is aware, the precise question involved was not presented in any other case. 43 Fed. Rep. 335. Neither party appealed from either decision, so that the unfortunate difference of opinion then existing in the circuit was not settled by the supreme court. But the question has again come, and has been again considered.

The act of July 27, 1866, did not direct the secretary of the interior to make any order withdrawing the lands that might fall within the grant from sale, pre-emption, homestead entry, or other disposition. Such an order, however, was made in the present case, as well as in Tilley's; and this court, in referring to that order in the case of Railroad Co. v. Tilley, supra, said:

"It is true the order of withdrawal made by the secretary on the 27th of March, 1867, had not been in terms vacated, but the secretary had the same power to vacate it that he had to make it; and when he permitted Tilley to make his entry, and awarded the land in question to him, and issued him a patent therefor, he, in effect, annulled the order of withdrawal so far as that particular piece of land was concerned. In doing so he violated no vested right of the complainant, for to that land the company had not then acquired any right of any nature. It had not selected it, and might never do so. There was, therefore, no legal reason why he should not allow the homestead entry. The act making the grant to the complainant did not direct the secretary of the interior to make any order withdrawing the lands that might fall within it from sale, pre-emption, homestead entry, or other disposition, and did not prescribe the effect to be given to such an order. It is not for the court to say whether the secretary ought or ought not to have allowed the homestead entry while the general order of withdrawal remained unrevoked. It is sufficient for the purposes of this suit to say that in doing so he did not interfere with any legal right of complainant, for the simple reason that complainant had not then acquired any right to the land in controversy in the only mode it could acquire it, namely, by selecting it."

In so holding the court had in mind the numerous decisions of the supreme court to the effect that railroad companies acquire, under grants in aid of their construction, no right of any nature to any specific tract of land embraced within the indemnity limits prior to selection, and also to the language of the supreme court in the case of St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 732, 5 Sup. Ct. Rep. 334, in respect to the effect of an order of the land department withdrawing lands embraced within the secondary or indemnity limits from market. The court there said:

"It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits."

In the subsequent case of Buttz v. Railroad Co., 119 U. S. 72, 7 Sup. Ct. Rep. 100, the supreme court, in speaking of a similar order of withdrawal, said:

"Although the act [then under consideration, namely, the act making a grant to the Northern Pacific Railroad Company] does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the

practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

And in the still later case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 18, 11 Sup. Ct. Rep. 389, the supreme court, after quoting from the case of Buttz v. Railroad Co., as above, added:

"After such withdrawal, no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

This is the latest expression of the supreme court upon that point to which my attention has been called, was subsequent to the decision in Tilley's Case, and is, of course, binding on this court.

An order of withdrawal made before the line of road is definitely fixed is as applicable to lands within the indemnity limit as to those within the primary limits of the grant; for up to that time the grant is no more attached to specific tracts of the one class of lands than of the other, neither being in any way identified.

The sixth section of the act of July 2, 1864, (13 Stat. 365,) making the grant to the Northern Pacific Railroad Company, is substantially the same as the sixth section of the act of July 27, 1866, involved in the present case. It reads:

"That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company, and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

In Buttz v. Railroad Co., supra, the court said:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain,—it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

The language of the sixth section of the two acts being in substance, and almost literally, the same, the language of the supreme court above quoted is equally applicable to the act in question here. If, as there held, the law itself withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side of the road represented by the map of general route, manifestly it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road as fixed by the map of definite location. Such being the true construction of the statute itself, as thus declared by the supreme court, it would seem to result necessarily that all of the odd sections within the indemnity, as well as the primary, limits of the grant contained in the act of July 27, 1866, were withdrawn from sale or pre-emption, without regard to the order of withdrawal promulgated by the secretary of the interior, through the commissioner of the general land office, and consequently they were not open to entry or settlement at the time of the defendant's entry and settlement thereon; for, as has been seen, the court declares that the law itself worked that result. "The object of the law," said the court, "in this particular, is plain,—it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land office of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking a settlement on the public lands, and thus prevent a settlement and expenditures connected with them which would afterwards prove to be useless." This decision was quoted with approval in the very recent case of U. S. v. Southern Pac. R. Co., 146 U. S. 599, 600, 13 Sup. Ct. Rep. 152.

For the reasons given, the demurrer is overruled, with leave to the defendant to answer within the usual time.

McMULLEN et al. v. RITCHIE et al.

(Circuit Court, N. D. Ohio, E. D. June 14, 1893.)

No. 4,927.

1. CREDITORS' BILL—PLEADING.

In an equity suit by a judgment creditor to subject certain collateral securities held by creditors of the judgment debtor to the payment of the judgment after satisfaction of the collateral holder's claims, the judgment debtor has no right to compel a corporation, some of whose stock is included in such collateral, to show its books, on the ground that the collateral holders are mismanaging the corporation, and depressing the value of its stock as security.

2. SAME—PARTIES—WIFE OF RESPONDENT.

The wife of a judgment debtor is not entitled to be made a party defendant with him to a creditors' bill to subject collateral securities deposited by him with certain of his creditors to the payment of the judg-

ment, after the satisfaction of the collateral holder's claims, merely because she has also deposited other collateral, not sought to be subjected to the payment of the judgment, with the same holders.

In Equity. Bill by James B. McMullen and George W. McMullen against Samuel J. Ritchie, Stevenson Burke, Henry B. Payne, and the executors of the Cornell estate, to subject certain collateral securities deposited by respondent Ritchie with his corespondents, after the payment of their claims, to the payment of a judgment in favor of complainants. Heard on motion of respondent Ritchie for an order on the Canadian Copper Company to produce its books and papers, and on motion by Sophronia J. Ritchie to be made a party respondent. Both motions denied.

Williamson & Cushing, for complainants.

Burke & Ingersoll, for defendants Burke, Payne, etc.

W. S. Kerrnish and Green, Grant & Seiber, for defendant Ritchie and for Mrs. Ritchie.

RICKS, District Judge. This case is now before the court upon two motions: First, upon the application of the defendant Samuel J. Ritchie for an order upon the Canadian Copper Company to produce its books, records, and papers for the inspection of said defendant, and to make such parts of it as he may desire to offer testimony in this case; and, second, upon the application of Sophronia J. Ritchie to be allowed to become a party defendant in this case.

As to the first motion: This is a bill filed by the complainants, as judgment creditors, against the defendant Samuel J. Ritchie, as judgment debtor, and Stevenson Burke, Henry B. Payne, and the executors of the Cornell estate, as creditors of the judgment debtor, to subject certain stocks and credits which said creditors and codefendants hold as collateral security for the indebtedness due to them from the judgment debtor. The answers of the defendants Burke, Payne, and the Cornell executors admit that there is a large indebtedness due to them from the judgment debtor, Samuel J. Ritchie. They admit that from time to time said Ritchie has deposited with them, as security for the payment of said indebtedness, a large amount of stocks in various corporations, among which is a large amount of stock issued by the Canadian Copper Company, in which said judgment debtor and his codefendants are all stockholders. To the answer filed by the executors of the Cornell estate, the defendant Samuel J. Ritchie filed what he terms a cross bill, in which he alleges that his codefendants are so managing the affairs and business of the Canadian Copper Company as to depreciate the value of its stock, and make it valueless as security for the payment of their indebtedness, and for the purpose of injuring said Ritchie. He asks for the privilege of examining the books of said copper company, and the right to inquire into the affairs and management of said corporation. I cannot find any authority for such a proceeding in a suit of this character. The complainants file their bill as judgment creditors, as aforesaid, and have rights

which must be respected in the conduct of the case. All they seek is their right to subject whatever surplus there may be after the satisfaction of the indebtedness due Burke, Payne, and the Cornell estate to the extinguishment of the judgment which they hold against Ritchie. In determining the amount of this surplus, and in what way it shall be applied to the satisfaction of complainants' judgment, the judgment debtor, Ritchie, has no right, upon any principle of equity pleading or practice, to bring into this action any controversy he may have with the Canadian Copper Company or with his codefendants as to the corporate management of said company. That is a controversy in which the complainants have no interest. If he could bring into this suit a controversy as to the management of the Canadian Copper Company, he might likewise bring into the suit a controversy as to the management of every other corporation, the stock of which is held by his codefendants as similar security. We would thus have injected into this suit several controversies involving the management of several different corporations. In this way, this controversy might be indefinitely prolonged, and the rights of the complainants indefinitely postponed. The defendant has no right, therefore, to bring such controversy into this suit, to delay the final determination of this cause, to the great expense and vexation of the complainants. If Ritchie has any equitable relief, as against his codefendants, for the improper management of the business of the Canadian Copper Company, his remedy is by an original suit. In such a proceeding, he would be the complainant, and would have a right, if proper grounds for relief are shown, to investigate the books of that concern, and inquire into its management. But he cannot bring into this action such a controversy, which is entirely foreign to the issue properly made between the complainants and the defendants.

The motion of said Ritchie is therefore denied.

As to the application of Sophronia J. Ritchie to become a party defendant in this case:

The collateral securities deposited with the defendants Burke, Payne, and the Cornell executors, referred to in the complainants' bill, and the surplus of which they seek to have applied to the satisfaction of their judgment, are the securities deposited with said defendants by the defendant Samuel J. Ritchie. These securities are set up in the answers filed by his codefendants. They are the only securities involved in this suit, and they are the only securities in the surplus of which the complainants are interested. In the application of Mrs. Ritchie to become a party defendant, she avers that after her husband deposited with the codefendants named the securities referred to in the complainants' bill, and in the answers of said defendants, she deposited with the said defendants other and additional securities, with her nusband's consent, and at his request. It is for the protection of these securities that she now asks to be made a defendant in this case. But, as before stated, these securities are not involved in this litigation. The complainants do not seek to have any surplus that may arise from the sale

of such securities applied to the extinguishment of their debt. I therefore see no ground upon which Mrs. Ritchie can bring into this controversy any right she may have in those securities. The securities deposited by her husband will be first exhausted and applied to the extinguishment of the complainants' debt. Should they seek by this or any other proceeding to reach the additional securities deposited by Mrs. Ritchie, it will be time enough then to make her a party, and give her the opportunity to defend the same. But, until the complainants do ask for some relief or remedy as against Mrs. Ritchie and her securities, there is no issue upon which she can properly be made a defendant in this case.

Her motion is therefore denied.

McCORMICK et al. v. FALLS CITY BANK OF LOUISVILLE.

(Circuit Court of Appeals, Seventh Circuit. October 17, 1892.)

No. 1.

REVIEW ON APPEAL—WAIVER OF OBJECTIONS.

Where a defendant files an amended answer after a demurrer to his answer has been sustained, and, waiving a jury, submits the cause to the court for trial, without objecting to the introduction of any of the evidence, or submitting any propositions of law to the court, he cannot question on appeal the validity of a judgment against him, since the record does not show any errors.

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

Action by the Falls City Bank of Louisville, Ky., against Patrick H. McCormick, Samuel Hege, A. C. White, and Joseph I. Irwin, upon a promissory note. Demurrers to defendants' answers were sustained, whereupon they filed amended answers, to which a reply was filed, and the cause was submitted for trial to the court without a jury, the trial resulting in a judgment for the plaintiff. No objections were made to the introduction of evidence, and no propositions of law were submitted to the court. Defendants bring error. Affirmed.

Lamb & Hill, for plaintiffs in error.

John T. Dye and Humphrey & Davie, for defendant in error.

Before GRESHAM, Circuit Judge, and BLODGETT and JENKINS, District Judges.

PER CURIAM. The record discloses no error, and the judgment is affirmed, with costs and interest.

McCORMICK et al. v. FALLS CITY BANK OF LOUISVILLE et al.

(Circuit Court, D. Indiana. July 24, 1893.)

No. 8,843.

1. NOTES—STIPULATION FOR ATTORNEYS' FEES — CONSTRUCTION—FEES IN APPELLATE COURT.

A note for a given sum, with interest and "attorneys' fees," includes only the attorneys' fees incurred in the trial court, and not those in-

curred by the holder in an appellate court to which the makers have carried the case.

2. CONTRACTS—ATTORNEYS' FEES.

A joint note was made to a bank by parties some of whom resided in Kentucky and some in Tennessee. The Kentucky makers paid their due proportion, and, being sued for the balance, agreed with the bank that if the latter would dismiss the suit and sue the Tennessee makers they would save it "harmless against all costs and expenses of said litigation, including attorneys' fees." They also gave the bank as collateral to the original note their note for the balance thereon, with "interest and attorneys' fees." The Tennessee parties were accordingly sued to judgment, but, collection being delayed, the Kentucky parties were sued on the collateral note, and judgment obtained, which was affirmed on appeal to the circuit court of appeals. *Held*, that the Kentucky parties were not liable to pay attorneys' fees incurred by the bank in the appellate court, for the attorneys' fees provided for in the contract related only to the Tennessee litigation, and the attorneys' fees included in the collateral note were only the fees of the trial court.

3. SAME—INJUNCTION.

The Tennessee parties having subsequently paid the judgment against them, this operated to satisfy and discharge the judgment on the collateral note, and equity would enjoin a threatened attempt by the bank to levy execution thereon, such threat being for the purpose of compelling payment of its attorneys' fees in the appellate court.

In Equity. Suit by Patrick H. McCormick and others against the Falls City Bank of Louisville and others for an injunction and a decree declaring a certain judgment satisfied. On demurrer to the bill. Demurrer overruled.

Lamb & Hill, for complainants.

John T. Dye, W. H. Dye, and Humphrey & Davie, for defendants.

BAKER, District Judge. Bill by complainants to restrain the collection of a judgment, and to have the same decreed to be satisfied. The defendants have interposed a demurrer to the bill for want of equity. The facts exhibited by the bill are in substance as follows: On the 26th day of June, 1888, Patrick H. McCormick, Samuel Hege, and Albert C. White, citizens of the state of Indiana, and the Erin Stave & Lumber Company, H. H. Brequo, V. R. Harris, J. A. McGregor, and H. H. Milner, citizens of the state of Tennessee, executed a promissory note for the sum of $10,000, with interest and attorneys' fees, to the Falls City Bank of Louisville, Ky., payable four months after date. The Falls City Bank, after its maturity, brought suit on the note in this court against McCormick, Hege, and White. Before the commencement of the suit McCormick, Hege, and White had paid the full one-half and their full share of the $10,000 note, and for that reason they were desirous that the makers of the note, resident in the state of Tennessee, should pay the remaining one-half; and to induce the bank to bring suit against them a contract was entered into between the bank and the complainants as follows:

"Whereas, the Falls City Bank of Louisville, Kentucky, holds a promissory note dated June 26th, 1888, for ten thousand dollars, payable four months after date, executed by the Erin Stave and Lumber Company, P. H. McCormick, Samuel Hege, H. H. Brequo, V. R. Harris, J. A. McGregor, H. H.

Milner, and A. C. White; and whereas, H. H. Brequo, V. R. Harris, J. A. McGregor, H. H. Milner, and the Erin Stave and Lumber Company are residents of Tennessee, and P. H. McCormick and S. Hege and A. C. White desire said bank to bring suit in the state of Tennessee against said parties: Now, it is agreed that if said Falls City Bank shall bring suit on said note in the state of Tennessee, in the United States circuit court, against the parties to said note resident in said state, P. H. McCormick, and Joseph I. Irwin, S. Hege, and A. C. White, will indemnify said bank, and save it harmless against all costs and expenses of said litigation, including attorneys' fees. It is further agreed that the bank will prosecute said suit to judgment and collection, or, at the expiration of 90 days, upon payment of a collateral note this day executed by P. H. McCormick, Samuel Hege, A. C. White, and Joseph I. Irwin, will assign the original note and cause of action to any person indicated by P. H. McCormick. This agreement is without relief from valuation or appraisement laws of the state of Indiana."

At the same time McCormick, Hege, White, and Irwin executed a note to the bank as collateral to the $10,000 note for $5,244.46, with interest and attorneys' fees, and the suit pending in this court on the $10,000 note was dismissed upon the payment of the costs and attorneys' fees in said suit, amounting to $195. The bank then brought suit against the parties resident in the state of Tennessee in the United States circuit court for that state, and recovered judgment for the full amount due on said note, including interest, attorneys' fees, and costs. An appeal was taken from said judgment to the supreme court of the United States, which judgment was afterwards affirmed. On the 7th day of February, 1890, the bank brought suit in this court against the complainants herein on said collateral note, and such proceedings were had therein that on the 2d day of February, 1891, judgment was recovered against them for $5,989.46, including therein $200 as attorneys' fees, besides $40.05 costs of suit. Complainants herein appealed from said judgment to the United States circuit court of appeals, in which court judgment of affirmance was rendered in 1892, with costs taxed at $86.90, which was fully paid by them; as also the costs of this court. See McCormick v. Bank, 57 Fed. Rep. 107. After the rendition of the judgment on the collateral note by this court in favor of the bank, it made an assignment in favor of its creditors to the Mechanics' Trust Company, of which one Cox was manager; and after said assignment was made, and said Cox had qualified as assignee, and had taken charge and possession of the assets and property of the bank, viz. on January 12, 1893, the complainants tendered in legal tender money to the said Cox the full amount of principal and interest due on the judgment against them in this court, to wit, $6,688.40, and demanded of Cox as such assignee an assignment of said judgment recovered on said $10,000 note in the United States circuit court for the district of Tennessee, according to the terms of the foregoing contract, which assignment said Cox refused to make, and refused to accept the money so tendered, and he thereafter, on the 17th day of January, 1893, caused an execution to be issued out of this court to the marshal of this district, on the judgment taken in this court against complainants, and by virtue thereof said marshal is threatening to and will levy upon and seize their property. On the 29th day of

January, 1893, the defendants in the judgment rendered in the United States circuit court for the district of Tennessee paid in full the judgment taken against them on the $10,000 note, and the costs accrued thereon, and Cox, as assignee, on said day received thereon the sum of $6,354.62 in excess of the costs on said judgment. The complainants have paid in full the attorneys' fees included in the judgment in this court, amounting, principal and interest, to $224.50, and they aver that they have paid in full the attorneys' fees in the United States circuit court for the district of Tennessee, amounting to $250. On the 16th day of February, 1893, the bank, by its attorney, credited on the judgment in this court, $5,928.12. The bank and its assignee claim that the complainants are indebted to said bank in the sum of $176.50 for attorneys' fees and expenses necessarily incurred by it in maintaining the judgment appealed as aforesaid to the United States circuit court of appeals, and the defendants refuse to satisfy said judgment in full until they have been paid the amount so expended by the bank for attorneys' fees and expenses by reason of the appeal.

No question is made but that the amount of the attorneys' fees and expenses are reasonable, if they are properly chargeable to complainants. The sufficiency of the bill is to be determined by the consideration whether or not the complainants are obliged to pay to the Falls City Bank or its assignee the amount of the attorneys' fees and expenses paid out by it in endeavoring to maintain in the circuit court of appeals the judgment recovered by it in the court below. The note on which the judgment was rendered was executed as a collateral security for another note previously executed. The use of the term "collateral security," when a debtor delivers to his creditor an article of value or an evidence of debt, is intended to express that it is not received in payment of the primary debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the facilities of the creditor to realize the principal debt which it is given to secure. The collateral note and the contract in writing, executed at the same time, exclusive of the principal note, which is irrelevant to the present discussion, evidence the entire contractual rights and liabilities of the parties. The contract confers no right on the bank or its assignee to claim reimbursement from the complainants of the attorneys' fees and expenses in controversy. The complainants therein agreed that they would "indemnify the bank and save it harmless against all costs and expenses of litigation" on the $10,000 note in the circuit court of the United States for the district of Tennessee, "including attorneys' fees." By the plain and obvious terms of the contract they did not become liable thereby to pay any other attorneys' fees and expenses than those growing out of the suit in Tennessee. The bank and its assignee, therefore, can find no support in this contract for their claim to be reimbursed for the attorneys' fees and expenses in question.

The collateral note on which the judgment in this court was

rendered contained a stipulation for the payment of attorneys' fees. This stipulation, under the firmly-settled law of this state, was valid. When the bank took judgment in this court on the collateral note, there was included in the judgment the sum of $200 as a reasonable attorneys' fee for the collection of the same. The stipulation for attorneys' fees contained in the note was merged in that judgment. The fact that the judgment was appealed from and affirmed gives no right or claim for the recovery of additional attorneys' fees. The amount of attorneys' fees in all such cases is settled by the judgment of the trial court once for all. Holmes v. Hinkle, 63 Ind. 518. If the bank or its assignee has any right to recover the attorneys' fees and expenses in controversy, such right must be found dehors the collateral note and contract. The parties presumably put into the note and contract their entire agreement and understanding on the subject of attorneys' fees and expenses. Expressio unius est exclusio alterius. Therefore, unless the condition of the complainants is worse by reason of the note being given as a collateral, and not a principal obligation, no attorneys' fees and expenses can be recovered beyond the amount included in the judgment. The collateral note and contract define and limit the rights and liabilities of the parties in reference to attorneys' fees and expenses. As neither of these impose any liability on the complainants to pay the attorneys' fees and expenses in controversy, they cannot, in my judgment, be recovered from them.

The whole of the principal debt, with interest and costs, and all attorneys' fees and expenses except those herein involved, have been paid to the bank or its assignee. Payment in full of the principal debt or obligation ipso facto satisfies and discharges the collateral contract, and the judgment recovered thereon. Colebrooke, Collat. Sec. p. 129; Bowditch v. Green, 3 Metc. (Mass.) 360. The attempt, after such payment, to use the execution to coerce the payment of the attorneys' fees and expenses in controversy, is wrongful and oppressive. It is the plain duty of the court to restrain such an abuse of its process.

The demurrer is overruled.

DE LA VERGNE REFRIGERATING MACH. CO. v. MONTGOMERY BREWING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 129.

MECHANICS' LIENS—ENFORCEMENT—LIMITATION—INCUMBRANCERS.

Code Ala. § 3041, providing that all mechanics' liens arising under that chapter shall be deemed lost unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby, refers only to a suit against the owners; and a lien is not lost, where such suit is brought in time, by a failure to make certain

incumbrancers parties thereto until more than six months, and the only effect of this omission is to leave open the question of priority between the two liens, for section 3030 declares that all persons interested in the matter in controversy "may" be made parties, "but such as are not made parties shall not be bound by the judgment or proceeding therein."

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

In Equity. Suit by the De la Vergne Refrigerating Machine Company against the Montgomery Brewing Company and others to foreclose a mechanic's lien. A demurrer to the bill was overruled. 46 Fed. Rep. 832. The bill was subsequently amended, was again demurred to, and the demurrers sustained. Thereafter the bill was dismissed. Complainant appeals. Reversed.

Statement by TOULMIN, District Judge:

Appellant, complaining below, filed its bill of complaint on the equity side of the circuit court of the United States for the middle district of Alabama, seeking to enforce, as a material man, a lien upon certain ice-making apparatus furnished by it to the Montgomery Brewing Company, and on the land upon which the machinery was located. It shows a contract between the parties, under which the apparatus was furnished and erected, and that the price to be paid was $32,000, payable as follows: $8,000 on delivery of the machine and materials on the said premises, $8,000 on the completion of the erection of the machine ready for work,—and at the same time two promissory notes, for $8,000 each, to be dated May 1, 1890, bearing interest at 6 per cent. per annum, and payable, one on November 1, 1890, and one on May 1, 1891. That the machinery was furnished pursuant to contract, and that the work of construction was completed on the 26th day of June, 1890, in all respects as agreed upon, and that the brewing company then accepted it, and has since continued to operate it. The first installment of $8,000 was paid, and also sundry amounts aggregating $3,460.55; but the balance of said $32,000, namely, $20,539.45, is still due and unpaid. It is further alleged that the De la Vergne Company had filed in the office of the judge of probate of Montgomery county, within the prescribed time, a verified statement of its claim, as required by said statutes. The prayer of the bill was that the lien be enforced by a sale of the property. The bill was filed against the Montgomery Brewing Company within six months from the accrual of the cause of action.

The bill was amended June 8, 1891, by alleging that the brewing company had, on the 1st day of November, 1889, executed a mortgage "on the lot or parcel of land upon which complainant is undertaking to assert its lien, together with the tenements, hereditaments, and rights thereunto appertaining, that were in existence at the date of its execution, as well as those that might be acquired," to Henry C. Tompkins, J. W. Dimmick, and A. M. Baldwin, as trustees; said mortgage securing an issue of $50,000 of bonds. The brewing company and the trustees each demurred to the bill as amended: and insisted that the right to enforce the lien, as against the trustees, had been lost, because they had not been made parties to the bill within six months after the claim of the complainant had accrued. The court sustained the demurrers, and held that the complainant was barred by its failure to join the trustees as defendants within six months after the claim accrued. This decree bears date July 22, 1892, and directs that, unless the complainant should further amend its bill "on or before the first day of the next term of this court," the same should stand dismissed, etc. At the next term, on the 16th day of January, 1893, a decree was rendered, dismissing the bill. From that decree this appeal was taken.

Roquemore, White & Dent, Jefferson Falkner, and John M. Chilton, for appellant.

Tompkins & Troy, for appellees, cited the following authorities:

Story, Eq. Pl. § 137; 1 Pom. Eq. Jur. § 114; 6 Amer. & Eng. Enc. Law, p. 731; Pom. Rem. & Rem. Rights, (2d Ed.) § 247; Bank v. Freese, 26 N. J. Eq. 453; Huggins v. Hall, 10 Ala. 283; Bell v. Hall, 76 Ala. 546; Crowl v. Nagle, 86 Ill. 437; McGraw v. Bayard, 96 Ill. 146; Hamilton v. Dunn, 22 Ill. 259; Clarke v. Boyle, 51 Ill. 105; Bannon v. Thayer, 24 Ill. App. 428; Association v. Taylor, 25 Ill. App. 429; Welch v. Porter, 63 Ala. 225; Tied. Real Prop. §§ 3, 4; Green v. Phillips, 26 Grat. 752; Pierce v. George, 108 Mass. 78; Crane v. Brigham, 11 N. J. Eq. 29; Quinby v. Paper Co., 24 N. J. Eq. 260; Wimberly v. Mayberry, 94 Ala. 240, 248, 249, 10 South. Rep. 157; Wilson's Adm'r v. Holt, 91 Ala. 204, 8 South. Rep. 794.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge, after stating the case, delivered the opinion of the court.

The question presented to the court for its decision is whether, under the statutes of Alabama relating to the liens of material men, a lien shall be deemed lost unless all persons, as mortgagees or other incumbrancers, interested in the property charged with the lien, are made parties to the suit for the enforcement thereof within six months after the maturity of the indebtedness. The sections of the statute bearing upon the question are as follows:

"Sec. 3018. Lien Declared. Every mechanic or other person, who shall do or perform any labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title and interest owned therein by such owner or proprietor, and in area of the entire lot or parcel of land if in a city, town or village.

"Sec. 3019. Priority of Lien. Such lien, as to the land, shall have priority over all other liens, mortgages or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereto; and, as to the building or improvement, it shall have priority over all other liens, mortgages or incumbrances, whether existing at the time of the commencement of such work, or subsequently created; and the person entitled to such lien may, when there is a prior lien, mortgage or incumbrance on the land, have it enforced by a sale of the building or improvement under the provisions of this chapter, and the purchaser may, within a reasonable time thereafter, remove the same."

"Sec. 3030. Parties to Such Actions. In such actions, all persons interested in the matter in controversy, or in the property charged with the lien may be made parties; but such as are not made parties shall not be bound by the judgment or proceeding therein."

"Sec. 3041. Limitation. Except in cases hereinafter provided, all liens arising under this chapter shall be deemed lost, unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby."

Our opinion is that section 3041 has no application to incumbrancers, but refers only to suits against the owner or proprietor. The proceeding as to incumbrancers is governed by section 3030, which confers upon the material man the right either to join incumbrancers or to omit them. He is authorized, but not re-

quired, to make them parties. Trammell v. Hudmon, 78 Ala. 224. If suit for the enforcement of the lien be commenced against the owner or proprietor within six months after the maturity of the indebtedness secured by it, the lien is not lost; and our opinion is that incumbrancers may, at any subsequent time, be made parties to the proceeding. The object of making them parties is to ascertain and adjust the priorities in the property charged with the lien, and to make the judgment in the proceeding binding on them. The effect of not making them parties is simply to exempt them from being concluded by the judgment. The statute declares, "Such as are not made parties shall not be bound by the judgment." It seems clear to us that the effect of not making them parties is not to lose the lien.

The Illinois cases cited by the counsel for the appellees have no application here. Reference to them will show that the court was construing a statute of that state which, the court say, requires that material men shall enforce their rights against all parties (creditors or incumbrancers) having, or claiming to have, an interest in the premises, by suit to be commenced against them within six months, and that the law means that parties having an interest shall be the parties to the suit. The statute of Alabama contains no such provision. The inchoate lien given by the statute has no force and vitality unless it is followed up by a proper filing for record, and suit commenced for its enforcement within six months after the maturity of the indebtedness, and is prosecuted to final judgment. If these steps be taken as prescribed, the lien becomes fixed as to time and extent, and the amount of indebtedness for which it is security determined. These proceedings, however, do not bind any person interested in the property charged with the lien, unless such person is made a party to the suit. Such person is not concluded by the judgment, which is evidence of the facts it ascertains only against parties to the record. But the lien ascertained and fixed by these proceedings is no less a lien although a priority between this and other liens or incumbrances on the property may have to be settled. The suit for the enforcement of the lien must be commenced within six months after the maturity of the indebtedness, which is a condition precedent to fixing the lien, but the settlement of the priority of liens is not limited to any such period. The lien declared by the statute is on the building or other improvement put on the land, and on the land, to the extent of all right, title, and interest of the owner or proprietor; and any decree rendered condemning the land to the satisfaction of the lien would extend to the entire property, but would be subordinate to the mortgage lien on the land, as it existed before the statutory lien attached. Wimberly v. Mayberry, 94 Ala. 240, 10 South. Rep. 157. "The mortgagee's lien is superior and prior as to the property covered by the mortgage before the material man's lien attached, and subordinate to the lien given to the material man for what he added; and so the lien of the material man is upon the whole property, but subordinate to the mortgage, as to

the property covered by the mortgage when his lien attached. This is the condition of the property, and the relative rights of both, as fixed by the statute; and the only question is as to the power of a court of equity to preserve, adjust, and enforce the respective rights of all. When the jurisdiction of a court of equity is invoked, all parties in interest may be made parties; and the court, by reason of its elastic power, has authority to so frame its orders and decrees as to ascertain, adjust, and protect every interest and priority." Wimberly v. Mayberry, supra. By express provision of the statute, the lien of a material man or mechanic may be enforced in equity without alleging or proving any special ground of equitable jurisdiction. Code Ala. § 3048. The lien to be enforced is against the "owner or proprietor," and other persons interested in the property, whether as mortgagees or other incumbrancers, are proper, but not necessary, parties. Their interests are not necessarily involved in the issue to be determined in the suit for the enforcement of the lien, and they are not necessarily to be affected by the judgment in the proceedings. The statute expressly declares that they are not bound by the judgment unless they are made parties. Id. § 3030.

We have thus disposed of the question presented by counsel in oral argument and briefs, but we notice that under the terms of the contract the entire indebtedness did not become due until the 1st May, 1891, and that, by election of the complainant, on account of the default of the brewing company in complying with the terms of its contract, the indebtedness did not become due until December 24, 1890; and as the amended bill making the mortgagees parties was filed on May 10, 1891, the suit against the mortgagees was in fact instituted within six months after the maturity of the indebtedness.

The decree of the court below, dismissing the bill as amended, not being in accordance with the views herein expressed, it follows that the cause should be reversed and remanded, with instruction to overrule the demurrers, and further proceed in the cause as right and equity may require; and it is so ordered.

EDDY et al. v. LETCHER.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 163.

RAILROAD COMPANIES—NEGLIGENCE—ACCIDENT TO TRAINS.

A railroad company which had the right to run its trains into a certain town over the tracks of another company, then in the hands of receivers, duly notified the yard master of the latter at that place that an extra train would arrive about 10 A. M. on a certain day. The yard master communicated this intelligence to the foremen of the several switching engines, but the foreman of one engine neglected to notify his engineer; and the latter, while looking backward at the cars in his charge, ran his engine into the extra, thereby killing a passenger. *Held*, that the receivers were liable for the death, and this notwithstanding the fact that

the extra was so late that, under the rules of the yard, the switch engine had a right to occupy the tracks, for the want of notice prevented the keeping of a proper lookout.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Foreclosure proceedings against the Missouri, Kansas & Texas Railway Company. The hearing was on an intervening petition by Annie Letcher against George A. Eddy and H. C. Cross, receivers, to recover damages for the death of Harvey Letcher by the wrongful neglect of respondents. A decree was rendered for the petitioner. The receivers appeal. Affirmed.

Statement by SHIRAS, District Judge:

The appellants in this proceeding, Messrs. Eddy and Cross, are the receivers of the Missouri, Kansas & Texas Railway. The St. Louis & Hannibal Railway Company, by a written contract between that company and the appellants as receivers, had secured the right to run its train over the tracks of the Missouri, Kansas & Texas Railway into the city of Hannibal, Mo., from the point where the roads of the two companies intersected at a junction about three miles southwest of Hannibal.

On the 2d of August, 1890, the St. Louis & Hannibal Railway Company ran a special excursion train from Gilmore to Hannibal, arriving at the latter place about 10:40 A. M. When this train had nearly reached the Union Depot in Hannibal, and was upon the track of the Missouri, Kansas & Texas Railway, a collision occurred with a switch engine belonging to the latter company, and operated by the appellants as receivers thereof; and one Harvey Letcher, a passenger on the excursion train, was killed. Annie Letcher, the widow of Harvey Letcher, thereupon filed an intervening petition in the foreclosure proceedings wherein the appellants have been appointed receivers, claiming damages against the receivers, upon the ground that the collision and consequent death of her husband was due to negligence on part of the employes of the receivers in charge of the yard and switch engine of the Missouri, Kansas & Texas Company at Hannibal. The questions arising out of the issues thus created were sent to a master for hearing and report, before whom a large amount of testimony was taken.

The master, among other findings of fact, reported the following as established by the evidence: "That early in the day of the fatal collision the train master of the Short Line Company notified the yard master of the M., K. & T. Company, as it was his duty to do, that an extra passenger train would be run into Hannibal by the Short Line Company on that day, and that it would reach the Union Depot at about 10 o'clock A. M. Thereupon the yard master of the M., K. & T. Company notified the foreman of each of the several switch engines in the M., K. & T. yards, including the foreman of switch engine No. 91, of the existence of this extra train for that day, and of the time at which it was expected to arrive and pass through the yards. This information, however, the foreman of the crew in charge of said switch engine No. 91 failed to communicate to his engineer, the latter in fact having no knowledge whatever of the existence of the excursion train until the moment of the collision. During the time his train, which consisted of ten freight cars, was passing down the yard towards the Union Depot, immediately before the collision, the engineer in charge of this switch engine was leaning partly out of his cab window, looking back for signals from others of his crew. He did not see the Short Line engine ahead of him until notified by his fireman, when he turned, and saw that the two engines were then not more than twenty-five or thirty feet apart. His station being on the inside of the curve as the train moved forward, he could have seen the Short Line engine as it moved from behind the M., K. & T. passenger train towards him at a time earlier than the position of his fireman on the other side of the engine enabled the latter to discover it, but was still looking back at the time his fireman discovered the danger. On being notified by the

fireman he immediately applied the brakes, reversed his engine, and took hold of the throttle to give her steam; but just at that moment the two engines struck."

The conclusion of the master in favor of the right of recovery on part of the intervener was affirmed by the court upon the ground that the proximate cause of the accident was the failure to give the engineer of the switch engine notice of the expected arrival of the excursion train.

From the judgment rendered in favor of the intervener, the receivers have appealed to this court.

George P. B. Jackson, (John Montgomery, Jr., on the brief,) for appellants.

James P. Wood, for appellee.

Before SANBORN, Circuit Judge, and NELSON and SHIRAS, District Judges.

SHIRAS, District Judge, (after stating the facts.) It does not seem necessary to enter upon any extended discussion of the evidence in order to show that the conclusion and judgment of the court below are correct, and must be affirmed. When the St. Louis & Hannibal Company determined to run an excursion train to Hannibal, certainly common prudence required that notice of the coming of this extra train should be given to the parties in charge of the yard and depot grounds at Hannibal. If the company had sent this extra train to Hannibal without giving notice of its coming, and a collision had occurred with another train in the yard at Hannibal, it would be clear that the fault would lie at the door of the St. Louis & Hannibal Company. In fact, notice of the coming of the train was sent to the depot master at Hannibal. The purpose of the notice was that parties in charge of other trains or engines might be warned of the coming of the excursion train, and thus be enabled to do whatever was necessary to prevent a collision with the incoming train. The sending of the notice would be of no effect unless it was communicated to the parties handling the engines at the yard. It was sent to the proper person in the first instance, to wit, the yard master at Hannibal. He, in turn, communicated it to the foremen of the several switch engines, but the foreman of switch engine No. 91 did not notify the engineer in charge of that engine, and he was permitted to engage in the work of switching in the yard and upon the track upon which the excursion train was coming, without being notified of the fact that an excursion train was coming in, and was fully due to arrive at the station. Certainly those who were upon engine No. 91 and those who were upon the excursion train were thus subjected to a danger of collision which would have been avoided if the engineer of No. 91 had been notified of the coming of the excursion train.

The subjecting the parties upon these trains to a risk which could have been so easily avoided was certainly negligence, for the consequences of which the receivers must be held liable.

If the engineer had been notified of the coming of the excursion train he would undoubtedly have kept a lookout for its ap-

proach, and would have run his engine at a speed commensurate to the risk, even if it be true that he had the right of way as against the excursion train, as is claimed on behalf of appellants.

Even if the fact be that the excursion train did not arrive at the notified time, and was so late that, under the rules of the yard, the switch engines could rightfully be put to work in switching within the limits of the yard, nevertheless it was the fact that the excursion train was liable to arrive at any moment. If a switch engine went upon the track upon which the excursion train was coming, thereby a liability to collision would be caused, and that undeniable fact called for the exercise of due watchfulness on part of those in charge of the engine that did go upon the track upon which the excursion train was approaching.

The facts show that a proper lookout for the approaching train was not kept by those in charge of engine No. 91, which, in turn, was due to the failure on part of the foreman to notify the engineer of the fact of the coming of the excursion train. The facts show negligence in the management of the switch engine, which aided in causing the accident, and for the consequences thereof the appellants were rightly held liable.

Affirmed.

DAVIS et al. v. CAPITOL PHOSPHATE CO.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 151.

PUBLIC LANDS — RAILROAD GRANTS — INDEMNITY SELECTIONS — WHEN TITLE PASSES.

Under Act Cong. May 17, 1856, (11 Stat. 15,) granting certain lands to the state of Florida in aid of railway construction, and providing that if, when the routes of the railroad were definitely fixed, the United States had sold any of the granted sections, or the right of pre-emption had attached thereto, an agent or agents appointed by the governor might select other land in lieu thereof within prescribed limits, subject to the approval of the secretary of the interior, the state acquired no title to lands so selected by the agent until the approval of such selection by the secretary of the interior. Wisconsin Cent. R. Co. v. Price Co., 10 Sup. Ct. Rep. 341, 133 U. S. 496, followed.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill for an injunction by John L. Davis and George L. Eastman against the Capitol Phosphate Company. From an order dissolving a temporary injunction and dismissing the bill, complainants appeal. Affirmed.

Statement by LOCKE, District Judge:

This was an action brought in the circuit court of Marion county, Fla., by a bill praying an injunction to restrain defendant from mining phosphates and cutting timber upon the south half of section 25, township 14 S., range 19 E., of that state. The bill alleged the complainants to be owners in fee simple of the land, and in possession of it. A temporary injunction was granted by the state court, but upon application of defendant the case was removed to the United States circuit court, as one involving the validity of

the laws of the United States. Upon a hearing upon a motion to dissolve the injunction, the several deeds of conveyance upon which the complainants based their title, and exhibits and affidavits in behalf of the respondent, were filed, whereupon it was ordered that the injunction be dissolved, and the bill dismissed. From this order an appeal was taken, assigning as error that the court erred in holding that the claim of defendant under mineral rights was superior to the rights of complainants under the grant of land by the act of congress of May 17, 1856, and in dissolving the injunction and dismissing complainants' bill. It appears from the several exhibits herein that complainants claim under mesne conveyances from the Florida Railroad Company through several parties, the title of that company coming, it is claimed, through the act of congress of May 17, 1856, granting certain lands to the states of Florida and Alabama for the purpose of aiding in the construction of certain railroads. 11 Stat. 15. The language of that act is, as far as necessary for the purposes herein: "Be it enacted * * * that there be and is hereby granted to the state of Florida for the purpose of aiding in the construction of railroads from St. John river at Jacksonville to the waters of Escambia bay, at or near Pensacola; and from Amelia island on the Atlantic to the waters of Tampa bay, with a branch to Cedar Keys on the Gulf of Mexico, and also a railroad from Pensacola to the state line of Alabama, in the direction of Montgomery, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads and branch. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any parts thereof granted as aforesaid or that the right of pre-emption has attached to the same then it shall be lawful for any agent or agents to be appointed by the governor of said state to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified so much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections, designated in odd numbers as aforesaid and appropriated as aforesaid) shall be held by the state of Florida for the use and purpose aforesaid: provided, that the land to be so located shall in no case be further than fifteen miles from the lines of said railroads and branch, and selected for and on account of each of said roads and branch."

W. S. Bullock, for appellants.

Robert M. Smith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) It is admitted that the state by proper legislation conveyed any rights which had been derived from the congressional grant to the railroad company. The bill of complainants must depend upon the validity of their title from the railroad company, and not the weakness of the defendant's; so, if their title is not well founded, it will not be necessary to make further examination of the case. It is shown by the certificates of the receiver of the United States land office for that district and of the commissioner of the general office herein filed that the land in question is embraced in the 15-miles indemnity limits, which had been withdrawn from entry and sale by direction of the secretary of the interior March 16, 1881, and had been selected as such indemnity lands April 5, 1887, but that there had been no action of the general land office or secretary of the inte-

rior in confirmation of the selection or looking to its approval or rejection.

The principal question in this case, then, and that which must first be determined, is, what rights were given under the act of congress to the state, and by the state to the railroad company, to lands not within the 6-mile grant, but within the 15-mile indemnity limit, by selection as indemnity lands, but before the approval of such selection by the secretary of the interior? This exact question was before the supreme court in the case of Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341. In that case a portion of the lands in question were within the limits of the positive grant, 10 sections on each side of the road, and a portion within the so-called "indemnity limits" of 20 miles. The language of the grant under which those lands were claimed, the act of 5th of May, 1864, (13 Stat. 66,) was, as far as any question herein, exactly similar to the act of 1856, relied upon by complainants. It provides:

"That there be granted to the state of Wisconsin for the purpose of aiding in the construction of a railroad * * * every alternate section of public land designated by odd numbers for ten sections in width on each side of said road. * * * But in case it shall appear that the United States have, when the line or route of said road is definitely fixed sold, reserved or otherwise disposed of, any sections or parts thereof, granted as aforesaid or that the right of pre-emption or homestead has attached to the same then it shall be lawful for any agent or agents of said state appointed by the governor thereof to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of the sections above specified as much public land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated, * * * provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road."

A list of the selections of the lands within the indemnity limits —20 miles—had been made, properly authenticated, and forwarded to the secretary of the interior, but he had not approved the same when the question arose.

In that case, Justice Field, speaking for the court, says:

"The lands taxed amounted to eleven parcels of 40 acres each, lying within the original sections named in the grant,—that is, within the ten-mile limit from the line of the road,—and the remainder were within the indemnity limits. So far as the eleven parcels are concerned, the right of the plaintiff to them, and to a patent for them, had as early as 1877 become complete under the term of the granting act. The line of the railroad had been definitely fixed. * * * The grant was, * * * until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them, and took effect as of the date of the grant, so as to cut off all intervening claims. * * * But as to the remainder of the lands taxed, which fell within the indemnity limit, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the states appointed by the governor, but until such selections were approved by the secretary of the interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the secretary of the interior; but that officer never approved them. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. * * * Until the selections were approved, there were

no selections in fact; only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of indentification; the proposed selection remained the property of the United States. The government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned, but such promise passed no title, and until it was executed created no legal interest which could be enforced in the courts."

In this case the court had been considering both the legal and equitable title of the land in question, and the decision plainly denies any title that can be enforced. This, we consider, fully determines the insufficiency of the title of complainants to support the action brought, and it is unnecessary for us to examine the numerous other questions presented and argued.

The judgment below is affirmed, with costs.

AHLHAUSER v. BUTLER et al.

(Circuit Court, E. D. Wisconsin. July 6, 1893.)

1. ATTORNEY AND CLIENT — ATTORNEY'S LIABILITY FOR NEGLIGENCE—MAKING INSUFFICIENT AFFIDAVIT.
   An attorney who is notified by wire to make an attachment is not liable for negligence in so doing merely because the attachment is dissolved for insufficiency of the attorney's affidavit, unless it appears that such insufficiency was clearly established by the language of the statute, or by well-settled decisions. Bank v. Ward, 100 U. S. 195, followed. Goodman v. Walker, 30 Ala. 482, approved.

2. SAME—NEW YORK LAW.
   Code Civil Proc. N. Y. §§ 635, 636, regulating attachments, provides that the judge must be satisfied by affidavit that a cause of action exists, and that plaintiff is entitled to recover the sum stated, over and above all counterclaims. Under these sections an attorney secured an attachment which was subsequently dissolved because the attorney's affidavit did not state his source of information. *Held*, that the insufficiency of such an affidavit was not clearly enough established by the language of the statute to render the attorney liable for negligence.

3. SAME.
   The attachment was made in New York city, and there were but two decisions (both in other judicial departments of the state) clearly holding such affidavits insufficient. One decision in another department, one in the same department, which had been affirmed by the court of last resort, and several in other states having similar statutes, held them to be sufficient. *Held*, that its insufficiency was not clearly enough established to render the attorney liable for negligence.

At Law. Action by William Ahlhauser against William Allen Butler and others for negligence while acting as plaintiff's attorneys. The case was tried by the court. Judgment for defendants.

F. W. Cotzhausen, for plaintiff.

Quarles, Spence, Hoyt & Quarles, for defendants.

SEAMAN, District Judge. In this action the plaintiff seeks to recover of the defendants, constituting the law firm of Butler, Stillman & Hubbard, of New York city, for alleged negligence as attorneys, whereby attached funds to the amount of $5,852.01 were

lost to plaintiff. There is no claim of want of promptness or diligence, but the charge of liability rests entirely upon the affidavit for attachment, which was adjudged there to be "wholly insufficient to confer jurisdiction."

In January, 1888, James W. Vail & Co., bankers at Port Washington, Wis., failed. Turner & Timlin, a law firm of Milwaukee, Wis., were retained by five depositors,—Crowns, Bostwick, Lewis, Kahn, and Ahlhauser,—with understanding that they should have priority in the order named. On the night of January 26th Turner & Timlin wired the defendants' firm to attach money of J. W. Vail & Co. in National Park Bank, "quick," for the first four named above (not including plaintiff) for amounts stated. This was answered with inquiries, etc., and followed by considerable correspondence by wire and letter; and the claim of plaintiff was added, for $11,000, to stand subordinate to the others. There was no previous acquaintance or relation between Turner & Timlin and defendants, but the former relied on the high professional standing which is conceded of and for defendants' firm. Attachment proceedings were commenced January 27th in one of the departments of the supreme court of New York in the five cases, and levy made of $5,852.01 of debtors' funds in National Park Bank. The affidavit for attachment was made by John Notman, of defendants' firm; a second affidavit being made on the next day, after further information, and constituting the foundation of attachments. The affiant is stated as attorney for the plaintiff, and swears positively to all the jurisdictional facts. Subsequently one Page, as assignee of sundry other claims, commenced attachment against the same debtors and fund, in the same court, and intervened to set aside these prior attachments; and upon the hearing the presiding judge granted the motion, holding that each affidavit failed to "disclose the source of his information in respect to the fact whether the amount stated in his affidavit was due to the plaintiffs over and above all counterclaims," and that positive statement by such an attorney was not sufficient. Appeal was taken to the general term of the department, and the order was affirmed,—reported as Crowns v. Vail, 4 N. Y. Supp. 324, 51 Hun, 204. The attachments were therefore dismissed, and any claim to the funds lost to these clients. Pending these decisions, upon suggestion of Turner & Timlin, the attachment suit of this plaintiff, Ahlhauser, was discontinued, to enable the taking out of a new attachment in his name, (but for the benefit of prior parties,) upon which to move for dismissal of the Page attachment, and thus regain the funds, if the original attachments failed. This move became abortive when the decisions were reached, as each held the Page attachment valid, and the facts in relation to it are not deemed material to the question here considered, but are referred to because each side urged point upon it; the one as further showing of negligence on the part of defendants, and the other as showing the plaintiff's claim in such standing that he could not have obtained benefit in any event, and therefore suffered no damage. No appeal was taken to the court of appeals,

and, although there was suggestion by Turner & Timlin in one letter to defendants that it should be appealed further, there was refusal to even reimburse defendants for their expenses thus far incurred,—presumably for the reason asserted here as a cause of action. Subsequently Turner & Timlin conducted other proceedings in Wisconsin in behalf of all these clients with such success that all obtained satisfaction of their claims excepting the plaintiff, who was left with about $7,000 unpaid. As this deficit exceeds the amount of the New York fund which was lost, he claims damages to the amount of that fund.

The question for determination is one of mixed law and fact, which by the waiver of a jury devolves upon the court. Consideration has been confined to the inquiry whether the making and use of the affidavit for attachment which was so adjudged to be insufficient was an act of neglect or ignorance upon the part of defendants, creating liability to the client for resulting loss. It is first necessary to ascertain the measure or degree of negligence which becomes actionable. Much confusion has arisen from employment of the term "gross," in its definition, by courts and text writers,—that the negligence or ignorance to charge liability upon a lawyer must be gross. With broad interpretation this leaves too much opportunity for escape from all responsibility. There is a reason for not holding him as an insurer of the correctness of his judgment or work where he proceeds honestly and with reasonable care and skill; but there is no justice in exempting one who undertakes the practice of the law from requirement of ordinary professional learning and care. The rule, as stated in Bank v. Ward, 100 U. S. 195, is the best, and is authority here, viz. requiring the exercise of "a reasonable degree of care, prudence, diligence, and skill." What is reasonable must depend largely upon the circumstances of each case; pretensions or standing and surroundings of the practitioner entering into consideration. The lawyer ordinarily undertakes to use his best judgment to follow the well-known lines of practice, and not to err when the way is plain to the generality of his profession. The opinion of Clifford, J., in Bank v. Ward, supra, adopts from Bowman v. Tallman, 27 How. Pr. 212, the following further explanation, applicable here:

"It must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is that, if he acts with a proper degree of skill, and with reasonable care, and to the best of his knowledge, he will not be held responsible."

Upon the question of practice here involved there is a further exemplification of the rule in the excellent opinion of Stone, J., in Goodman v. Walker, 30 Ala. 482, which I think well states the measure to be applied, viz.:

"If the law governing the bringing of the suit was well and carefully defined, both in text-books and in our decisions, and if the rule had existed and been published long enough to justify the belief that it was known to the profession, then the disregard of such rule by an attorney at law renders him accountable for the loss caused by such negligence or want of skill.—

negligence if, knowing the rule, he disregards it; want of skill if he was ignorant of the rule."

If it must be held of this affidavit (1) that the clear language of the statute was against its use, or (2) that it was prohibited by well-settled decisions, as above defined, then I think there would be ground for liability; and this is the remaining inquiry.

1. The provisions for attachment are contained in sections 635 and 636 of the New York Code of Civil Procedure. The requirement as to the affidavit reads as follows:

"To entitle the plaintiff to such a warrant he must show by affidavit to the satisfaction of the judge granting the same as follows: (1) That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein over and above all counterclaims."

This does not require that the affidavit be made by the plaintiff, and it is undisputed that it may (and must in many cases) be made by an agent or attorney. It only requires an affidavit of the jurisdictional facts, and to the satisfaction of the judge who issues the warrant. If it is in positive terms, there is no express requirement that the affiant shall state how he knows the facts. Therefore it cannot be held that there was clear reading of the statute against this affidavit, but rather that on its face it seems to favor it.

2. The attachments were vacated by the order of the special term, based entirely upon the ruling that the affidavit was insufficient upon its face, because made by an attorney, without stating the sources of knowledge, although all facts are stated positively. On appeal to the general term this order was affirmed. Crowns v. Vail, 51 Hun, 204, 4 N. Y. Supp. 324. It was not carried to the court of appeals, which is the court of last resort in New York, and this decision is conclusive upon the litigants there, and may become the rule of that department, unless the court of appeals shall settle otherwise in some future case. The fact of this adverse decision cannot of itself serve to charge liability upon the defendants, for that would require of the attorney a foreknowledge or insurance of what might be decided by the courts upon questions which are new or open to doubt,—a requirement beyond all rule or reason, and which cannot be imposed.

It is therefore necessary to determine whether there were controlling decisions, prior to the one here pronounced, which would constitute a law of the forum against an affidavit in the form here employed. To this end I have carefully examined all the cases cited in the opinion handed down in Crowns v. Vail, and others referred to, and find only two—in other departments of the state—where questions arose upon the positive affidavit of an attorney or agent, and it was held insufficient without a showing of the sources of knowledge, viz. Cribben v. Schillinger, 30 Hun, 248; Buhl v. Buhl, 41 Hun, 61. In the others cited the affidavits were stated upon information and belief, or otherwise distinguished, and

any statements in the opinions as to the rule for positive affidavits were unnecessary, and dicta. On the other hand, there was in this same first department, where the attachments in question were brought, a clear decision by the general term—Bank v. Whitmore, 40 Hun, 499—upholding an affidavit for attachment made by an agent described simply as "assistant cashier," without stating any sources of knowledge, on the ground that it was positive; and distinguishing from one stated as on information and belief. Applying the same rule to an attorney as to an agent,—and no distinction is made or appears,—this seems to be authority ex fori. But this case has additional force in that it was taken to the court of appeals, and there affirmed. 104 N. Y. 297, 10 N. E. Rep. 524. While the opinion on appeal does not expressly pass upon this form of the affidavit, it must have approved the finding of the general term that it was sufficient; otherwise the defect would have been jurisdictional, and the attachment could not have been sustained. This is the only case found in which the point here involved reached the court of appeals, and it certainly must be taken rather for than against this affidavit. In James v. Richardson, 39 Hun, 399, such an affidavit is held good by the general term of the fourth department. Whatever might be the force of these general term decisions, outside their respective departments, for establishing rules of practice,—and imparting to a statute requirements not apparent on its face, however wise in policy,—it is clear that such decisions must be reasonably harmonious before they can be held to establish the liability of an attorney to damages for nonobservance of the one or the other line. This affidavit had at least the appearance of sanction by the court of last resort, a favoring decision in the same department, and no settled rule against it in the other departments of the state. Furthermore, in other states having similar code provisions, like affidavits were held good. Anderson v. Wehe, 58 Wis. 615, 17 N. W. Rep. 426; Rice v. Morner, 64 Wis. 599, 25 N. W. Rep. 668; White v. Stanley, 29 Ohio St. 423; Simpson v. McCarty, 78 Cal. 175, 20 Pac. Rep. 406; Drake, Attachm. (6th Ed.) §§ 94, 94a.

I therefore hold that the defendants are not liable, and file herewith findings and order for judgment in their favor.

CINCINNATI, N. O. & T. P. R. CO. v. CLARK.

(Circuit Court of Appeals, Sixth Circuit. June 22, 1893.)

No. 81.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—RAILWAY COLLISION—ENGINEER'S NEGLIGENCE NOT IMPUTABLE TO FIREMAN.

The neglect of a locomotive engine driver to keep a proper lookout, and his consequent failure to avert a collision caused by the negligence of his employer's vice principal, is not imputable as contributory negligence to the fireman of the same engine, who is injured in the collision.

2. SAME— FELLOW SERVANTS — TELEGRAPH OPERATOR AND LOCOMOTIVE FIREMAN.

A telegraph operator at a way station, whose duty it is, under the general rules of the railway company, to display signals to prevent one train following another on the same track too closely, is the fellow servant of a locomotive fireman, injured in a collision caused by the operator's neglect of such duty. Railroad Co. v. Charless, 2 C. C. A. 386, 51 Fed. Rep. 567, distinguished. McKaig v. Railroad Co., 42 Fed. Rep. 288, approved.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

At Law. Action by F. A. Clark, administrator, against the Cincinnati, New Orleans & Texas Pacific Railroad Company, to recover damages for the death of W. R. Clark. Verdict and judgment were given for plaintiff. Defendant brings error. Reversed.

Statement by BARR, District Judge:

This is a suit to recover damages for the death of plaintiff's intestate, W. R. Clark, who was killed in a tail-end collision of two trains on the 23d of May, 1891, near Melville station, Tenn.

The defendant, the Cincinnati, New Orleans & Texas Pacific Railroad Company, ran and operated trains on a single track railroad between the cities of Cincinnati and Chattanooga, and had on the night of the 23d of May, 1891, two trains running south to Chattanooga. No. 1 was the fast passenger express train, which stopped only at a few of the stations, and the other, No. 7, was the mail passenger train, which was slower than No. 1, and stopped at the principal stations and all others when signaled.

The schedule time made these trains 30 minutes apart at Evansville station, and this decreased as they ran south, until by the schedule they were to arrive at Chattanooga 15 minutes apart,—No. 7 at 9 P. M., and No. 1 at 9:15 P. M.

Both trains were on the day of the accident behind their schedule time, and from Dayton, a station 20 9-10 miles north of Melville, (the place of the collision,) No. 7 was running on the time of No. 1. Train No. 1 caught and ran into train No. 7 at Melville station, just as that train had gotten some 200 feet beyond the station. That train had the proper signal lights out at the end, and slowed up to let a passenger get off at Melville. The track as these trains ran to Melville station was straight for some distance, say 1,950 feet, and down grade.

W. R. Clark, who was the fireman, and Mr. Chapin, who was the engineer, on No. 1, seeing a collision inevitable, jumped from their engine, and were killed,—Chapin instantly, and Clark hurt so badly that he died in a few days.

This suit was brought in state court, and removed to this court. After removal, plaintiff filed a declaration containing nine counts, alleging negligence by the defendant, so as to cover every view which the testimony might possibly present. There was a trial and a verdict against defendant for $10,000.

Lewis Shepherd, Edward Colston, and George Hoadly, Jr., for plaintiff in error.

Spurlock & Latimore, for defendant in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

BARR, District Judge, (after stating the facts.) The defendant has taken a writ of error, and has assigned, as we read the record, three errors:

(1) Because the trial court overruled the motion to instruct the jury to find for the defendant.

(2) Because the court erred in the charge on the question of plaintiff's intestate's contributory negligence.

(3) Because the court instructed the jury that Jenkins, the operator at Rathburn, a telegraph station, was not the fellow servant of Clark in the performance of his duty in regard to giving the signal and holding trains so there should be at least ten minutes between them.

The four subdivisions of error No. 1 cannot be considered as separate assignments of error, as they were not excepted to at the trial. We presume, however, these subdivisions were only intended to subdivide the argument presented to sustain the general assigned error of refusal to give the instruction to find for defendant.

There were no exceptions to the charge of the court other than errors No. 2 and 3; hence this court can only consider the errors to the charge reserved at the trial.

The only exception to the charge of the court is this, viz.:

"The defendant duly excepted at the time to all that part of the charge of the court to the jury to the effect that the operator or signalman at Rathburn, in respect to his duty to keep the two trains ten minutes apart, was not a fellow servant of the plaintiff's intestate; and to all that part of the charge of the court which in substance and effect instructed the jury that the plaintiff's intestate was not guilty of contributory negligence in failing to see the obstruction on the track caused by the position of No. 7 thereon, and in failing to give notice of the obstruction to the engineer."

We need not discuss the first error assigned if neither of the others are sustained, because the only other question to be considered on this assignment of error would be the proximate cause of the death of Clark. The court, under the evidence, should not have taken that question from the jury. The court left the jury to determine the proximate cause of the death, saying that both Chapin, the engineer on train No. 1, and Martin, conductor of train No. 7, were fellow servants of Clark, and the defendant company was not liable for their negligence.

If, therefore, neither the second nor third assignments of error is sustained, the first must be overruled.

We do not find that the trial court gave, or was asked to give, any distinct instruction in regard to the contributory negligence of Clark. The court did say to the jury:

"In my opinion, this whole case centers around the conduct of that dispatcher or operator at Rathburn, or Soddy, as some call it. There is a difference in the statements of the witnesses as to what occurred there; some of the witnesses swearing to one thing, and some of them to another thing. In my opinion, gentlemen of the jury, if you find from proof that the telegraph operator there at Rathburn did not signal this train No. 1, or detain it there until the ten minutes had elapsed from the departure of the other train, this failure to do so was negligence on the part of the company; that he was not a fellow servant of the intestate, but that he was a vice principal of the defendant, and therefore the defendant would be responsible for his negligence, if any injury resulted from it."

And in a subsequent part of his charge the court said to the jury:

"Now, if the proximate cause of the injury was the negligence of this telegraph operator at Rathburn, and the engineer of the train No. 1 was guilty

of negligence, why, that would not preclude this plaintiff from recovering. Whatever effect it might have in a case between the engineer and the railroad, it would have nothing to do in this case. This man had nothing to do with the control of the engine, and if Chapin was ever so negligent in controlling that engine, and the injury resulted from the conduct of the train dispatcher, why, the plaintiff would still be entitled to recover."

The court was correct in telling the jury that Clark had no control over the engine, and also in saying, if the negligence of the company, through its vice principal, caused his death, the negligence of Chapin would not preclude a recovery. See Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493. This was, however, not a charge upon the subject of the contributory negligence of Clark in not seeing and informing Chapin of the obstruction, in time to prevent a collision. But if we assume the language of the charge negative, the idea of contributory negligence upon the part of decedent, there was, we think, no error. For Clark to have been guilty of contributory negligence under the circumstances, he must have seen and known the character of this obstruction in time to notify the engineer, so that he could have stopped his train and avoided the collision, and have failed to thus notify him; or he must have failed to perform his duty by seeing this obstruction in time and notifying the engineer, so that he might have avoided the collision. There is not the slightest testimony tending to prove Clark did actually see this obstruction in time to notify the engineer, that he might avoid the collision. Indeed, there is not the least evidence to prove that Clark did not notify the engineer in time to avoid the collision. Had he seen this obstruction and known its character, self-preservation would have impelled him to have notified the engineer Chapin of the impending danger immediately.

Clark's principal duty as fireman was to look after the engine, and fire the furnace, and his duty as a lookout was secondary to this. In the absence of all testimony showing or tending to show that he was not thus engaged, or tending to prove that he did not immediately communicate any information he had, or could have had by the greatest diligence, to the engineer, the court was right in ignoring the question of his contributory negligence. The testimony of several witnesses introduced by the defendant company was to the effect that they did see on a night selected for that purpose the signals on train No. 7 when at Melville by looking across the curve in the railroad, a distance of about 2,800 feet, and from the end of the curve next Melville, a distance of 1,950 feet, and that they continued to see this signal down the straight track all this distance of the 1,950 feet. But such evidence as this did not require the court to call the attention of the jury to the question of Clark's contributory negligence, especially as he was not requested to do so.

We pass to the consideration of the other assigned error, which is the important question, and that is whether Jenkins, the telegraph operator, represented the company as vice principal. Rathburn was the last telegraph station passed by these trains before

the collision at Melville, which is 3 9-10 miles distant, and there is conflict in the testimony as to the time of the passages of these trains. There is some testimony tending to prove that train No. 1 passed Rathburn within two or three minutes after train No. 7 had left that station, and other testimony tending to show that these trains were as much as 10 minutes apart when they passed this station. Train No. 1 did not stop at this station, but passed on under a white or clear signal placed by the operator; but it is evident the jury found, under the instruction of the court, that Jenkins, the telegraph operator, was guilty of the negligence which caused the death of the plaintiff's intestate, and thus the liability of defendant was fixed.

The rules of the defendant's company provide under head of "Movement of Trains:"

"A train must not leave a station to follow a passenger train until ten minutes after the departure of such passenger train, unless some form of block signal is used."

And under the head of "Rules for Telegraph Operators:"

"401. When two passenger trains are running in the same direction, they must display a red signal immediately after the first train passes, and, at the expiration of ten minutes, display a white signal to the following train."

"390. Telegraph operators report to, and receive their instructions from, the chief train dispatcher. They must obey the instructions of the station agent when they do not interfere with their duties as operators."

There were no special orders given either train No. 1 or train No. 7 by the train dispatcher through Jenkins, the operator at Rathburn. The only order given by the train dispatcher was in regard to the meeting and passing train No. 8, which was north bound, and that was through another operator. The neglect of Jenkins, if neglect there was, was his failure to use a proper signal, and to stop train No. 1 until the expiration of ten minutes after the passage of train No. 7.

A careful reading of the decisions of the supreme court satisfies us that the question under consideration has not been definitely settled by that court. This court has had occasion to consider the liability of railroad companies for injuries done employes by the negligence of another employe, and the cases of Railroad Co. v. Andrews, 1 C. C. A. 636, 50 Fed. Rep. 728, and Railroad Co. v. Howe, 3 C. C. A. 121, 52 Fed. Rep. 362, are cited by counsel.

In the Andrews Case the death was caused by a collision between train No. 37 and train No. 88, running in opposite directions. The negligence was the misreading a dispatch from train dispatcher, which ordered train No. 88 to meet and pass train No. 37 at "Bairdstown." Both the conductor and the engineer on train No. 88 read this as "Bloomdale," another station on the road, instead of "Bairdstown." Andrews was a brakeman on train No. 37, and in the collision which followed was killed. This court held the negligence of the conductor and engineer on train No. 88 was that of a fellow servant of Andrews, and that the railroad company was not liable to Andrews. 1 C. C. A. 636, 50 Fed. Rep. 728.

In the Howe Case one of the questions was whether Howe, who

was a brakeman on a freight train which had parted into two parts, was the fellow servant of the engineer who had charge of the engine and forward part of the parted train at the time of the injury, which was caused by the engine running over his arm. Hughes was the conductor of this freight train, and, when the train separated, he sent Howe forward with a lantern to signal the engine and that part of the train as it returned. Howe fell asleep on the track, and the engine, which was backing, ran over and crushed his arm. One of the complaints of negligence was that the engineer, who, by the rules of the company, was in charge of his part of the train, did not promptly stop his engine after he discovered Howe on the track. This court held the negligence of the engineer, if any, was that of a fellow servant of Howe, and the company was not liable therefor. 3 C. C. A. 121, 52 Fed. Rep. 362.

These cases do not decide the one under consideration, and we think the present question remains undecided by any court whose authority is binding upon this. It is, however, true, we think, that the trend of recent decisions, especially in the state courts, has been to make the orders of a train dispatcher the orders of the company, and his negligence in the control and running of trains the negligence of the company for whom he acts. The reason for this is that the power and authority of a train dispatcher when running trains under telegraphic orders is and must be supreme; hence the company, having thus delegated supreme authority in the special service, should be responsible for any negligence of the train dispatcher. The train dispatcher is the superior of all persons running the trains, and in a limited degree he has all persons in that service under his authority; hence, may not be a fellow servant with any of these persons when his negligence causes their injury. Sheehan v. Railroad Co., 91 N. Y. 334; Dana v. Railroad Co., 92 N. Y. 639; Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. Rep. 514.

Some other decisions extended the company's liability to be for the negligence of all telegraph operators, holding that the telegraphic service is a separate and distinct department in the operation of a railroad, and that persons engaged in that service are not fellow servants of conductors, engineers, brakemen, and others in the immediate management and control of trains. Hall v. Railway Co., 39 Fed. Rep. 18; Railroad v. De Armond, 86 Tenn. 75, 5 S. W. Rep. 600.

We do not deem it necessary to determine in this case whether the negligence of a train dispatcher while in the performance of the service of running trains by telegraph is the negligence of the company in whose service he is, so far as to make the company liable for an injury done an employe in running its trains; nor to determine whether the telegraphic service used in the operation of a railroad is a separate and distinct department from that of conductors, engineers, and other trainmen, whose immediate business is the running of trains. These questions need not be and are not decided.

In this case we think the neglect of duty by Jenkins, the operator, did not arise from his failure to perform a duty which pertained to the telegraphic service, or a duty which was imposed upon him because he was a telegraph operator. This service of putting out a proper signal for passing trains, and thus seeing that no train passed within 10 minutes of another, could properly have been imposed on the station agent, or upon Jenkins, as a signalman, if he had not been a telegraph operator. It is true that by rule 390 telegraph operators report to, and receive their instructions from, the chief dispatcher, and it is also true that they must, by same rule, obey the instructions of the station agent when they do not interfere with their duties as operators. In this instance Jenkins did not receive instructions from the chief dispatcher, nor was his failure of duty in reporting or not reporting to him, but was the failure to perform a duty imposed upon him by general rules, and was a service which might have been performed by him without relation to or connection with his duties as telegraph operator. If he had in this instance stopped train No. 1, and informed the conductor of the time of the passage of the other train, his whole duty, under the rules, would have been performed, and the duty of detaining the train would have been upon others.

Jenkins was, in this service, performing a work which had for its object the same as the service of Clark, viz., the proper and safe running of trains on the road, and thus, having the same employer, and engaged in a common employment, was a fellow servant with Clark, the fireman on train No. 1., and not the vice principal of the railroad company. The relation of Clark and Jenkins was in a general way not unlike that between Randall, the switchman, and the engineman, whose unskillfulness and negligence caused the injury to Randall. In that case the supreme court said:

"They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time; so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master." Randall v. Railroad Co., 109 U. S. 484, 3 Sup. Ct. Rep. 326.

The counsel cite each a case to sustain their respective contentions. The one cited by counsel for defendant in error is from the circuit court of appeals for the ninth circuit,—Railroad Co. v. Charless, 2 C. C. A. 386, 51 Fed. Rep. 567. That court is excellent authority, but an examination of the case will show this was not the material point in the case, but that it had gone off on other points, and that on the trial the alleged negligence of the telegraph operator had been abandoned. The court was considering a demurrer which had been overruled, and was assuming all the allegations of the petition as true. Under these allegations, the court considered the negligence of the telegraph operator as the same as that of a train

dispatcher. This question was given only a passing notice, and the court evidently placed the case upon other grounds. The decision is not, therefore, entitled to the same weight as it would be if the question had been material or important.

The other case, cited by the counsel of plaintiff in error, is from the circuit court of the district of Minnesota,—McKaig v. Railroad Co., 42 Fed. Rep. 288. In that case, the relation which a telegraph operator bore to the engineers, firemen, and others running trains on the road was the question, and is similar to the case under consideration, except much stronger, in that the negligence of the operator was in not signaling a train, and delivering special orders sent him by a train dispatcher, who was running the trains that collided by telegraph. The facts are briefly these: The east and west bound trains were running on telegraph orders from the chief train dispatcher of that division. The first order was that these trains should meet each other at Buffalo. One of the trains lost so much time that it became necessary to change the place of meeting of these trains to a point further west. The train dispatcher telegraphed the telegraph operator at Tower City to put out signals, and hold the east-bound train for orders. The operator, in answer, telegraphed to the train dispatcher that the signals had been put out, and the dispatcher thereupon issued orders to change the place of meeting of trains from Buffalo to Tower City. This order was delivered to the west-bound train, and it started towards Tower City, expecting to meet the other train there. The east-bound did not stop at Tower City, but ran on, and a collision was the consequence, in which the plaintiff, a fireman on the west-bound train, was hurt. The charge was negligence of the defendant, and the case turned upon the alleged negligence of the telegraph operator in not putting up the proper signals and stopping the train, as ordered by the train dispatcher.

The court (Judge Nelson) sustained a motion to instruct the jury to find for the defendant, upon the ground that the telegraph operator was, in that service, a fellow servant of the plaintiff, and the railroad company was not liable therefor.

The court, after a review of the cases somewhat, said:

"The engineers and firemen of the east and west bound trains were in the same common employment, having the same object in view, and so was the telegraph operator at Tower City, who, under his duty, and the orders which were sent to him, was required to communicate information to the engineer of the east-bound train how to run and what to do. He was a coemploye with them in the same common employment—common service—of operating both trains at that time, and within the definition of who are 'fellow servants' and who are 'coemployes.' * * * The negligence of the telegraph operator was not the negligence of the railroad company."

In this opinion the court assumed as settled law that the negligence of the chief train dispatcher would have been the negligence of the company, and it would have been liable for any injury done plaintiff by such negligence, but drew a distinction between a chief train dispatcher and a telegraph operator. As this case was evidently put by the trial court upon the negligence of Jenkins, the

operator at Rathburn, being the negligence of the company, we are constrained to reverse it for this error in the charge.

The verdict and judgment of the court must be set aside, and new proceedings had in conformity with this opinion, and it is so ordered.

SMITH v. NEW YORK LIFE INS. CO.

(Circuit Court, N. D. California. June 26, 1893.)

No. 11,450.

1. ADMINISTRATORS — ADMINISTRATION IN DIFFERENT STATES — SUITS ON LIFE INSURANCE POLICY.
   A widow, shortly after her husband's death, removed from Illinois to California, taking with her a policy of insurance on her husband's life, and there took out letters of administration, and brought suit on the policy. In the mean time an administrator had been appointed in Illinois, and had there brought suit on the policy. *Held*, that the pendency of the Illinois suit was no bar to the California suit, for the policy was assets of the estate in the latter state, and the issuance of the letters of administration was legal. Insurance Co. v. Woodworth, 4 Sup. Ct. Rep. 364, 111 U. S. 138, followed.

2. SAME—SUITS BY ADMINISTRATOR—FRAUDULENT CONVEYANCES.
   The California suit could not be defeated on the ground that the deceased, before his death, had assigned the policy to a third person, it appearing that such assignment was made for the purpose of defrauding his creditors, of whom his wife, the plaintiff, was one; for Civil Code Cal. § 3439, makes all transfers of property with intent to defraud any creditor void as to all creditors; and Code Civil Proc. § 1589, makes it the duty of an administrator, when there is a deficiency of assets, to sue for all property conveyed by the decedent for the purpose of defrauding his creditors.

3. SAME—FRAUDULENT CONVEYANCES—CONFLICT OF LAWS.
   The alleged fact that the conveyance was valid by the law of Illinois, where it was made, was immaterial, for the laws of Illinois could not affect property and credits in California, against the express provisions of the California statute.

4. FRAUDULENT CONVEYANCES—EVIDENCE.
   A husband, being indebted to his wife, who was about to institute proceedings against him for divorce, gave to a third person a bill of sale of all his property, worth nearly $12,000, of which $10,000 was practically in money, in payment of a debt of $3,400. *Held*, that the conveyance was void, as being made with intent to defraud his wife of her claim.

5. SAME—BILL OF SALE.
   The fact that the bill of sale was ambiguous, so as to make it doubtful whether $5,000 in money belonging to the seller was intended to be conveyed, would not prevent the instrument from being invalid when it clearly appeared from parol evidence that it was the intention of the parties to include the $5,000.

At Law. Action by Eudora V. Smith against the New York Life Insurance Company to recover on a policy of insurance. Jury waived, and trial to the court. Judgment for plaintiff.

Henry N. Clement, for plaintiff.
Wilson & McCutchen, for defendant.

McKENNA, Circuit Judge, (orally.) Plaintiff sues as administratrix of the estate of William F. Smith, deceased, to recover the sum

of $5,800, alleged to be due on a life insurance policy. At the time of the issuance of the policy, and at the time of his death, Smith was a resident of Chicago, Ill. Negotiations, the details of which are unimportant here, were pending between him and his wife, the plaintiff, looking to a divorce between them, she only having grounds therefor. Upon obtaining the divorce she was to receive $5,000 in money and the insurance policy, in trust for their son, who lived with her in this state. As assurance to plaintiff, the policy was deposited with Mr. Campbell and the money with Mr. Lynch, in this state. Dr. Smith died before the proceedings for divorce were instituted. To obtain the $5,000, he borrowed on 10th of March, 1891, $1,700 of one Dr. J. B. Murphy, of which $300 was returned next day, leaving a balance of $1,400. Within a few days afterwards he borrowed $2,000 of the Ft. Dearborn National Bank of Chicago, upon a note signed by Dr. Murphy and himself, which note was afterwards taken up, and Dr. Murphy's personal note substituted for it. On April 4, 1891, Dr. Smith executed and delivered the following instrument to Dr. Murphy:

"Chicago, April 4, 1891.

"For value received, I hereby sell, assign, and transfer to John B. Murphy all of the property, effects, choses in action, and things of value hereinafter mentioned, and all my right, title, and interest therein: A judgment note, made by Morris J. Allburger for $8,700 or thereabouts; a policy in the N. Y. Mutual Insurance Company for $5,000 or thereabouts; accounts due me as shown by my books, and said books; my horse and buggy; all my stock bonds in all corporations and associations; all my library, books, instruments, office furniture, and effects of every kind soever. And I hereby authorize said Murphy to take immediate possession thereof, or possession thereof at any time hereafter. Wm. F. Smith. [Seal.]"

This bill of sale is set up as a defense by the defendant, claiming it to be an assignment of the policy. There is no doubt the policy referred to is the policy sued on in this case. At the time of the execution of said bill of sale, Smith made his last will, by which bequeathed all his estate to Elizabeth C. Merrill, subject to the payment to Dr. Murphy of $3,400, $50 to his son, and $50 to plaintiff, whom he described as formerly his wife. He appointed an executor, but the latter declined to act, and letters of administration with the will annexed were taken out by the Jennings Trust Company of Chicago, who brought suit on the policy of insurance in Illinois against defendant. This suit is also pleaded as a defense, and it is hence contended that the power to recover on the policy is in the Illinois administrator, where Smith resided and died, and not in California, where the policy was at the time of his death, and now is.

In the case of Insurance Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. Rep. 364, one Ann E. Woodworth was insured in the New England Mutual Life Insurance Company, she being at that time a resident and domiciled in the state of Michigan. She died in Seneca Falls, N. Y. After her death her husband removed to the state of Illinois, and took out letters of administration, then having in his possession the policy of insurance. It was held by the court that

the policy was personal property, situate in Illinois, and the issuance of letters of administration in that state was legal, and that the defendant was properly sued in Illinois. The court further said: "Payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere." The policy of insurance sued on in this case, therefore, is undoubtedly assets of the estate in California, and the plaintiff is entitled to recover, unless the assignment to Dr. Murphy conveyed the policy to him. The plaintiff, however, contends that the assignment was made to delay and defraud her as a creditor of the assignee. By section 3439 of the Civil Code of this state, "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest;" and section 1589, Code Civil Proc., requires an executor or administrator, when there is a deficiency of assets, to sue and recover all goods, chattels, rights, or credits which have been conveyed by decedent in his lifetime with intent to defraud his creditors, or to avoid any right, debt, or duty of any person.

The plaintiff was not only the wife of decedent, but she was a creditor also, she having obtained a judgment against him for alimony, which, at the time of his death, was unpaid; and the evidence, in my opinion, shows that the assignment to Dr. Murphy was made to defraud her, and to give his property, after the satisfaction of the doctor's claim, to Miss Merrill, the residuary legatee of his will. A motive for this purpose the testimony of witnesses for defendant supplies. To the lawyer who drew the assignment and will Dr. Smith expressed the utmost aversion for his wife, the utmost affection for Miss Merrill. He virtually disinherited his minor son. The sum of $50, which he bequeathed to him, was not a substantial bequest.

Of the property described in the bill of sale a portion exclusive of stock was sold for $1,350. Certain of the stocks were sold for $380. The other stocks are said to be worthless, and the judgment against Allburger is also said to be worthless. The policy of insurance was good, absolutely good, for $5,000, making, therefore, property to the value of $6,730 conveyed for $3,400,—not to secure, but to pay $3,400,—for Dr. Murphy distinctly testifies that the bill of sale was payment, not security. That is $3,330 more than Dr. Smith owed Dr. Murphy. The disproportion was greater, if we include the $5,000 in money which was in the hands of Mr. Lynch. That this sum was intended to be conveyed the defendant denies, but the evidence establishes it. The bill of sale says, among other things, "All my library, books, instruments, office furniture, and effects of every kind soever." This is ambiguous. Considering the instrument alone, whether the word "effects" is to be regarded as independent and as comprehending all other property of Dr. Smith, or whether it is to be limited by the word "office," and be confined to office effects, is disputable; but what

the parties intended to be conveyed is not disputable, and, if the purpose was fraudulent, a mistake in executing it did not alter its character. The lawyer who drafted the bill of sale testifies how it came to be executed, and what was said when it was delivered. His testimony is: "Doctor Smith said, addressing himself to Doctor Murphy: 'Doctor, in payment for the debt I owe you, * * * I desire to execute and deliver to you a bill of sale of all of my property of every kind, no matter where the same may be, and everything of value that I have got.'" Language could hardly be more comprehensive. It is emphasized further by Dr. Murphy's reply. He replied: "If you have transferred everything to me that you have, I cannot expect any more from you. * * *" Other witnesses confirm this testimony, but it is not necessary to quote them. Indeed, that the bill of sale does not, or was not intended to, convey the $5,000 in money, is the excuse of the defendant. It never was the excuse of Dr. Murphy. He always claimed, and still claims, the $5,000 in money, and by the claim justifies acts which certainly otherwise would be inconsistent with the character of the bill of sale as payment, which, as we have seen, he testified it was. I have no doubt, therefore, that the bill of sale, no matter what its language alone may justify, was intended to convey the $5,000 in money as well as all other property of Dr. Smith; and it would be an extreme credulity to believe that he meant only to pay Dr. Murphy, when he conveyed to him $11,730, for an indebtedness of $3,400, and practically $10,000 of the sum in money. If it be said that litigation with the plaintiff was expected as to this amount, the answer is, the expense of litigation could not have been expected to reach the sum of $8,330,—the difference between $10,000 and the balance due Dr. Murphy after deducting the amount realized from the other property. The conclusion deduced from the disproportion of the property conveyed to the amount of the debt owed is confirmed by other evidence, which it is unnecessary to mention.

It is contended by defendant that the transfer was good by the laws of Illinois. It is not necessary to determine whether it was or not. The laws of Illinois cannot be extended to affect property and creditors in California against the provisions of section 3439 of the Civil Code of California. Green v. Van Buskirk, 7 Wall. 139; Whart. Confl. Laws, § 334 et seq., and cases cited. It is also contended that the bill of sale is only voidable, not void, and that it must prevail until set aside in a direct proceeding. This contention is not good. The Codes of this state make the transfer void, not voidable, and therefore it can have no effect whatever.

Judgment for plaintiff.

Mr. McCutchen: I will ask for a stay of 20 days.

Mr. Cannon: I do not think Mr. Clement will have any objection to it.

The Court: Very well.

COFFIN et al. v. BOARD OF COM'RS OF KEARNEY COUNTY.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 231.

1. MUNICIPAL CORPORATIONS—BONDS—POWER TO ISSUE.
When the power of a municipal corporation to issue negotiable paper is called in question, it will not be deduced from uncertain inferences, and can be conferred only by language which leaves no reasonable doubt of an intention to confer it. Brenham v. Bank, 12 Sup. Ct. Rep. 559, 144 U. S. 173, followed.

2. SAME—CONSTRUCTION OF KANSAS STATUTE.
Laws Kan. 1876, c. 63, § 1, concerning the organization of new counties, contained a proviso that "no bonds of any kind shall be issued by any county * * * within one year after the organization" thereof. This act was afterwards amended, (1 Gen. St. Kan. pp. 535, 536, § 120,) and the proviso was changed to the following: "That no bonds * * * shall be voted for and issued * * * within one year after the organization." *Held*, that the words "voted for" were a further restriction, and not an enlargement, of the power of counties, and that funding bonds were within the prohibition of the act.

3. SAME—RECITALS—ESTOPPEL.
A purchaser of municipal bonds is bound to ascertain whether the municipality has power to issue them, and an utter want of such power is not cured by any recitals in the bonds. Dixon Co. v. Field, 4 Sup. Ct. Rep. 315, 111 U. S. 83, followed.

4. SAME—KANSAS STATUTE.
Under Gen. St. Kan. pp. 535, 536, § 120, declaring that after certain steps have been taken a new county "shall be deemed duly organized, provided that no bonds shall be issued * * * within one year after the organization," a county, after taking such steps, is not "duly organized" for the purpose of issuing bonds, and is not estopped by any recitals in its bonds to show that they were issued within the forbidden time, and are therefore invalid in the hands of bona fide holders. State v. Commissioners of Haskell Co., 19 Pac. Rep. 362, 40 Kan. 65, approved.

5. SAME—MATTERS OF PUBLIC RECORD.
Municipalities are not estopped by recitals in their bonds, except as to matters of fact, nor even then if the facts recited are matters of public record, open to the inspection of every inquirer. Sutliff v. Commissioners, 13 Sup. Ct. Rep. 318, 147 U. S. 230, followed.

6. SAME—KANSAS STATUTE.
1 Gen. St. Kan. pp. 535, 536, § 120, providing for the organization of counties, declared that after certain steps had been taken the governor should appoint county officers, upon whose qualification the county should be deemed "duly organized," provided no county bonds should be issued within one year thereafter. An examination of the records in the executive department of the state would show the date of the appointment of such county officers. *Held*, that all purchasers of bonds were charged with notice of such date, and that the county was not estopped to deny the validity of bonds issued within one year thereafter, as against a bona fide holder.

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

At Law. Action on county bonds by William Edward Coffin, Walter Stanton, and Charles Fawcett Street, partners as Coffin & Stanton, against the board of county commissioners of the county of Kearney, Kan. The circuit court overruled a demurrer to defendant's plea, and on plaintiff's refusal to plead further gave judgment for defendant. Plaintiffs bring error. Affirmed.

Statement by THAYER, District Judge:

This was a suit on county bonds which were issued by Kearney county, Kan., on August 1, 1888, for the purpose of refunding its outstanding indebtedness. Each bond contained the following recital:

"This bond is one of a series of like tenor, date, and amount, issued to refund outstanding indebtedness of said county of Kearney, duly surrendered and canceled, in conformity to and in full compliance with the provisions of chapter 50, Laws of 1879, approved March 8th, A. D. 1879, entitled 'An act to enable counties, municipal corporations, the boards of education of any city, and school districts, to refund their indebtedness.'

"It is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of this bond have been properly done, happened, and performed, in regular and due form as required by law; and that the total indebtedness of said county, inclusive, is within the statutory limits."

Kearney county is one of the newly-organized counties of the state of Kansas. Its territorial limits were defined by an act of the legislature of the state of Kansas, which took effect March 23, 1889, (1 Gen. St. Kan. 1889, p. 522;) but it was organized under and pursuant to the provisions of a law of that state relating to the organization of new counties, which will be found in 1 Gen. St. Kan. pp. 535, 536, the material parts of which are as follows:

"Sec. 120. That when there shall be presented to the governor a memorial signed by four hundred householders who are legal electors of the state of Kansas, of any unorganized county, showing that there are two thousand five hundred bona fide inhabitants in such county, and that four hundred of said two thousand five hundred are householders and reside in said county, and praying for the organization of the same, accompanied by an affidavit attached thereto of at least five freeholders of such county, showing that the signatures to such memorial are genuine signatures of householders and bona fide residents within said unorganized county, residing therein for thirty days prior to the taking of such census, that affiants do believe that there are two thousand five hundred bona fide inhabitants in such county,—it shall be the duty of the governor to appoint some competent, disinterested person who is a citizen of the state and a nonresident of the county, to take the census and ascertain the number of actual bona fide inhabitants, as herein provided, of such unorganized county, who shall also act as assessor, and ascertain as nearly as possible the amount of taxable property that will be within the bounds of said unorganized county in case of its organization. The said census taker shall take and subscribe on oath that he is not interested directly or indirectly in said unorganized county, and that he will not become interested either directly or indirectly in any manner therein during his official term as said census taker, and that he will impartially and faithfully discharge the duties of his office, and that he will truly and correctly make return of the enumerated inhabitants and of the amount of property found by him within the bounds of the said unorganized county. After having qualified as aforesaid, he shall proceed to take the census of such unorganized county on duplicate schedules, by enrolling the names, ages, places of nativity, and actual place of residence, * * * of each of the bona fide inhabitants and the numbers of actual householders as herein provided residing in such unorganized county, and the number of acres of land cultivated by each. * * * The census taker shall register upon said duplicate schedules opposite the name of each legal voter his election for temporary location of county seat, which shall be taken by the governor as the definite expression of said voter, unless there shall be evidence before him that said list has been tampered with and changed. He shall also assess all property, both personal and real, at its true value, in the manner provided by law for taking the assessment in organized counties, and make due return thereof to the governor, upon appropriate schedules in duplicate, with his affidavit sworn to before the clerk of the supreme court of the state, attached thereto, that the census enumeration and assessment contained in said returns are impartial and true. If it appear by such returns that there are in such unorganized county at least two thousand five hundred actual bona fide inhabitants, as herein pro-

vided, and that four hundred of them are householders, and that there is at least one hundred and fifty thousand dollars' worth of property in excess of legal exemption, exclusive of railroad property, of which not less than seventy-five thousand dollars' worth is real estate, the governor shall appoint three persons, citizens of said unorganized county, to act as commissioners, and one to act as county clerk, to whom he shall cause to be delivered the duplicate returns aforesaid, one to act as sheriff, and when the election precincts shall have been established, at least one justice of the peace in each election precinct, and shall designate and declare the place chosen by the greatest number of legal voters to be the temporary county seat; *and from and after the qualification of the county officers appointed under this act the said county shall be deemed to be duly organized: provided, that no bonds except for the erection and furnishing of schoolhouses shall be voted for and issued by any county or township within one year after the organization of such new county, under the provisions of this act.*"

The proviso contained in the foregoing statute which we have italicised first appeared in an act relative to the organization of new counties, which was passed on March 15, 1876. As first enacted the proviso was as follows: "And provided further, that no bonds of any kind shall be issued by any county, township, or school district within one year after the organization of such new county, under the provisions of this act." Laws Kan. 1876, c. 63, § 1.

On March 11, 1887, the act relative to the organization of new counties was amended in some respects, and in the amended act—being the one in force when the bonds in suit were issued—the proviso was made to read as first above quoted.

It is conceded that Kearney county did not become duly organized as a county, within the meaning of the foregoing law, until April 3, 1888; but the bonds in suit were issued on August 1, 1888,—that is to say, within four months succeeding the due organization of the county.

The act referred to in the bonds, and under and by virtue of which they purport to have been issued, is an act which was passed by the legislature of Kansas long prior to the organization of Kearney county, to wit, on March 10, 1879. Vide 1 Gen. St. Kan. 1889, pp. 167, 168. The material portions thereof are as follows: "Every county, every city of the first, second, or third class, the board of education of any city, every township and school district, is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds, with semiannual interest coupons attached, in payment for any sums so compromised; which bonds shall be issued at not less than par, shall not be for a longer period than thirty years, shall not exceed in amount the actual amount of outstanding indebtedness, and shall not draw a greater interest than six per cent. per annum."

As a defense to the present action the defendant in error pleaded that the bonds sued upon were issued within one year after the temporary organization of Kearney county, and were for that reason issued without authority of law. To such plea the plaintiffs in error filed a demurrer, which was overruled by the circuit court. Thereupon the plaintiffs in error declined to plead further, and a final judgment was entered in favor of the county.

Silas B. Jones and W. H. Rossington, (Charles Blood Smith, on the brief,) for plaintiffs in error.

S. R. Peters, (J. W. Ady and J. C. Nicholson, on the brief,) for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The first question presented for our consideration is whether the

proviso contained in the act relative to the organization of new counties (1 Gen. St. Kan. 1889, p. 536, § 120) was intended by the legislature to prohibit newly-organized counties from issuing funding bonds, as authorized by the act of March 10, 1879, or was merely intended as a prohibition against the issuance of those bonds which could only be issued when authorized by a popular vote? Much stress is laid on the fact that the proviso as first adopted on March 15, 1876, declared that "no bonds of any kind shall be issued," etc., whereas the proviso, as amended on March 11, 1887, provides "that no bonds except for the erection and furnishing of schoolhouses shall be voted for and issued." It is said that, as funding bonds, under the general laws of the state of Kansas, may be issued without a popular vote, the addition to the proviso of the words "voted for," by the act of March 11, 1887, is significant, and indicates an intention to except funding bonds from the operation of the proviso.

This, we think, is a very partial view of the question, and one that overlooks some important considerations. It must be borne in mind that the legislature was dealing with newly-organized counties, that would rarely, if ever, have occasion during the first year of their existence to issue bonds for the purpose of funding their outstanding indebtedness, if their affairs were honestly administered. Again, it is hardly probable that the legislature intended to confer on the commissioners of a partially organized county the power to issue any class of bonds at will, during a period when they were deprived of the power to issue every other species of bonds which required the sanction of a popular vote. But a more important consideration is this: It is manifest to us that the restriction upon the power to issue negotiable securities was imposed upon newly-organized counties because the legislature deemed it unwise to confer that power until their affairs had become in a measure settled, and until the machinery for county government had been fully adjusted. We do not have to look far among the records of judicial proceedings in that state to discover the circumstances which probably gave rise to that opinion in the mind of the lawmaker. State v. Stevens, 21 Kan. 210; Lewis v. Comanche Co., 35 Fed. Rep. 343; Id., 133 U. S. 198, 10 Sup. Ct. Rep. 286. In view of the purpose which evidently inspired the proviso in question, it would be strange if the legislature intended to leave the newly-organized political subdivisions of the state at full liberty to issue funding bonds, and no such purpose should be presumed without the clearest evidence that such was the legislative intent; for, if that view should prevail, it might lead to the very train of evils which the lawmaker intended to prevent. The power contended for could be so wielded as to enable a few irresponsible persons, without any practical restraint, to saddle a new and sparsely settled county with a large indebtedness, that would prove a serious impediment to its future growth and prosperity.

Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable

paper to be clearly made out and established whenever the existence of such a power is called in question. A power of that nature will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it. Brenham v. Bank, 144 U. S. 173, 182, 12 Sup. Ct. Rep. 559; Ashuelot Nat. Bank v. School Dist. No. 7, (8th Circuit,) —— U. S. App. ——, —— C. C. A. ——, 56 Fed. Rep. 197.

In view of these considerations we have concluded that the proviso to which the discussion relates was intended to prohibit newly-organized counties from issuing bonds of any description until one year after they were duly organized. In our judgment, the words "voted for," which were added to the proviso by the amendment of March 11, 1887, instead of enlarging the power of newly-organized counties to issue bonds, were in fact intended as a further restriction, and were inserted in the proviso for the purpose of preventing such counties, during the first year of their existence, not only from issuing bonds, but from taking any of the preliminary steps requisite to an issue of negotiable securities. We think that this is a more reasonable view of the purpose of the amendment than that which regards it as authorizing newly-organized counties to issue funding bonds.

The next question to be considered arises out of the contention of counsel that the county of Kearney is estopped by the recitals contained in the bonds from asserting as against a bona fide holder thereof that the bonds are invalid. The argument in this behalf may be fairly summarized as follows: It is said that Kearney county, under the terms of the act relating to the organization of new counties, became a "duly-organized" county of the state of Kansas on April 3, 1888, by the appointment by the governor of three persons to act as commissioners, and by their qualification; that the phrase, "shall be deemed to be duly organized," as used in the act, implies that the county is admitted to the family of counties, and becomes vested with whatever powers are possessed by the older counties of the state, under the general laws of the state, including the power to issue funding bonds; and that the proviso heretofore quoted is merely a limitation of the right to exercise that power for a given period, to wit, for one year. From these premises it is argued that, in view of the recitals contained in the bonds herein sued upon, a purchaser thereof in the open market was not required to ascertain if the county had been organized for one year before the bonds were issued; in other words, it is contended, in effect, that the county officials who caused the bonds to be issued, had power to make a representation as to whether the time limited had expired, and that they did make such a representation, which is binding upon the county, whether true or false, in a suit on said bonds by a person who bought them on the faith of their recitals.

With reference to this contention we remark, in the first place, that we cannot assent to the proposition that the phrase "duly organized" must be held to mean that upon the appointment of com-

missioners for a new county, and upon their qualification, such county thereupon becomes vested with whatever powers are possesed at the time by other counties under the general laws of the state. The statute declares that "from and after the qualification of the county officers appointed under this act the said county shall be deemed to be duly organized: provided, that no bonds except for the erection and furnishing of schoolhouses shall be voted for and issued by any county or township within one year after the organization of such new county, under the provisions of this act." It was clearly competent for the legislature to admit a new county into the family of counties, and yet to withhold from such new county, for the time being, some of the powers which the older counties possess. And in view of the fact that the phrase, "said county shall be deemed to be duly organized," is immediately followed by the proviso, we think that the necessary effect of the proviso is to withhold from new counties for the period of one year the power to issue bonds which other counties possess. It declared, in effect, that the county should be deemed an organized county after the qualification of the commissioners, but that the general laws of the state empowering counties to issue bonds should not become operative within such new county until a year after its due organization. The proviso does not, as counsel suppose, impose a limitation upon the exercise of a power which becomes vested in a newly-organized county as soon as commissioners are appointed and qualified, but its effect is to prevent such power from becoming vested in a newly-organized county for a period of one year.

The view that we have thus expressed touching the proper interpretation of the act relating to the organization of new counties appears to be entertained by the supreme court of Kansas. In the case of State v. Commissioners of Haskell Co., 40 Kan. 65, 19 Pac. Rep. 362, the supreme court of that state had occasion to consider whether the proviso prohibiting new counties from issuing bonds during the year succeeding their organization was a valid prohibition, or whether it violated that clause of the constitution of the state which declares that "no bill shall contain more than one subject, which shall be clearly expressed in its title." In considering that question, the court said, in substance, that the organization effected by the appointment and qualification of commissioners for a new county is not "a completed or perfected organization sufficient for all purposes, * * * but at most is only temporary or provisional, * * * and for special and limited purposes." It was further remarked that when the legislature declared that, after "the temporary officers appointed by the governor * * * have qualified, the county shall be deemed duly organized," it meant, and in effect said, that "it should be deemed duly organized, except for certain purposes, including the voting and issuing of bonds." It is manifest from these expressions that the supreme court of Kansas construed the act relating to the organization of new counties as withholding from such communities some of the powers which fully organized and older counties possess, and that among the powers so

withheld was the power to issue negotiable bonds; and this view of the act—that it withholds the power in question for the term of one year, instead of conferring it under certain limitations—overthrows the foundation on which counsel attempt to erect an estoppel, for no doctrine is better established than that a purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue such securities, and that no recital contained in a municipal bond can cure such a defect as an utter want of power in the municipality to execute it. Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315; Town of Coloma v. Eaves, 92 U. S. 484, 490; Marsh v. Fulton Co., 10 Wall. 676; Northern Bank of Toledo v. Porter Tp. Trustees, 110 U. S. 608, 615, 4 Sup. Ct. Rep. 254; Anthony v. Jasper Co., 101 U. S. 693, 697; McClure v. Township of Oxford, 94 U. S. 429.

But, even if we were able to concede, according to the contention of counsel, that a newly-organized county in the state of Kansas is endowed with power during the first year of its existence, and by virtue of the appointment and qualification of commissioners, to issue funding bonds, and that the proviso is a mere limitation as to time, of the mode of exercising that power, still we would not be able to concede the further proposition of counsel that purchasers of bonds issued by such counties are not required to ascertain the age of the county, but may rely as to that upon recitals which such bonds happen to contain. It has frequently been held that municipalities will not be estopped by recitals contained in bonds unless the recitals relate to matters of fact which it may fairly be presumed that the officers of the municipality were left to determine. Town of Coloma v. Eaves, 92 U. S. 484, 490; Dixon Co. v. Field, 111 U. S. 83, 94, 4 Sup. Ct. Rep. 315; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. Rep. 654; National Bank of Commerce v. Town of Granada, 54 Fed. Rep. 100. And the later decisions on this subject distinctly announce that recitals cannot be relied upon as an estoppel, where the facts recited are matters of public record, and are open to the inspection of every one who is disposed to make inquiries. Sutliff v. Commissioners, 147 U. S. 230, 235, 13 Sup. Ct. Rep. 318; Nesbit v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. Rep. 746; Dixon Co. v. Field, and Northern Bank of Toledo v. Porter Tp. Trustees, supra. In the present case the fact which rendered the bonds invalid was a matter which could easily have been ascertained from the public records of the state. The act relating to the organization of new counties provides that the commissioners for such counties shall be appointed by the governor. It was at least incumbent on the purchaser of the bonds to ascertain that Kearney county had become a recognized political subdivision of the state. That fact had to be ascertained to enable the bondholder to further ascertain if it had power under any circumstances to issue bonds. And even a casual examination of the record kept in the executive department would have disclosed the fact that commissioners were not even appointed until April 3, 1888, which was less than four months previous to the day on which the bonds bear date. It seems obvious, therefore, that within the

doctrine of the cases last cited, the purchasers of the bonds were bound to take notice of the fact that the bonds in suit had been issued within less than one year after the organization of the county, and were for that reason invalid.

We are of the opinion, therefore, that the circuit court properly overruled the demurrer to the plea, and its judgment is hereby affirmed.

HARLEY v. LOUISVILLE & N. R. CO.

(Circuit Court, D. Tennessee. June 2, 1893.)

RAILROAD YARD—YARD MASTER — FOREMAN — SWITCHMAN—VICE PRINCIPAL—FELLOW SERVANTS.

A railroad yard was shown to consist of side tracks upon either side of the main track, adjacent to some principal station or depot, where arriving trains are separated and departing trains made up, and where such switching is done as is essential to the proper placing of cars for deposit or departure. All operation of the yard was under the direction and supervision of a yard master. The several yard switching crews were each under the control of a foreman or conductor. A brakeman of one of the crews claimed to have been injured by the negligence of his foreman in giving a signal at improper time, whereby the train was moved, and ran over his foot. *Held*, under authority of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914, that the foreman and switchman were fellow servants, and the railroad company was not liable for negligence of foreman resulting in injury to switchman.

At Law. Action by T. J. Harley against the Louisville & Nashville Railroad Company to recover damages for personal injuries sustained while in its employment. There was a verdict for plaintiff, and the case is now heard on motion for a new trial. Granted.

Steger, Washington & Jackson, for plaintiff.

Smith & Dickinson, for defendant.

LURTON, Circuit Judge. Plaintiff, while in the employment of the defendant company as switchman, and while engaged in switching cars in the yard of the company at Nashville, was run over, and lost a leg. The jury have returned a verdict in his favor, and a motion for a new trial has been argued. In its present attitude the case must turn upon the single question as to whether the negligent movement of the train while plaintiff was between cars in the discharge of his duty, was due to signals given by a fellow servant. Harley, the plaintiff, belonged to a switching crew engaged in the yards of the company at Nashville. A "switching crew," or "train," as sometimes designated by witnesses, consisted of an engine, an engineer and fireman on the engine, and several switchmen, all under the control of a superior servant, designated generally as the "foreman," though occasionally spoken of as "conductor" of the "switching train." The force in the defendant's yards at Nashville seems to have been divided into several such crews, each under control of a foreman, and the whole under the general control and supervision of an officer of

still higher grade, designated "yard master." The yard master has power to employ and discharge all yard employes, including the foremen of switching crews. The yard of the company, as the court may know from its general knowledge of the methods and appliances of railroad companies, as well as from the evidence in this case, consists of side tracks upon either side of the main tracks, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure. All the operations of the yards at Nashville are under the direction and supervision of a yard master, and his subordinates in control are the foremen of the several gangs or crews of men engaged in the movement and switching of cars within the yard. The yard master's orders were communicated to the foreman, and the foreman had control and direction of the crew under him, and through them executed the orders of his superior with regard to the switching he was directed to do.

Plaintiff was directed by his foreman to uncouple certain cars attached to others, which had been moved from a track upon which they had been standing, which cars, when uncoupled, were to be deposited upon a particular track in the yard. While endeavoring to uncouple, and while between the cars, the train was moved. He was so jostled as to lose his footing, fell, and was run over. It was clearly shown that when a switchman or brakeman was to make or unmake a coupling it was his business to signal the engineer for such movement of the train as was necessary in the discharge of his duty. There was evidence that plaintiff found difficulty in uncoupling, and came out and gave a signal to the engineer to "give him the slack," and that the movement which resulted in his injury was due to his own signal. On the other hand, there was evidence tending to show that, while plaintiff was between the cars, the foreman gave a signal to move backwards, and that the engineer's compliance with this signal brought about the accident. The latter is the most favorable view of the case for the plaintiff, and was the view argued by plaintiff, and the only view upon which any recovery could be predicated. If it be assumed that the verdict is based upon the theory that the foreman negligently signaled for a movement of the train before plaintiff had come out from between the cars, ought it, under the law, to stand? There was evidence sufficient to justify the jury in finding, as they must have done, that the foreman negligently ordered the movement of the train while plaintiff was in a dangerous situation. Was this foreman a fellow servant with the plaintiff, for whose negligence the company was not liable? I instructed the jury that he was not a fellow servant, if they found that he had immediate command and control of the switching crew and train, as to the employes under him, such as the engineer, foreman, and switchmen. I also instructed them that, if plain-

tiff was subject to the control and direction of the foreman, and that, if under such direction plaintiff undertook to uncouple cars in the train being handled under directions of the foreman, and if, while obeying this order, the foreman negligently caused the train to be moved, thereby knocking down and injuring plaintiff, the defendant company would be liable; that in such case the foreman stood as a vice principal, and represented the master, and his negligence would be the personal negligence of the master.

The test of responsibility was made to consist in the fact that the negligence was that of the immediate superior of the plaintiff, who had a right to direct and control the plaintiff in the matter and upon the occasion when the injury was sustained. This is the common law, as explained and expounded by the supreme court of Tennessee, the state wherein the injury was sustained and in which the suit was brought. Railroad Co. v. Bowler, 9 Heisk. 866; Railroad Co. v. Collins, 85 Tenn. 227, 1 S. W. Rep. 883; Railroad Co. v. Wheless, 10 Lea. 741. I was further of opinion that the principle upon which the case of Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184, rested, was in harmony with the law of Tennessee. Since charging the jury, and pending this motion for a new trial, the opinion of the supreme court of the United States in the case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914, has been received. This case was not decided until April 24, 1893. That court, after most mature consideration, held in that case: (1) That the question as to who is and who is not a fellow servant is a question of general, and not local, law, and to be determined by courts of the United States "by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant." (2) That "the mere control of one servant over another in doing a particular piece of work" does not destroy the relation of fellow servant. (3) That the liability of the master to a servant who has sustained an injury through the negligence of another servant depends upon conditions wholly independent of the mere superiority of the negligent servant, or his control over the injured servant.

The conditions, as adjudged in the Baugh Case, are these:

(1) If the negligence of the superior servant was in regard to some positive duty, which by law the employers owe to the employe, as in regard to the duty of furnishing the employe a reasonably safe place in which to work, or reasonably safe appliances with which to work, or that he will not associate the servant with other servants unfit and careless, then for every such act of negligence the master is liable, for he cannot, by delegating to an agent the discharge of an affirmative duty, escape his responsibility to the injured servant.

(2) If the negligence be not the breach of some positive duty, then the master is only liable if it be his personal wrong, in contradistinction to the legal negligence just mentioned.

Where the master is an individual, the difficulty in regard to this aspect of his responsibility to his servants cannot be very great;

but where the master is a corporation the courts have found great trouble in determining just where the negligence is to be regarded as that of the master and ceases to be that of a fellow servant. A corporation can act only through agents. It has no personality. Which of these agents is to be regarded as acting for and representing the master is the point in regard to which the decided cases have been in hopeless conflict. Which of these many servants are to be regarded as "vice principals," and which of them are to be regarded as "fellow servants?" All servants are in some sense agents of such a master; all, in some degree, represent and stand for the master; but this is so in regard to the employes of an individual, and yet it cannot be pretended that all therefore represent and bind him by their negligent or wrong acts.

With regard to the control which is assumed to underlie the relation of master and servant, Mr. Justice Brewer, in the Baugh Case, said:

"Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants; and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master to further his interest in the one enterprise. Each knows, when entering into that service, that there is risk of injury through the negligence of other employes; and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross Case, (page 382, 112 U. S., and page 186, 5 Sup. Ct. Rep.,) it was said: 'Having been engaged for the performance of specific services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffer by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffer from a risk which he has voluntarily assumed, and for the assumption of which he is paid.'"

But when we are to deal with a corporation acting only through agents, how are we to determine when an act of negligence, committed by one servant to the injury of another, is the personal negligence of the employer, as distinguished from the mere negligence of a coworker and fellow servant, whose negligence he has agreed to risk? The Tennessee rule, and that of several other states, including Ohio, was that, whenever one servant was in control of another, the controlling servant, in the line of his duty, was, as to the subordinate servant, a vice principal, and was therefore the responsible representative of the corporation. The weight of authority, however, was clearly against this as a controlling limitation. It is a limitation expressly repudiated by the United States supreme court, and, as a United States circuit judge, it becomes my duty to conform to the view so strongly announced as is the utterance of that court in the Baugh Case. To hold a corporation liable for an injury sustained by one servant through the personal carelessness of a superior servant, the superior servant must be shown to stand for and represent the corporation as the superintending and commanding head of one of the separate and distinct departments of its service. This is the clear holding of the Baugh Case. There may

be difficulty at times in determining just where the line is to be found between the separate branches or departments of a railroad company's service. There may be difficulty sometimes in determining just who represents the company as the head of such department. The illustrations of such separate branches or departments used by Mr. Justice Brewer in the Baugh Case concern two departments, so separate and distinct that all would be able to discern the servants of one from the servants of the other, and so it would be very evident why each should constitute a separate branch or department. The reason why a railroad train under charge of a conductor should be regarded as a separate branch or department of service is not so apparent, yet the Ross Case is left to stand upon this narrow and apparently untenable ground.

The underlying principle upon which the decision in the Baugh Case was rested is very pronounced. Baugh was a fireman on a locomotive engine. He was injured through the negligence of his engineer. The engine was on detached service, and the engineer had charge and control of it and his fireman. By the rule of the company, in the absence of a conductor, the engineer became "conductor." It was held that an engine out on the road was not a separate branch or department, and that the corporation was not liable for the negligence of the engineer, although he was in control and the superior of the fireman. Upon the department idea, the decision could not be otherwise. The result must be the same in the case under consideration. The foreman of the switching crew, engaged in the yard of the railroad company, under the general control of a yard master, cannot be regarded as the head of a distinct branch or department of a railroad company's service. The words used to designate the kind of control and superintendence necessary to constitute an agent the alter ego of the master are words implying a natural and distinct subdivision of the service. He must superintend or control a "branch" or a "department." To say that the foreman of a switching crew represents the switching branch or department of the company's service would lead to most absurd results. The same might be said of every gang of men under charge of a boss, and doing a particular work, whereby we would at once get back to the test of mere control, so distinctly repudiated in the Baugh Case. If the service or work in which the plaintiff was engaged was a separate branch of the company's service, and to be separated from the general operating department, then the yard master represented the company as the superintendent of such branch or department. The foreman of the crew to which plaintiff belonged was a subordinate under the control and direction of the yard master, and the latter under the orders and control of a still superior servant. This foreman was a mere coworker with plaintiff. That he had control of plaintiff is immaterial. Under the Baugh Case he must be taken to have assumed the risks incident to the negligence of such foreman in immediate control. The danger from "the negligence of one specially in charge of the particular work was as obvious and as great as from that of those

who are simply coworkers with him in it." He assumed and was paid for the risks incident to each.

I conclude by again quoting from the opinion of Mr. Justice Brewer:

"Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other." "Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employe, it includes all coworkers to the same end, whether in control or not."

The verdict must be set aside and a new trial awarded.

BOARD OF COM'RS OF KINGMAN COUNTY v. CORNELL UNIVERSITY.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 234.

1. RAILROAD COMPANIES—MUNICIPAL AID—COUNTY BONDS—VALIDITY.
   A county, with general powers to lend its credit in aid of railroads, issued bonds in exchange for the stock of a railway company on condition that the company build a railway of standard gauge through the county, which condition was subsequently fulfilled. In making this issue, all formalities required by law were complied with. *Held*, that the county could not set up the defense of ultra vires, in an action on the bonds, merely because the railway company was authorized to build only a narrow-gauge railroad.
2. SAME—RECITALS—BONA FIDE HOLDER.
   County bonds bore on their face recitals that they were issued to a certain railway corporation in payment of a subscription for stock, made by virtue of a certain act of the state legislature, (cited by title and date,) and acts amendatory thereof; "the provisions and requirements of said acts, and the conditions precedent necessary to the subscription aforesaid, and the lawful issue of this bond, having been in all respects fully and completely complied with and performed." *Held*, that the defense of ultra vires was not available in an action on the bonds, as against a bona fide purchaser for value on the faith of the recitals, and without notice that the corporation was authorized to construct only a narrow-gauge road, and that the bonds were issued on condition that the road should be, as it in fact was, of standard gauge.
3. SAME—POWER OF COUNTIES UNDER KANSAS STATUTE.
   Act Kan. March 3, 1877, § 2, (1 Gen. St. Kan. 1889, pp. 456, 457,) empowered counties to issue bonds to aid in the construction of narrow-gauge railways to the amount of $4,000 per mile, and to exchange them for second mortgage bonds of such railways. Section 3 provided that the act should not be construed to repeal or change any then existing law authorizing counties to issue bonds in aid of railroads. Prior to the passage of this act, counties were empowered to issue bonds in aid of railways irrespective of the gauge, but could not make such issue in exchange for second mortgage bonds. *Held*, that the act of 1877 did not take away the pre-existing power of counties to issue bonds in aid of railways.

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

At Law. Action by Cornell University against the board of commissioners of the county of Kingman, Kan., to recover upon certain railroad aid bonds of said county. Judgment was given for plaintiff. Defendants bring error. Affirmed.

Statement by Thayer, District Judge:

This is a suit on railroad aid bonds, which were issued on August 2, 1886, by Kingman county, Kan., to the amount of $125,000. The bonds contained the following recitals: "This bond is redeemable and payable after ten years, at the option of the board of county commissioners of said county, after twelve months' notice to the holder hereof, and is one of a series of one hundred and twenty-five bonds of like tenor, date, and amount, numbered from 1 to 125 inclusive, issued to the Denver, Memphis and Atlantic Railway, a corporation of the state of Kansas, in full payment of a subscription by the clerk of said Kingman county for and in behalf and in the name of said county of Kingman, for two hundred and fifty shares, of five hundred dollars each, of the capital stock of said railway corporation; said subscription to stock, and issue of bonds in payment thereof, being made under and by virtue of authority conferred by a certain act of the legislature of the state of Kansas, entitled 'An act to enable counties, townships, and cities to aid in the construction of railroads, and repeal section eight of chapter thirty-nine of the Laws of 1874,' approved February 25, 1876, and by the acts of the state legislature amendatory thereof and supplemental thereto, the provisions and requirements of said acts, and the conditions precedent necessary to the subscription aforesaid, and the lawful issue of this bond, having been in all respects fully and completely complied with and performed."

Laws that were in force in the state of Kansas at the time the bonds in suit were issued, and which are referred to in the bonds, empowered any organized county of the state of Kansas to subscribe to the capital stock of any railroad company constructing or proposing to construct a railroad through or into the county, and to issue bonds in payment for the stock so subscribed, provided that two-fifths of the resident taxpayers of the county first petitioned the board of county commissioners to call an election to determine if aid in such form should be extended, and provided, further, that at such election two-thirds of the votes cast were in favor of granting such aid.

The Denver, Memphis & Atlantic Railway, in whose favor the bonds in suit were issued first filed articles of incorporation under the general incorporation laws of the state of Kansas relative to the formation of railway corporations on October 11, 1883. In the original articles of incorporation the company was styled, "The Denver, Memphis & Atlantic Narrow-Gauge Railway," and the articles stated that it was organized, "to construct and operate a narrow-gauge railway and telegraph line between the cities of Denver, Colorado, and Memphis, Tennessee." On November 12, 1884, the stockholders of said company, by a resolution duly adopted, changed the name of the company to "The Denver, Memphis & Atlantic Railway," and a copy of such resolution was filed with the secretary of state for the state of Kansas on November 17, 1884.

On March 11, 1885, the requisite number of taxpayers of Kingman county (to wit, two-fifths) petitioned the county commissioners to call an election to vote upon a proposition that the county subscribe for 250 shares of the capital stock of the Denver, Memphis & Atlantic Railway, and in payment therefor issue bonds of the county to the amount of $125,000. The conditions contained in the proposition were as follows: "That the aforesaid Denver, Memphis & Atlantic Railway Company shall construct a good substantial railroad of standard gauge, with steel rails, and fully equipped to handle all business offered, and shall enter said Kingman county near the southeast corner, and run northwesterly via the city of Kingman through said county, and leave it near the northwest corner, with a freight and passenger depot and side tracks for the convenient handling of freight, within half a mile of the intersection of Maine and Sherman streets in said city of Kingman, and at such other points along the line of said railway in said county as will accommodate the shipping interests adjacent and tributary thereto. The aforesaid railway company shall commence work on their line of railway within nine months, and shall have it completed and in operation by lease or otherwise, to furnish a competing line to the city of Kingman, within eighteen months from the date of this election and through the county within two years from said date."

At an election duly called and advertised and held on April 14, 1885, the proposition aforesaid was accepted by the requisite majority of two-thirds of the votes cast, and thereafter the railroad was duly completed and put in operation in accordance with the terms of the proposition. The bonds were delivered to the railway company some days subsequent to August 2, 1886, and thereafter, for some three years, the county paid the interest thereon as it accrued.

At a meeting of the stockholders of the aforesaid railway company held on January 20, 1886, amended articles of incorporation were adopted, which were on February 2, 1886, filed in the office of the secretary of state for the state of Kansas. Such amended articles appear to have been adopted to remove all doubt of the company's right to construct a standard-guage road, instead of a narrow-gauge road, as at first contemplated. In the amended articles of incorporation, the clause in the original articles relative to constructing a narrow-gauge road was omitted, and in lieu thereof it was stated that the road proposed to be built, and then being built, was a standard-gauge railroad. It was further recited in the articles that such change in the plan of construction had been authorized by a resolution of the stockholders at a meeting held by them on September 26, 1885, and that since the latter date the company had been engaged in building a standard-gauge railroad on the route as originally laid out.

An act passed by the legislature of the state of Kansas on February 3, 1886, entitled "An act in relation to railway corporations, and authorizing and confirming change of gauge in certain cases, and municipal aid in such cases," (1 Gen. St. Kan. 1889, p. 478,) contains the following provision, among others: "Sec. 3. If before the passage of this act any such railway corporation by vote of its stockholders shall have changed the gauge of its track from narrow gauge to standard gauge, and shall within sixty days after the passage of this act, by its secretary and under its corporate seal, certify to the secretary of state the form of such change and the date thereof, such change is hereby ratified and affirmed, and shall have the same force and effect as if made after the passage of this act."

Pursuant to the foregoing section of said act, the secretary of the Denver, Memphis & Atlantic Railway on February 8, 1886, filed with the secretary of state a certificate showing that on September 26, 1885, the gauge of that company's road had been changed from a narrow to a standard gauge by a vote of its stockholders.

By an act passed by the legislature of the state of Kansas on March 3, 1877, (1 Gen. St. Kan. 1889, pp. 456, 457,) it was provided, in substance, in the first section, that any railroad duly organized for the purpose of building a narrow-gauge railroad might issue bonds to the amount of $10,000 per mile, $6,000 thereof per mile to be first mortgage bonds, and the residue to be second mortgage bonds. By the second section, counties, cities, and towns in that state were authorized to issue bonds in aid of the construction of such narrow-gauge roads to the amount of $4,000 per mile, and to exchange them for the second mortgage bonds of the railway company. By the third section of the act it was declared that the act should not be construed as repealing or changing any then existing law of the state of Kansas authorizing counties to issue bonds in aid of building railroads

As a defense to the present suit the county pleaded, in substance, that the bonds sued upon were issued without authority of law, and were therefore void, even in the hands of an innocent purchaser for value; and it relied upon the various laws of the state, and the proceedings heretofore recited, to substantiate such defense. The circuit court overruled the defense, and entered judgment against the county, whereupon it sued out a writ of error.

S. S. Ashbaugh, and Samuel R. Peters, (J. W. Ady and J. C. Nicholson, on the brief,) for plaintiff in error.

W. H. Rossington, Charles Blood Smith, E. J. Dallas, and R. T. Herrick, for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

To make good the defense that these bonds are void even in the hands of an innocent purchaser for value, the county endeavors to establish, and must establish, the following propositions:

First. That the Denver, Memphis, & Atlantic Railway only had authority to construct and operate a narrow-gauge railroad, when the proposition to take stock in that company, and to issue bonds therefor, was proposed to, and was accepted by, Kingman county.

Second. That after the passage of the act of March 3, 1877, relative to granting aid to narrow-gauge railroads, such roads could only be aided by counties and municipalities of the state of Kansas, in the mode prescribed by that act,—that is to say, by exchanging county bonds for second mortgage bonds of the railroad at the rate of $4,000 per mile.

Third. That the so-called curative act of February 3, 1886, authorizing and confirming a change of gauge in certain cases, contravenes the constitution of the state of Kansas, and is therefore void and of no effect.

And finally the county must maintain that, in view of the foregoing propositions, there was such an utter want of power to issue the bonds in controversy that the county is not estopped from denying their validity in a suit by an innocent purchaser for value.

As the last of these propositions is, in our judgment, the most important, we shall first consider it. It will be observed that from the standpoint occupied by the county—that is to say, admitting all of its premises—the sole defect in the bonds is the supposed want of power in the Denver, Memphis & Atlantic Railway to construct and operate a standard-gauge railroad at the time it undertook such construction, and at the time the bonds were voted by the inhabitants of the county. In no other respect does it appear that there was any such want of power attending the issuance of the bonds as will serve to render them void. It is not questioned that the county had ample authority, under the laws of the state, to aid in the construction of standard-gauge roads by taking stock in railroad companies which proposed to construct such roads through or into the county, and to issue its bonds in payment for such stock subscription; and it is not denied that the road proposed to be built by the railway company, when the bonds in suit were voted, was a standard-gauge road, and that such a road was actually built, and has been in operation through the county for the past seven years. Fairly stated, therefore, the defense interposed by the county is simply this: that it entered into a contract with the railway company to build a particular kind of road, which the company did not at the time have the charter authority to construct, and that the bonds which it issued and delivered are utterly void, notwithstanding the fact that the road has been built in exact compliance with the terms of the contract, and notwithstanding the fact that the county had a general power to issue bonds in aid of the construction of such a road as it bargained for, and has in fact received.

In view of the authorities, we feel justified in holding that, without reference to the recitals, the county is not at liberty at this time to plead as a defense to the bonds that the railway company exceeded its powers in constructing a standard-gauge road. The position occupied by the county is very different from what it would be, if it had agreed to issue the bonds in payment for stock, on condition that the railway company would build a narrow-gauge road, and if such a road had in fact been built. In that event it might be plausibly argued that the bonds were utterly void because the county had undertaken to aid in building a narrow-gauge road in a manner not authorized by law; but that argument is not tenable, on the facts disclosed by the present record, for the reason that the road constructed was of standard gauge, and aid was extended to the enterprise in the very manner contemplated by the statute. The want of power alleged is not a want of power in the county to aid in the work that was actually undertaken, or in the mode of granting such aid, but is merely a want of power in the railway company to construct a standard-gauge road. Furthermore, the act of the railway company in undertaking to build a standard-gauge road, was simply in excess of its charter powers, and was not otherwise contrary to law or illegal, and the contract between the county and the railway company is now fully executed. On the one hand, the road has been built, and the stock has been delivered, and, on the other, the bonds of the county have been issued, and have passed into the hands of innocent third parties. We repeat, then, that, in view of all the circumstances, we feel justified in holding that the county is not at liberty at this time to interpose the plea of ultra vires as a defense to the bonds. The general doctrine is that where a contract or undertaking which has been entered into by a corporation is simply in excess of its charter powers, and the same has been fully executed, the defense of ultra vires cannot be successfully pleaded in a suit to enforce negotiable securities or other obligations which have issued out of the original transaction. In such cases the state is entitled to restrain the offending corporation from exercising powers that do not belong to it, or to oust it of its franchises, in a proper proceeding brought for that purpose, but it is ordinarily held that in collateral suits between private litigants the plea of ultra vires is not available as a defense. Bank v. North, 4 Johns. Ch. 370; Bank v. Matthews, 98 U. S. 621; Gold Min. Co. v. National Bank, 96 U. S. 640; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Bradley v. Ballard, 55 Ill. 417; Ditch Co. v. Zellerbach, 37 Cal. 543; Argenti v. City of San Francisco, 16 Cal. 255; Allegheny City v. McClurkan, 14 Pa. St. 81; Wood's Field, Corp. §§ 230–235.

But we do not find it necessary, in this case, to rest our decision solely on the ground last indicated. The bonds in controversy are now held by a corporation which purchased them for value on the faith of their recitals, and without any actual notice of the matter relied upon as a defense, i. e. that the original articles of association of the Denver, Memphis & Atlantic Railway declared that the

company intended to construct and operate a narrow-gauge railroad. The bonds do not show on their face that the railway company is a narrow-gauge road, or that it was organized to build a road of that character. Under the laws of Kansas, all railroad corporations are organized under and pursuant to the same law relative to corporate organization, and the statute in question does not, in terms, require a railroad corporation to state in its articles of association whether its track is to be of a standard or of a narrow gauge. Furthermore, the bonds contain recitals showing that they were issued under laws existing in the state of Kansas, which conferred upon the county ample power to issue bonds for the purpose for which they purport to have been issued. In the case of County of Macon v. Shores, 97 U. S. 272, it appeared that county aid had been granted to a railroad company in the form of a stock subscription and by an issuance of bonds, although the company had not accepted its charter and become organized as a corporation within the time limited by law for such acceptance of the charter, and for organization thereunder. In a suit against the county upon the bonds, it was held that a plea that the company had not become organized within the time limited by law constituted no defense, as against an innocent purchaser of the securities. The same ruling was repeated in the case of County of Ralls v. Douglass, 105 U. S. 728, and in the latter case it was also held, that it was not competent for the county to show by way of defense, as against an innocent purchaser of its bonds, that when they were executed a person was acting as presiding judge of its county court who was not de jure a member of the court. It seems to be settled by these decisions that a purchaser for value of railroad aid bonds is not required to ascertain and to determine, at his peril, whether the railway corporation to whom they were voted and issued was at the time duly and regularly constituted; and, within this rule, we think that it may be safely affirmed that a purchaser of the bonds in suit was under no obligation to ascertain if the railway corporation to whom they were voted had the requisite charter authority to construct a standard-gauge road. That was a matter which did not so affect the power of the county to issue the bonds, as to make it the duty of the bondholder to institute inquiries. We hold, therefore, that, as there was nothing on the face of the bonds to indicate that the Denver, Memphis & Atlantic Railway was only authorized to construct a narrow-gauge railroad, a purchaser of the bonds was not affected with notice of that fact, and, furthermore, that the county is estopped from pleading such fact as a defense, in view of the recital, that everything had been "complied with and performed," which was "necessary * * * to the lawful issue of the bonds."

And, finally, we are not able to assent to the second proposition of counsel, which is stated at the beginning of this opinion, that the act of March 3, 1877, deprived counties of the state of Kansas of the power to aid in the construction of narrow-gauge roads otherwise than by exchanging municipal bonds for second mortgage

railroad bonds at the rate of $4,000 per mile. It admits of no doubt, we think, that prior to the passage of that act no distinction was made in that state between railroads of a standard and narrow gauge. They were organized then, as now, under the same law, and prior to March 3, 1877, undoubtedly possessed the same powers, franchises, and privileges, including the right to receive county aid in the form of a stock subscription or a loan of credit. But prior to March 3, 1877, counties in that state could not exchange their own bonds for second mortgage railroad bonds. That was a new feature added to the railway legislation of that state, and it was only made applicable to companies proposing to build narrow-gauge roads, and was most likely added with a view of holding out special inducements for their construction. We have not been able to discover anything in the provisions of the act in question which evidences an intention on the part of the legislature to withdraw from counties or other municipalities the power which they previously possessed to extend aid to narrow-gauge roads, but, on the contrary, the concluding section of the act of March 3, 1877, expressly declares that it shall not be construed "as repealing or changing any provision of any law of the state * * * authorizing counties * * * to issue bonds to aid in building railroads." Our conclusion is, therefore, that the act of March 3, 1877, is cumulative in its character, and that it enlarges the previous power of counties in the state of Kansas to aid in the construction of narrow-gauge roads.

The view which we have thus taken of the several questions already considered is decisive of the case, and renders it unnecessary to consider the other propositions, heretofore cited, which have been discussed by counsel. The judgment of the circuit court is manifestly for the right party, and it is hereby affirmed.

In re ROZELLE.

(Circuit Court, E. D. Arkansas, W. D. January 30, 1893.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MUNICIPAL LICENSE.

A municipal ordinance which imposes a license tax on every merchandise broker who maintains a warehouse or office within the city limits is void as to a broker whose sole business is making contracts by sample for the sale and delivery to citizens of the state of merchandise which, at the time of making the contract, is the property of citizens of other states, and is situated therein; for as to him it is a regulation of interstate commerce, and contravenes the provision of the federal constitution vesting power to regulate such commerce exclusively in congress. Ficklen v. Taxing Dist., 12 Sup. Ct. Rep. 810, 145 U. S. 1, distinguished.

At Law. Petition for a writ of habeas corpus. Prisoner discharged.

Coleman & Coleman, for petitioner.
Morris M. Cohn, for respondent.

WILLIAMS, District Judge. This is an application by petition of J. S. Rozelle to be discharged by this court upon a writ of

habeas corpus heretofore issued, stating that he is held in custody by one Sam Speight, a policeman of the city of Little Rock, and illegally restrained of his liberty. The response to the writ of habeas corpus by the said Speight states that he holds the petitioner by virtue of a warrant of arrest issued to him by the police court of the city of Little Rock, a municipal corporation of the state of Arkansas, because of the breach of an ordinance of said city by said petitioner, which ordinance ordains, among other things, as follows:

"Be it ordained by the city council of the city of Little Rock:

"Section 1. That it shall be unlawful for any person to engage in, exercise, or pursue any of the following vocations or business without having first obtained a license therefor from the proper city authorities, the amount of which license is hereby fixed as follows, to wit: (1) Every merchandise broker who maintains a storeroom or wareroom or office within the city limits, $50 per annum."

"Sec. 4. That whoever shall engage in any business for which a license is required in this ordinance without first obtaining and paying for the same as above required, and where not specifically amended herein, as required by the terms of Ordinance No. 391, passed December 29, 1891, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $25."

It is conceded that the petitioner is a merchandise broker, who makes contracts in this state by sample for the sale and delivery to citizens of this state of goods, wares, and merchandise which, at the time of entering into said contract, are the property of citizens of other states, and situated in such other states; and that it is no part of his business to make sales of such goods, wares, and merchandise situated in this state at the time of making any such contracts. And it is contended by said petitioner that he is not amenable to the provisions of said ordinance, and that the same is, as to him and his vocation, void, because it is in conflict with the provisions of the constitution of the United States regulating commerce between the states, and that for that reason this court has jurisdiction to inquire into his case, and afford him relief if he is entitled to the same; and the respondent admits the jurisdiction of this court to hear and determine this case.

The case of Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, is a case very similar to the one under consideration. The learned justice, in delivering his opinion in this case, uses the following language:

"In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state without in some way obtaining orders therefor? Must he be compelled to

send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them; but this would require a warehouse or a store in every state with which he might desire to trade. Surely he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale; but this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse and wait for the people of those states to come to him? This would be a senseless and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly, and without due attention to the truth of things. It may be suggested that the merchant or manufacturer has the post office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the state. Besides, why could not the state to which his letters might be sent tax him for soliciting orders in this way as well as in any other way? The truth is that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts. But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States mar-

shal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten in argument that the people of this country are citizens of the United States as well as of the individual states, and that they have some rights under the constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

Analogous to this case is the case of Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, in which the court uses the following language:

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of congress passed July 24, 1866, and such other acts incorporated in title 65 of the Revised Statutes. Can a state prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. * * * In our opinion, such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form whatever by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."

It would seem unnecessary to quote further decisions or authorities upon this question. The only case that would seem to be at all in conflict with these decisions is the case of Ficklen v. Taxing Dist., 145 U. S. 1, 12 Sup. Ct. Rep. 810, but this was a case where the petitioners or complainants had taken out license under the state law to do a general commission business, and had given bond to report their commissions during the year, and to pay a required percentage thereon, and applied to the municipal authorities to issue such license again without the payment of the stipulated tax; so that case is so dissimilar from the one under consideration that it is not authoritative upon the point in issue, for Chief Justice Fuller, in the opinion in that case, uses the following language:

"What position the petitioners would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record."

From all the authorities on this question I am clearly of the opinion that the ordinance in question, so far as the same refers to the petitioner or his occupation, is unconstitutional, and is in conflict with the provisions of the constitution regulating interstate commerce, and that, therefore, the petitioner should be discharged. It is accordingly so ordered.

LOREE v. ABNER et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1893.)

No. 62.

1. EVIDENCE—JUDICIAL NOTICE—STATUTES OF STATES.
The federal courts may properly take judicial notice of the statutes of the various states which were in force prior to the adoption of the constitution of the United States.

2. DEEDS—ACKNOWLEDGMENT—VIRGINIA STATUTE.
Act Va. Oct. 1785, (12 Hen. St. 154,) required conveyances of lands made by persons not resident in Virginia to be acknowledged "before any court of law," and "certified by such court * * * in the manner such acts are usually authenticated by them." *Held*, that this acknowledgment before the "court" was a ministerial, rather than a judicial, act, and was not a matter to be entered of record, or even to be done by the court as such. It was sufficient if done before the persons constituting the court; but, where the court was composed of several members, the acknowledgment was invalid unless taken before a sufficient number to constitute the court.

3. SAME—CERTIFICATE OF PROTHONOTARY—PRESUMPTIONS.
Where a Virginia deed bore a certificate of acknowledgment signed by two justices of a Pennsylvania court, accompanied by the certificate of a prothonotary that the signers of the first certificate were in fact such justices, and entitled to full credit as such, the fact that the prothonotary's certificate was under his seal as such was sufficient to raise a presumption that the certification was "in the manner such acts are usually authenticated by them," as required by the Virginia statute.

4. SAME—SUFFICIENCY OF ACKNOWLEDGMENT.
By the laws of Pennsylvania in force in May, 1788, (1 Laws 1810, p. 142,) three justices were necessary to constitute the court of common pleas for the county of Philadelphia, and an acknowledgment of a Virginia deed under the said act of 1785, before two of them only, was invalid.

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

At Law. Action of ejectment by John Loree against William Abner and others. Judgment was given for defendants. Plaintiff brings error. Reversed.

Statement by BARR, District Judge:

This is an action of ejectment, in which plaintiff, Loree, sued for the recovery of a tract of land patented to Samuel Young by the commonwealth of Virginia on the 4th day of January, 1786, containing over 30,000 acres, lying in what are now the counties of Lee, Wolfe, and Powell, in the state of Kentucky.

The defendants answered, and put in issue plaintiff's title, and claim adverse possession, and pleaded the statute of limitation. Some of them deny that the deed from Young to Gitt, through whom plaintiff claims title, is valid, and allege that it was never executed by the patentee, Young, and the alleged deed to Gitt is fraudulent and void. On the trial, plaintiff read a copy of the patent to Samuel Young from the commonwealth of Virginia, dated January 4, 1786, and a copy of a deed from Samuel Young to W. W. Gitt, dated May 23, 1845, and then a deed from Gitt to plaintiff. This was plaintiff's chain of title, and, after he introduced testimony tending to prove that the defendants were in the possession of portions of the land sued for, he rested his case.

The defendants then read, with the permission of the court, and over the objections of the plaintiff, a certified copy of a deed from Samuel Young

to Charles Vancouver, dated March 9, 1786, which conveyed the same land patented to Young by the commonwealth of Virginia, January 4, 1786. This certified copy is in words as follows, viz.:

"This indenture, made the ninth day of March, in the year of our Lord one thousand seven hundred and eighty-six, between Samuel Young, of the city of Philadelphia, a merchant, of the one part, and Charles Vancouver, of the same city, gentleman, of the other part. Whereas, Patrick Henry, Esquire, by patent, under his hand and the lesser seal of the commonwealth of Virginia, bearing date the 4th day of January last past, did grant unto the said Samuel Young, his heirs and assigns, forever, a certain tract or parcel of land, containing thirty thousand nine hundred and seventy-three and one-third acres by survey, bearing date the 7th day of May, 1784, lying and being in the county of Fayette, in Kentucky; beginning at the letter 'A' in the plat, a black oak, standing at the end of four hundred and forty poles north, nine degrees west, line drawn from the mouth of the north fork of the three forks of the Kentucky river, and running thence north, nine degrees west, thirty-eight hundred and fifty poles, to letter 'B,' a hickory; thence north, eighty-one degrees east, thirteen hundred and seventy-five poles, to letter 'C,' a black oak; thence south, nine degrees east, three thousand poles, to letter 'D,' on Kentucky river, at a sugar tree, near the mouth of a large branch; thence running down, and binding with the meanders of the river, to letter 'E,' a buckeye, at the end of six hundred and forty poles when reduced to a straight line, where it intersects with an entry made by Adams and Crow; thence bounding by said entry, north, eighty-seven degrees west, two hundred and forty poles; thence south, four degrees east, seventy poles; thence south, eighty-six degrees west, one hundred and eighty poles; thence south, seventy-seven degrees west, four hundred poles; thence south, forty degrees west, one hundred and eighty poles, to the beginning, as by the said patent and recorded at Richmond fully appears: Now this indenture witnesseth that said Samuel Young, for and in consideration of the sum of one thousand three hundred and fifty pounds lawful money of Pennsylvania, to him in hand paid at the time of the execution thereof, the receipt whereof is hereby duly acknowledged, hath, and by these presents doth, grant, bargain, sell, alien, enfeoff, release, and confirm unto the said Charles Vancouver, his heirs and assigns, all that the above-described tract of land, together with all and singular the rights, privileges, immunities, hereditaments, and appurtenances whatsoever to the same belonging, and the reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, and interest whatsoever of the said Samuel Young of, unto, and out of the same. To have and to hold all and singular the hereby-granted premises, with the appurtenances, unto the said Charles Vancouver, his heirs and assigns, to his and their own proper use and benefit, forever, and the said Samuel Young, and his heirs, all and singular, the hereby-granted premises, with all the appurtenances, unto the said Charles Vancouver, his heirs and assigns, against himself and his heirs, and against all persons whatsoever lawfully claiming or to claim by, through, from, or under him or them, shall and will warrant and forever defend by these presents. In witness whereof, the said parties have hereunto set their hands and seals, interchangeably, the day and year first above written.

"Samuel Young. [L. S.]

"Sealed and delivered in presence of us:

"Miers Fisher.

"John Hallowell."

"I do hereby acknowledge to have received the full consideration money above mentioned. Samuel Young.

"Witnesses:

"Miers Fisher.

"John Hallowell."

"Philadelphia county—ss.: Before us, the subscribers, two of the justices of the court of common pleas for the county of Philadelphia, personally came Samuel Young, in the above indenture named, and in due form of

law acknowledged the same as his act and deed. In witness whereof we have hereto set our hands and seals, the ninth day of March, in the year of our Lord one thousand seven hundred and eighty-six.

"Plunket Fleeson. [L. S.]
"Edward Shippen. [L. S.]"

"(L. C. S.) Philadelphia county—ss.: I, Jonathan Bayard Smith, Esquire, prothonotary of the court of common pleas of Philadelphia, do hereby certify that Plunket Fleeson and Edward Shippen, Esquires, the persons taking the foregoing acknowledgment, are, and at the time of taking and subscribing same were, justices of the court of common pleas for the said county, as by their commissions remaining of record in my office fully appear, and that, to all acts and deeds by them subscribed, full credit is and ought to be given. In witness whereof, I have hereunto affixed the common seal of the said court, and set my hand, the tenth day of March, in the year of our Lord one thousand seven hundred and eighty-six.

"J. B. Smith."

"Philadelphia, in Pennsylvania—ss.: Before us, the subscribers, two of the justices of the court of common pleas for the county of Philadelphia, personally appeared Samuel Young, in the within written indenture named, and acknowledged that on the third day of May, in this present year, he had again sealed and delivered the within indenture as his act and deed, and now desires that the same may be recorded as such. Witness our hands and seals, the third day of May, one thousand seven hundred and eighty-eight.

"John Gill.
"William Pollard."

"I, Jonathan Bayard Smith, Esquire, prothonotary of the court of common pleas for the county of Philadelphia, do hereby certify that John Gill and William Pollard, Esquires, the persons taking the foregoing acknowledgment, are, and at the time of taking the same were, justices of the court of common pleas and of the peace for the same county, and that, to all acts by them done as such, full credit is and ought to be given. Witness my hand and seal, the sixth day of May, in the year of our Lord one thousand seven hundred and eighty-eight. J. B. Smith, Prot'y. [L. C. S.]"

"Recorded in the office for recording deeds, etc., for the city and county of Philadelphia, in Deed Book No. 16, pages 175, etc. Witness hand and seal of office, the 30th of March, A. D. 1786.

"Mathw. Irwin, Rec'r. [L. C. S.]"

"The time for recording the within written indenture, according to the laws of Virginia, being expired, the same was again sealed and delivered by the said Samuel Young as and for his act and deed, this present third day of May, in the year of our Lord one thousand seven hundred and eighty-eight, in the presence of us, to the end that the same may be yet recorded there. Miers Fisher.

"John Hallowell."

"At a court held for Bourbon county, at the courthouse, on Tuesday, the 18th day of November, one thousand seven hundred and eighty-eight, the above indenture of bargain and sale, from Samuel Young to Charles Vancouver, acknowledged before Plunk. Fleeson and Edward Shippen, Esquires, justices of the peace for Philadelphia county, in the state of Pennsylvania, and certified by Jonathan Bayard Smith, prothonotary of the said county, with the said county seal affixed thereto, was admitted and ordered to be recorded.

"Test: John Edwards, C. C. B. C."

"State of Kentucky, Bourbon county—Set.: I, Wm. Myall, clerk of the Bourbon county court, Kentucky, certify that the foregoing is a true and complete copy of a deed from Samuel Young to Charles Vancouver, together with the certificates to same, as same appears of record in my office. Given under my hand, November 24th, 1891. Wm. Myall, C. B. C. C."

This deed being read, the court instructed the jury they must find for defendants. This was done, and judgment entered thereon, and the plaintiff has sued out a writ of error.

C. B. Simrall, O'Hara & Bryan, and T. M. Hinlke, for plaintiff in error.

Trabue & Trabue and St. John Boyle, (S. F. J. Trabue, E. F. Trabue, and Strother & Gordon, on the brief,) for defendants in error.

Before JACKSON, Circuit Judge, and SEVERENS and BARR, District Judges.

BARR, District Judge, (after stating the facts.) The errors assigned are that the court should not have allowed the certified copy of the deed from Samuel Young to Charles Vancouver to be read to the jury, and that it erred in instructing the jury to find for the defendants. If the certified copy of the deed from Young to Vancouver was competent evidence, the instruction of the court to find for the defendants was correct, as that conveyance proved the title was not in Samuel Young at the date of the deed to W. Gitt, through whom plaintiff claimed. Whether this certified copy was competent evidence depends upon the question of whether the original deed had been legally executed and acknowledged, so as to authorize its record in the Bourbon county court under the laws of Virginia. This land lay in Bourbon county, and the county court of that county had authority to order it to record if it had been executed and acknowledged according to the statutes of Virginia. The Virginia statute of October, 1748, prescribed the mode of conveying land where the interest was a life estate or more than a life interest. The statute was similar to the one enacted October, 1710. See 3 Hen. St. p. 517.

By these statutes, nonresidents of the colony of Virginia were required to have their deeds recorded in the records of the general court, or the county court of the county where the land, or part of it, lay, within two years after the sealing and delivery thereof; and it was provided, as to these deeds, they should not—

"Be admitted to record in the general court, or in any county court, unless the same be acknowledged in such court by the grantor or grantors thereof in person, or by some or one of them, to be his, her, or their proper act and deed, or else that proof thereof be made in open court, by the oath of three witnesses at the least." 5 Hen. St. p. 409.

These statutes which required nonresidents of the colony to acknowledge their deeds in person before the general court or the county court of the county where the land lay, or else prove their execution in one of said courts by three witnesses, were found to be inconvenient and difficult, and in October, 1776, the then commonwealth of Virginia changed this by statute. This statute, after reciting the difficulty and inconvenience of requiring nonresidents of the state to acknowledge deeds in person, or prove them by witnesses in the general court or the county court of the state,

provided that such deeds should be acknowledged by the party or parties making same, or should be proven by three witnesses—

"Before the mayor or other chief magistrate of the city, town, or corporation wherein or near to which he, she, or they shall reside; and such acknowledgment or proof, certified by the mayor or other chief magistrate, under the common seal of said city, town, or corporation, annexed to the deed, shall be admitted to record in the general court or the county court where the lands or other estate lie, and shall be effectual for passing the estate therein mentioned, as if the conveyance had been acknowledged or proven in such court; or when the parties making such deeds shall reside in any of the states of America, and there shall happen to be no city or town corporate within the county wherein they shall dwell, a certificate, under the hands and seals of two justices or magistrates of the county, that such proof or acknowledgment hath been made before them, together with a certificate from the governor, under the seal of the state, or from the clerk of the county court, under the common seal of the county, that the persons certifying such proof or acknowledgment are justices or magistrates within the same, shall authorize the recording of such deeds, and make them effectual as aforesaid." 9 Hen. St. p. 207.

In October, 1785, another statute was passed by Virginia, regulating conveyances, in which it was enacted:

"That no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another unless the conveyance be declared by writing, sealed and delivered, nor shall such conveyance be good against a purchaser, for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her, or their act, before the general court or before the court of that county, city, or corporation in which the land conveyed, or some part thereof, lieth, or in the manner hereinafter directed."

The manner thereinafter directed was this, viz.:

"If the party who shall sign and seal any such writing reside not in Virginia, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing, before any court of law, or the mayor or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court or mayor or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within eighteen months after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court." 12 Hen. St. p. 154.

This act, by its terms, did not take effect until January 1, 1787, so that the acknowledgment before Judges Fleeson and Shippen was under the act of 1776, and the acknowledgment before Judges Gill and Pollard was under the act of 1785. The latter act repealed the former so far as it related to conveyances of real estate. Hynes v. Campbell, 6 T. B. Mon. 286. This deed was not offered before the county court of Bourbon county for record within the required two years, and hence the first acknowledgment need not be considered, as we assume that the county court of Bourbon did not act judicially in admitting this deed to record.

The questions to be determined in this view are, did Judges Gill and Pollard constitute a court of law, within the meaning of the act of 1785, and is the certificate of Prothonotary Smith in the form and manner such acts are usually authenticated? This certificate of Jonathan Bayard Smith, prothonotary of the court of

common pleas for the county of Philadelphia, is sufficient as to the fact that Judges Gill and Pollard were justices of said court, and that all acts done by them as justices were entitled to full credit; and this certificate, being under seal of Smith as prothonotary, must, we think, raise the presumption that the authentication is in the usual manner of such authentication. Ewing's Heirs v. Savary, 3 Bibb, 237. But he did not certify that these two justices constituted this court of common pleas, or that they would be a quorum to hold such a court. We do not think it necessary that these justices should have taken this acknowledgment in open court, or as a court at all, but it is sufficient that they should have constituted a court of law. It cannot be assumed that Virginia intended the courts of the several states of the Confederation who might take acknowledgments of deeds to lands in Virginia, or hear proof thereof, would enter such proceedings in the records of these courts, and have them authenticated as judgments or other like proceedings would have been authenticated. Bank v. Portman, 9 Dana, 112. These acknowledgments were ministerial acts, rather than judicial ones, and, being done under the statute of another state, could not properly be entered upon the records of the common pleas court of Philadelphia.

In view of the provisions of the act of 1776 which authorized, in certain cases, these acknowledgments, or the proof thereof, to be taken before two justices or magistrates of the county, and the provision of this act (1785) which authorized the mayor and other like officers to take such acknowledgments and proof, we conclude "any court of law" in this act means any person or persons who at the time constituted a court of law in the state where the grantor resided. This was intended to designate the person or persons who constituted a court of law, and authorize him or them to take such acknowledgments or proof, but not to require a court of law, as a court, to take such acknowledgments and proof.

As there is no evidence offered by the defendants other than the copy of this deed and the certificates thereon, the trial court must have taken judicial notice of the laws of Pennsylvania, and decided those laws made this court of common pleas a court of law, and constituted two justices a court.

The states of Virginia and Pennsylvania were then part of the United States of the Confederation. Our present Union was not perfected until July 21, 1788, by the ratification of the requisite nine states. Pennsylvania was one of the nine, having ratified the constitution December 12, 1787, but Virginia did not ratify it until July 25, 1788. Although this government and the courts thereunder were first established under the present constitution, which was ratified and became effectual in July, 1788, we think the court was correct in taking judicial knowledge of the laws of Pennsylvania in May, 1788. The federal courts take judicial knowledge of the laws of the several states of the Union, (Church v. Hubbart, 2 Cranch, 187; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242,) and have taken judicial notice of the laws of Mexico in force in

territory acquired afterwards by the republic of Texas, and then by the United States, (U. S. v. Perot, 98 U. S. 430,) and also of the laws of California existing before that territory was acquired by the United States, (Fremont v. U. S., 17 How. 557.)

We find that there was a court styled the "County Court of Common Pleas" established by the colony of Pennsylvania in and for the county of Philadelphia as early as May 22, 1722, and that it was given common-law jurisdiction, but that law required three or more of the justices to constitute the court. See 1 Laws Pa. 1810, p. 142. There was no change in the number of justices necessary to constitute this court of common pleas until after the adoption of the constitution of 1790 by Pennsylvania. That constitution provided for the appointment of not fewer than three, nor more than four, justices, including a presiding justice, who should compose courts of common pleas, and in some instances two of said justices were allowed to constitute a court; but, as this was after the acknowledgment of this deed by Young, it cannot aid his acknowledgment. It is likely the mistake in thus taking the acknowledgment before two justices was because the parties were not aware of the repeal of the act of 1776 by the act of 1785.

As this deed had not been acknowledged by Samuel Young before those authorized by the act of 1785 to receive such acknowledgment, it was not legally recordable by the county court of Bourbon; hence a copy thereof was incompetent evidence, and it was error to allow it to be read.

For this error the case must be reversed, and a new trial granted, and proceedings had in conformity with this opinion; and it is so ordered.

ARROWSMITH v. NASHVILLE & D. R. CO. et al.

(Circuit Court, N. D. Tennessee. July 27, 1893.)

No. 2,929.

1. CARRIERS—WHO IS PASSENGER FOR HIRE—RAILWAY MAIL CLERK.
   A railway mail clerk, traveling upon a railway in the service of the United States, is a passenger for hire in so far as the railway company's liability for his injury is concerned.

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—PLEADINGS TAKEN AS TRUE.
   For the purpose of determining whether a controversy is separable so as to give one of several joint defendants the right of removal to a federal court, the allegations of the plaintiff's pleadings must be taken as true, and such defendants, on a joint cause of action in tort, cannot, by filing separate defenses, tendering distinct issues, render the suit separable for the purpose of removal.

3. SAME—PRIMA FACIE RIGHT OF REMOVAL—JOINDER OF FICTITIOUS DEFENDANT TO DEFEAT REMOVAL.
   In a petition for removal of a cause to a federal court a prima facie case requiring the state court to order the removal is made out by an averment that plaintiff originally sued the petitioning defendant alone, and on removal of that suit to a federal court voluntarily dismissed it, and at once brought this action in a state court upon the same cause of action joining as a defendant a citizen of his own state, against whom

no cause of action existed, merely for the purpose of defeating petitioner's right of removal.

4. SAME—PROCEEDINGS ON MOTION TO REMAND.
After removal of such a cause, the circumstances of the joinder will raise an inference that it was made in order to defeat petitioner's right of removal, unless such purpose is denied; and if, on motion to remand, it appears from the pleadings as a matter of law that no cause of action exists against the resident defendant, the motion should be denied.

5. RAILROAD COMPANIES—LEASE WITHOUT AUTHORITY OF LAW—NEGLIGENCE—LESSOR'S LIABILITY.
A lease by a railway company of its line without authority of law is void, and the lessor continues liable for all the negligence of the lessee, the latter being treated as the lessor's agent operating the railway.

6. SAME—INJURY TO PASSENGER—LESSOR'S LIABILITY.
Where a railway company leases its line by authority of law, and there is no exemption of the lessor from future liability either by express terms of the statute or by the terms of the lease, it is nevertheless not liable for injuries to a passenger traveling under contract with the lessee, when such injuries are caused wholly by the lessee's negligence in operating the road. Railroad Co. v. Brown, 17 Wall. 445, distinguished.

7. SAME.
The N. & D. R. Co. leased its line, in good condition, to the L. & N. R. Co., by authority of Code Tenn. 1858, §§ 1122, 1123, permitting such leases, and providing that a lessee should hold a road so leased subject to the same liabilities as when it was in the hands of the lessor. The lease was silent as to liability for future negligence by the lessee. By permission of the lessee a mail crane was placed near the track, and thereafter a railway mail clerk, traveling under a contract between the United States and the lessee, was struck and injured by the crane, either because it stood too near the track, or because the lessee had allowed the track to get out of repair. *Held*, that there was no cause of action for such injury against the lessor.

At Law. Action brought in the circuit court of Giles county, Tenn., by Henry Arrowsmith, administrator of David S. Martin, against the Nashville & Decatur Railroad Company and the Louisville & Nashville Railroad Company, for negligence causing the death of plaintiff's intestate. The Louisville & Nashville Railroad Company removed the cause to this court. Heard on motion to remand. Denied.

John T. Allen and Flournoy Rivers, for plaintiff.

W. G. Hutcheson and Z. Ewing, for defendant Louisville & N. R. Co.

W. H. McCollum, for defendant Nashville & D. R. Co.

LURTON, Circuit Judge. This case is now heard upon a plea in abatement and a motion to remand to the state court, from which the case was removed on petition of the Louisville & Nashville Railroad Company. The Nashville & Decatur Railroad Company is a corporation created by the laws of the state of Tennessee. It owned and operated a line of railway extending from Nashville, in the state of Tennessee, to Decatur, in the state of Alabama. The Louisville & Nashville Railroad Company is a Kentucky corporation, whose original line extended from Louisville, in the state of Kentucky, to Nashville, in the state of Tennessee, where it connected

with the Nashville & Decatur Railroad. In 1871 this nonresident corporation leased the railway line of the Tennessee corporation, together with all its rolling stock of every kind, under a lease for 30 years; and since that time it has been in exclusive control and possession of the leased line, running and operating it as a part of its own line, and in its own name as lessor. In September, 1892, David S. Martin sustained injuries from which he died while traveling over that part of the leased line within the state of Alabama as a United States railway mail clerk, and having in his care and custody the United States mail. The plaintiff, as administrator upon the estate of said Martin, brought this suit under and by virtue of the Alabama and Tennessee statutes, giving and defining such actions against both the lessor and lessee corporations, to recover damages for the death of his intestate. For the purposes of this case, we shall treat the deceased as in all respects a passenger for hire. The Louisville & Nashville Railroad Company having contracted for the carriage of the United States mail over this leased line, contracted at the same time safely to carry the mail clerks having lawful custody thereof. The compensation for the carriage of such clerks must be regarded as included in the compensation paid by the government for the carriage of its mails. It is immaterial who pays the compensation for the carriage of such passenger. The legal relation of passenger and carrier must be taken to have existed at the time of his injury between the deceased and the Louisville & Nashville Railroad Company, with whom the contract for his carriage had been made by the government.

The declaration, in substance, charges that while being thus carried as a passenger for hire the deceased, in the discharge of his duty, was standing in the open door of the mail car, and was struck and violently thrown from it while passing the extended arm of a mail crane. This crane was a machine standing in close proximity to the passing train, and was placed there by the rai'road company, or by its consent, for the purpose of holding the mail pouch to be taken into the car by one of the clerks thereon as the train passed, without stopping. Plaintiff charges that the crane was placed too close to the passing train, and that the track of the defendant company opposite the crane was out of repair, the crossties being decayed, causing a "low-joint," which operated to cause the car as it passed to careen towards the side on which the crane was, thus bringing it into such proximity to the arm of the crane as to strike the deceased, standing in the door, as he was obliged to do to take the pouch from the crane. There is no allegation that this crane was so improperly placed by the Nashville & Decatur Railroad Company before its lease, or that at the time of the lease the track and roadway of the said Nashville & Decatur Railroad was not in good repair. On the contrary, it satisfactorily appears that this machine was placed on the right of way by permission of the lessee company, long after it took possession, and that the "low joint" which operated to careen the car towards the crane did

not exist when the lease was made, but was a consequence resulting from decay of cross-ties occurring thereafter.

The petition of the Louisville & Nashville Railroad Company, upon which the state court directed the removal of the cause to this court, charges:

"That said Nashville & Decatur Railroad Company is neither a necessary nor a proper party defendant in this cause; that said Nashville & Decatur Railroad Company was made a party defendant in this cause with the sole and single purpose to prevent a removal by petitioner of this cause to the circuit court of the United States for the middle district of Tennessee, and thereby unlawfully to deprive petitioner of a right conferred upon it by the constitution and laws of the United States. Wherefore your petitioner states that in this suit, brought by plaintiff against it and the sham defendant, said Nashville & Decatur Railroad Company, there is a controversy which is wholly between citizens of the different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that it was at the commencement of this suit, and still is, a citizen of the state of Kentucky, and the said H. Arrowsmith, administrator of the estate of D. S. Martin, deceased, who, your petitioner avers, was at the commencement of this suit, and still is, a citizen of the state of Tennessee, in which state this suit was brought; and that both the said Arrowsmith, administrator of the estate of D. S. Martin, deceased, and your petitioner, are actually interested in said controversy."

To support this averment the petition further recites that the said plaintiff, Arrowsmith, administrator, on the 31st day of October, 1892, brought suit in the circuit court of Giles county, upon the same cause of action stated in the present suit, against the petitioner alone; that upon the filing of the declaration the Louisville & Nashville Railroad Company on the 5th day of December, 1892, filed its petition to have said cause removed to the circuit court of the United States for the middle district of Tennessee; that said application was granted, and a transcript of the record in said cause was filed in said United States court; that afterwards, on the 1st day of April, 1893, said Arrowsmith dismissed the said suit so begun in October, 1892, and thereafter, to wit, on the 4th day of April, 1893, instituted the present suit in the same state court, for the same cause of action, joining as a defendant the said Nashville & Decatur Railroad Company, a resident of the state of Tennessee. The petition further avers that at the time of said injury and now the said Louisville & Nashville Railroad Company was perfectly solvent; that it was at said time in sole and exclusive occupation of the railway built and owned by the Nashville & Decatur Railroad Company, and had been exclusively using and occupying said road for more than 20 years, and the said Nashville & Decatur Railroad Company ran no trains, carried no mails or passengers; that the lessee alone undertook the care and repair of the said leased line and exclusive control of said line by and through its own servants; and that, if any liability existed by reason of the injury sustained by the deceased, the responsibility rested in law and in fact upon the said lessor company.

To entitle the petitioner to a removal it must be made to appear that a separable controversy exists. "A controversy is not sepa-

rable when a defendant, who would otherwise be entitled to remove the suit, is charged as jointly liable with another defendant who is a fellow citizen of the plaintiff." Fost. Fed. Pr. § 384. A separable controversy is not presented because the plaintiff has elected to sue two as jointly liable, when he might have sued either separately. If he states in his pleadings a cause of action which is joint, and elects to join as defendants all who are jointly liable, it is not for the defendants to complain that he need not do so. That ultimately it may turn out that one was not liable at all, and the other exclusively so, is a question on the merits, and does not affect the jurisdiction any more than that the final issue might be the nonliability of either or the liability of both. For the purpose of determining whether a controversy is separable, the allegations of the pleadings must be taken as true. Hyde v. Ruble, 104 U. S. 407; Ayres v. Wiswall, 112 U. S. 193, 5 Sup. Ct. Rep. 90; Plymouth Con. Gold Min. Co. v. Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. Rep. 1034; Railroad Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. Rep. 203. Neither will the filing of separate defenses, tendering distinct issues by several defendants on a joint cause of action in tort, operate to divide the suit into separate controversies, so as to make it removable into the United States courts. Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; Railroad Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. Rep. 735.

That "a defendant has no right to say that an action shall be several, which a plaintiff elects to make joint," is practically conceded by counsel resisting the motion to remand. Their contention is this: That if, in point of fact, the plaintiff has no cause of action whatever against the resident defendant, and such defendant has been joined as a defendant with the sole purpose of defeating the right of the real defendant to remove the action against it to the circuit court of the United States, then such misjoinder operates as a legal fraud, and will not be permitted to deprive the nonresident defendant of its constitutional right of removal. The doctrine contended for was thus stated by Mr. Justice Miller:

"It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right." Board of County Com'rs v. Kansas Pac. Ry. Co., 4 Dill. 277.

On the same subject, Judge Shiras, in Dow v. Bradstreet Co., said:

"The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the circuit court of the United States regard will be had only to the citizenship of the real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in, or actual connection with, the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the federal court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the constitution and laws of the

United States, and it certainly must be true that it cannot be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same state as the plaintiff." 46 Fed. Rep. 827.

The averments of the petition clearly make a case entitling the nonresident defendant to a removal. If the Nashville & Decatur Railroad Company has been joined for the purpose of defeating a removal only, and such purpose is made out, then this case should not be remanded. The facts which are relied on as establishing the averment that the Nashville & Decatur Railroad Company is a sham defendant are: (1) That the suit was originally instituted against the Louisville & Nashville Railroad Company alone; that when it was removed to the federal court the plaintiff voluntarily dismissed it, and at once sued again in the state court upon the same cause of action, joining in this second suit the Nashville & Decatur Railroad Company as a defendant. (2) That no cause of action exists against the local defendant thus joined.

These averments are made in the face of the petition for removal, and constitute such a prima facie case as to require the state court to make the order of removal. The question whether the Nashville & Decatur Railroad Company was or was not a sham defendant is a question to be determined by this court. Railroad Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. Rep. 306.

The plea in abatement, and upon which the motion to remand is based, raises no issue of fact. It does deny that the sole purpose in joining the Nashville & Decatur Railroad Company was to deprive the Louisville & Nashville Railroad Company of its right of removal, and it does insist upon the legal liability of the lessor railway company for the torts of the lessee company in possession. The first denial affects only the inference drawn from the circumstances under which the joinder was made. The second relates to a question of law. If it be true that the plaintiff originally sued the Louisville & Nashville Railroad Company alone, and if it be true that, upon the removal of that suit to the United States circuit court, the plaintiff voluntarily dismissed his suit, and at once brought in the state court a second suit for the same cause of action against the Louisville & Nashville Railroad Company, and if he joined as defendant to the second suit a corporation of the state of Tennessee, against whom he has shown no case, then the averment that the Nashville & Decatur Railroad Company is a sham defendant is made out. The law can only infer that the purpose intended in joining the local defendant was the only one which such joinder was likely to accomplish, to wit, that it would deprive the only real defendant of its constitutional right to remove a suit against it to the courts of the United States, where local prejudice in favor of a resident suitor and as against a nonresident suitor would be less effective. The right to remove is a constitutional right; and, while this court should never seek to trench upon the jurisdiction of state courts, yet, on the other hand,

it cannot submit to see its jurisdiction defeated by so apparent a device as the joinder of a local defendant for the purpose of depriving the only real defendant of the right of removal.

Has the Nashville & Decatur Railroad Company incurred any liability to the plaintiff upon the facts stated in the plaintiff's declaration? If it is jointly or separably liable, then the motion to remand should be granted. If it is not liable, then the motion must be disallowed.

1. Where a railway company leases its line without authority of law such lease is void, and it will continue liable for all the negligence of the lessee affecting the public; the latter being treated as operating the road as a mere agent of the lessor. There is great unanimity of opinion in support of this proposition. The reasons for the rule, as generally stated are, substantially:

(a) That where the power to sell or lease is not expressly conferred upon a public corporation, it will not arise from implication. The enumeration of the powers of a public corporation implies the exclusion of all others not necessary to the reasonable enjoyment of those conferred.

(b) The selling or leasing of a railway line is an abdication of the public duties imposed upon such corporation by law, and it is contrary to public policy that such duties should be abandoned or imposed on another without legislative sanction. This principle was well stated, in a case involving the validity of a lease without express sanction of law, by Mr. Justice Miller, who said:

"There is another principle of equal importance and equally conclusive against this contract, which, if not coming exactly within the doctrine of ultra vires, as we have just discussed it, shows very clearly that the railroad company was without the power to make such contract. That principle is that, where a corporation, like a railroad corporation, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions by which it undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." Thomas v. Railroad Co., 101 U. S. 83.

Some of the principal cases supporting the general rule are: Railroad Co. v. Winans, 17 How. 30; Railroad Co. v. Brown, 17 Wall. 445; Frazier v. Railway Co., 88 Tenn. 138, 12 S. W. Rep. 537; Railway Co. v. Dunbar, 20 Ill. 623; Railroad Co. v. Morris, 68 Tex. 50, 3 S. W. Rep. 457; Railroad Co. v. Eckford, 71 Tex. 274, 8 S. W. Rep. 679; Railroad Co. v. Culberson, (Tex. Sup.) 10 S. W. Rep. 706; Railway Co. v. Lane, 79 Tex. 643, 15 S. W. Rep. 477, and 16 S. W. Rep. 18; Nelson v. Railroad Co., 26 Vt. 717; Railroad Co v. Chasteen, 88 Ala. 591, 7 South. Rep. 94; Ricketts v. Railway Co., 85 Ala. 601, 5 South. Rep. 353. "It cannot by its own act absolve itself from its public obligations without the consent of the legislature." Pierce, R. R. 283.

2. There was express statutory authority to support the leasing of the Nashville & Decatur Railroad by the Louisville & Nash-

ville Railroad Company from the legislatures of both the states of Tennessee and Alabama. Sections 1122 and 1123 of the Code of Tennessee of 1858, being sections 1249d and 1249e of the compilation of Milliken & Vertrees, are as follows:

"1122. A railroad company owning any main line may contract with any company owning a railroad connecting with such main line for the lease thereof.

"1123. The lessee shall hold such road subject to the liens and liabilities to which it was subject in the hands of the lessor and be bound for all payments for which the lessor was liable."

These sections originated with the act of 1857–58, c. 8. The act was in ambiguous language. The codifiers have simplified it, and carried it forward in plain, unequivocal language. The conflict, if any there be, between the acts passed during the session of 1857–58 and the Code enacted at the same session must be resolved in favor of the Code. Code, § 41. The effect of these sections is to permit connecting lines to be leased, and to impose upon the lessee company all liabilities in favor of the state or the general public imposed by the charter of the lessor company or the general law of the state. There is no provision expressly continuing the liability of the lessor company, nor is there any expressly exempting the lessor company for the omissions and negligences of the lessee company. The responsibility of the lessor company, after it shall have executed a lawful lease, and placed the lessee company in full possession, must depend upon the terms of the particular lease and upon the common law. The Alabama statute is equally explicit as to the power to make a lease, and is equally silent as to the future exemptions and liabilities of the lessor company. See Alabama Acts of 1868, pp. 470, 471. These statutory provisions authorizing the lease under which the Louisville & Nashville Railroad Company operated the line of road owned by the Nashville & Decatur Railroad Company make wholly inapplicable the line of cases above referred to, all of which were cases relating to leases without authority of law.

3. The contention of the plaintiff is that there must be not only legislative authority to make a lease, but that there must be also legislative exemption from further liability; that, unless the lessor be exempted by law, he will continue liable as to the public for all the negligent acts of the lessee. The learned counsel for the plaintiff have cited a very large number of cases as tending to support this proposition. Many of them are cases arising upon licenses or leases, where neither was sanctioned by the charter of the contracting companies or authorized by the legislature. In the case of Hanna v. Railway Co., 88 Tenn. 313, 12 S. W. Rep. 718, the only question was as to the liability of a railroad company for an injury sustained by one employe of a cross-tie contractor through the negligence of a coemploye while engaged in moving some empty cars by permission of the company. The company was held not liable. The observation of Mr. Justice Folkes as to the necessity of both "sanction and exemption" to authorize the operation of a

railroad by permission of the owner was a mere passing remark, and uncalled for by any question before the court. The question for decision is res integra in Tennessee. The same may be said as to Alabama, the state within which plaintiff's intestate sustained the injury from which he died. The cases cited by counsel are Ricketts v. Railway Co., 85 Ala. 601, 5 South. Rep. 353, and Railroad Co. v. Chasteen, 88 Ala. 591, 7 South. Rep. 94. Neither is in point. In the Ricketts Case the defense was that its road had been sold, and was at the time of the injury in the exclusive occupation of the purchaser. The sale was without authority of law, and the Alabama court held that it was therefore void, and the purchaser should be treated as the mere agent for the owner. The latter presented a question as to whether the company, or a contractor engaged in building the company's road, was liable for an injury sustained by a brakeman on a train operated by the contractors. What the Alabama court decided in each case was this:

"A railroad company does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation, or of a natural person, to whom it may lease or voluntarily surrender its franchise without competent authority." 88 Ala. 591, 7 South. Rep. 94.

The following cases were all cases where the lease was wholly unauthorized by law: Thomas v. Railroad Co., 101 U. S. 71; Railroad Co. v. Morris, 68 Tex. 50, 3 S. W. Rep. 457; Railroad Co. v. Kuehn, 70 Tex. 582, 8 S. W. Rep. 484; Railroad Co. v. Eckford, 71 Tex. 274, 8 S. W. Rep. 679; Railway Co. v. Dunbar, 20 Ill. 623; Ricketts v. Railway Co., 33 W. Va. 433, 10 S. E. Rep. 801.

The next class are cases construing local statutes requiring railroad companies to fence their roads, which were held applicable to the companies owning the road. Fontaine v. Railroad Co., 54 Cal. 645; Whitney v. Railroad Co., 44 Me. 362. The unfenced road was a nuisance under the statute, and the cases might well be rested upon the principle affecting landlord and tenant,—that each is liable; the one for creating, and the other for continuing, a nuisance. Tayl. Landl. & Ten. § 175; Swords v. Edgar, 59 N. Y. 28. In Railroad v. Hambleton, 40 Ohio St. 496, both the lessor and lessee companies were held liable for an unlawful change of grade in the streets of a city, which was made before the lease, and continued thereafter by the lessee. The case was rested upon the rule affecting a landlord who lets premises on which is maintained a nuisance which is continued by the lessee. In the case of Railway Co. v. Curl, 28 Kan. 622, the opinion was by Brewer, J. The lessor company had failed to fence in its railway track as required by the Kansas statute. In that condition the road was by legislative authority leased to another railroad corporation. The plaintiff sued for damages resulting to him by reason of the unfenced condition of the track, and brought his suit against the lessor company. The contention of the defendant company was that where the statute authorized the lease of one company to another of its track the lessor was not liable for injuries caused by the torts of the lessee company. Brewer, J., in answer to this argument, said:

"To a certain extent this proposition is true. If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road,—matters in respect to which the lessor company could, in the nature of things, have no control,—then the lessee company will alone be responsible; but when the injury results from the omission of some duty, which the lessor itself owes to the public in the first instance,—something connected with the building of the road,—then we think the company assuming the franchises cannot divest itself of responsibility by leasing its track to some other company. * * * The injury resulted directly from its own wrong, and not from any mere negligence on the part of the lessor company. It cannot release itself by contracting with some other party to discharge its statutory duties. The defendant omitted this duty, and by the statute it is responsible for all damages sustained by reason of such omission."

See, also, Railroad Co. v. Wood, 24 Kan. 619.

Others are cases depending upon statutes making every railway company liable for fire upon adjacent property, caused by sparks from engines running upon the road. Ingersoll v. Railroad Co., 8 Allen, 438; Davis v. Railroad Co., 121 Mass. 134; Bean v. Railroad Co., 63 Me. 295; Balsley v. Railroad Co., 119 Ill. 68, 8 N. E. Rep. 859; Railway Co. v. Campbell, 86 Ill. 443. In the case of Bean v. Railroad Co. the action was against the lessor company by an adjoining proprietor whose property had been destroyed by fire communicated from the engines used by the lessee company. The lessor corporation was held liable on the ground that the lease was authorized by statute, which provided "that nothing in the act, or in any lease or contract that may be entered into under the authority of the same, shall exonerate the said company from duties or liabilities imposed upon them by the charter of the company or the general laws of the state." The court held that under the general laws of the state the lessor company was responsible for fires thus communicated. The court concludes by saying:

"Whether they would have been responsible also for injuries to passengers who contracted directly with their lessees is another and a different question. There would be room, perhaps, to argue that the liability in such case is not one imposed by the charter or the general laws of the state, but by the principles of the common law applied to the contract of the parties, and so dependent upon the contract as not to affect any but the parties immediately contracting. But the liability to adjoining proprietors for injuries inflicted is another matter."

In the case of Mahoney v. Railroad Co., 63 Me. 68, the defendant was held not liable for injuries sustained by a passenger as the result of the misconduct and wrong of a conductor and other servants upon the train of the lessee. The court held that liability for injuries of that class was not imposed by the charter or the general law of the state, but sprang out of the contract between the plaintiff and the railroad company, whose passenger he was. This case will be again referred to. Plaintiff also cites and relies upon Questead v. Railway Co., 127 Mass. 204. That case was this: The horse-railway company leased its line of railway under a statute which authorized it to lease its road and franchises to any responsible party for the operation of the road, but provided that "such lease or contract shall not release or exempt such company

from any duties, liabilities, or restrictions to which it would otherwise be subject." The court held that the effect of this provision was that the defendant had the same liability to compensate persons injured during the management of the road, while the lease was in force, as it would have had if the corporation had been managing its own road. The case turned wholly upon the construction of the statute authorizing the lease.

Counsel also cite the following cases from the United States supreme court: Railroad Co. v. Barron, 5 Wall. 90; Thomas v. Railroad Co., 101 U. S. 71; Railroad Co. v. Winans, 17 How. 31; Railway Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. Rep. 578; Railroad Co. v. Brown, 17 Wall. 445. None of the decisions are in point. The Winans Case turned upon the identity of interest between the two companies, and want of legislative authority to turn over the management of the road to another company. The court said: "The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." 17 How. 39. Thomas v. Railroad Co. was a lease wholly without authority of law. Railway Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. Rep. 578, presented a case of contract between a township and a railway company by which the company agreed to build and maintain a railway to a city within the township. It constructed the line according to agreement, and then leased the road to another company, which changed the line so as to avoid the town. The lessor company was the contracting company, and the court held it to be a necessary party to a suit by the township against the lessee company to compel a reconstruction of the line. Railroad Co. v. Brown, 17 Wall. 446, was this: A railroad operated on the joint account of a receiver of a part of it and the lessee of the remaining part was held liable for the unlawful ejection of a passenger by a servant of the parties working it. It did not appear that the lease had been made by authority of law, and it appeared that the road was operated by consent of the owner of the road in the name of the company owning it, the plaintiff holding a ticket contract with the lessor company. The question of the effect of a legislative authority to make a lease upon the liability of the lessor to a passenger by contract with the lessee was not involved and not discussed. In the opinion the decision was mainly rested upon the proposition that the ticket on which the plaintiff was riding was issued in the name of the lessor company. On this point the court said:

"The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Catherine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this road was run, as railroads generally are, by a chartered company. Besides, the company, having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts."

The Barron Case was one of joint use by two companies, the permissive use being without express authority of law.

The cases of Singleton v. Railroad Co., 70 Ga. 464; Harmon v. Railroad Co., 28 S. C. 401, 5 S. E. Rep. 835; Hart v. Railroad Co., 33 S. C. 427, 12 S. E. Rep. 9,—are cases laying down in very unguarded terms the doctrine that, without both sanction and exemption, the lessor continues liable for both the torts and contracts of the lessee company. This doctrine, in this undiscriminating form, seems to have its origin in the Georgia case cited above. The plaintiff was a passenger, and was unlawfully ejected from a train operated by the lessee of the defendant company. The lessee was in exclusive possession under a lease authorized by legislative consent, but the lessee operated the road in the name of the lessor company, and the ticket upon which the plaintiff was riding was issued in the name of the lessor company. The court quote and adopt with approval the language of Mr. Justice Davis in Railroad Co. v. Brown, supra, as to the effect of the conduct of business, after the lease, in the name of the lessor. It is true that the learned judge who wrote the opinion in the Georgia case does say, as to the effect of a lease authorized by law, "that the original obligation can only be discharged by a legislative enactment consenting to and authorizing the lease, with an exemption granted to the lessor company." For this he cites Redfield and Pierce on Railroads, and Railroad Co. v. Dunbar, 20 Ill. 627. This Illinois case did not involve the question at all. It was a lease without authority of law. Railroad Co. v. Brown, 17 Wall., is also referred to. This does not bear upon this aspect of the opinion, as has already been shown in a former part of this opinion. Mr. Redfield, in speaking of the want of power in a railway company to lease out its road without legislative consent, says:

"But even where such contracts have been made by permission of the legislature, it has been held in this country that the company leasing itself does not thereby escape all responsibility to the public; but that the public generally may still look to the original company as to all its obligations and duties which grow out of its relation to the public, and are created by charter and the general laws of the state, and are independent of contract and privity between the party injured and the railway. But the party in possession of a railway, whether a lessee or trustee under a mortgage, is primarily liable for all injuries and defaults." 1 Redf. R. R. p. 618.

It will be noticed that this author speaks in very guarded terms, and confines his statements to the effect of such lease on the rights of the public, which rights spring from the charter or from the general laws of the state. The case he cites is that of Nelson v. Railway Co., 26 Vt. 717. The opinion in that case was by Judge Redfield, and the question as to the effect of legislative consent to the lease was not made or decided. In the fifth edition of his work on the Law of Railways, he notices this fact in a note to the text quoted above. See 1 Redf. R. R. p. 618, note.

The text of Pierce on Railroads is as follows:

"The company cannot, in the absence of special statute authority, and exemption, divest itself of responsibility for the torts of persons operating its

road by transferring its corporate powers, or leasing the road to them. It cannot by its own act absolve itself from its public obligations without the consent of the legislature. It is liable for injuries to its passengers caused by the negligence of another company which it allows to use its road."

"The lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts; but the corporation will remain liable if it continues, notwithstanding its lease, to operate the railroad, or allows it to be operated in its corporate name, or fails to require other companies using the track to take proper precautions, where it has the power to require them. Lessees who permit another company under contract to use the road are liable for its torts. Statutes imposing police and other duties and liabilities on railroad companies are usually construed to apply to companies and persons who are in possession and under contracts with, or by permission of, the company owning the railroad."

"The lessees of a railroad are presumed, by virtue of a lease duly authorized by law, to succeed to the powers and obligations of the lessor corporation, and are therefore liable for the torts of their servants in its management. They cannot, it has been held, set up in defense the illegality of the lease. Some statutes make the lessor company liable for the negligence of the lessee's servants in the working of the road."

"Statutes which, for the public security, make certain conditions in the construction and use of the railroad, are sometimes held to affect both the corporation owning the road and other parties using the road by its permission under a lease or contract authorized by law. Thus, if the duty to fence is prescribed, and in consequence of an omission of the duty cattle are killed by the trains of the company which uses the road under lease or contract, such company, and also the company owning the railroad, are both liable; the former for using the road, and the latter for permitting its use in a defective condition. But some statutes are construed to impose liability resulting from the omission of the legal duty only on the company, whether lessor or lessee, which inflicted the injury. The lessee by whose act cattle were killed was held not relieved from liability under a statute by the fact that, by the terms of the lease, his trains were to be operated in subordination to time-tables fixed by the lessor, and that the latter was to keep up repairs and fences." Pierce, R. R. pp. 283–285.

The first part of this paragraph, to the effect that a company "cannot, in the absence of special statute, authority, and exemption, divest itself of responsibility for the torts of persons operating its road by transferring its corporate powers, or leasing the road to them," is likely to mislead by the presence of the word "exemption." The cases he cites are all cases where the lease was wholly unauthorized, or cases where the effect of a legislative sanction was not discussed. The learned text writer makes plain that he is not to be understood as discussing in that paragraph the effect of a lease silent as to the lessor's exemption; for he immediately follows it with the statement that, where the lease is authorized by law, "a transfer of rights and liabilities in the management" is effected, "and the lessor discharged from responsibility for the lessee's torts." Id. 283.

This Georgia case has been quoted frequently, as well as the Vermont case, as authority for the view contended for by plaintiff.

Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relation with it, it may very well be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not

absolve it from liability. So, if a railway be in such condition that it is a nuisance when leased out by reason of the absence of something necessary to its safe operation, or the presence of something dangerous to its safe operation, and this nuisance be continued by the lessee, both the lessor and lessee would be liable,—the one as having created, and the other as having continued, a nuisance. But to say that, after the lessor has by authority of law transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made. The state, on grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy to authorize the courts to say that the responsibility for the future management and operation of the road has not been exclusively imposed upon the lessee as the lawful substitute for the company owning the road.

In the case at bar there is no privity between the plaintiff and the Nashville & Decatur Railroad Company. His intestate was a passenger for hire by virtue of the contract between the Louisville & Nashville Railroad Company and the government. The Louisville & Nashville Railroad Company was in exclusive control and possession of the railway. The Nashville & Decatur Railroad Company had no right to enter upon and repair the leased track. It had no right to interfere with the location of the mail crane. The track was not a nuisance when leased. If it had become so, it was the fault of the company alone authorized to repair it and to prevent the placing of the crane in too close proximity to the track. With respect to the future management and operation of this road the state had consented that, from and after its lease, the lessee should stand as the substitute for the owner in regard to all those rights and liabilities which should spring out of the future management and operation of the leased road. The duty to carry the plaintiff's intestate with the highest degree of care and skill did not rest upon any charter requirement, or spring from any general statutory law of the state. The duty was imposed by operation of common law upon the contract of carriage. The right to maintain this action arises from the contract relation of carrier and passenger. If intestate had been carried safely, there would be no right of action by reason alone of the defective condition of the road. The duty to keep the road in repair is like the duty to furnish a safe vehicle. Each arises from the relation of carrier and passenger. Each is imposed upon the lessee company by necessary legal effect of the assumption of the carrier duty. These principles seem to have the support of the most satisfactory authorities. Mr. Wood thus sums up the rule, as deduced by him from the cases:

"But where the statute authorizes the lease the lessee assumes, during the existence of the lease, all the duties and obligations of the lessor, and from the time that it enters into possession of the road becomes solely liable

for all injuries resulting from its management, unless it is operating the road in the name of the lessor." Wood, Ry. Law, § 490.

This principle has the express sanction of the court of appeals of the state of New York in two well-reasoned cases: Ditchett v. Railroad Co., 67 N. Y. 425; Miller v. Railroad Co., 125 N. Y. 118, 26 N. E. Rep. 35. The distinction between public duties imposed by law and the right of one injured through the negligence of the lessee is recognized by the courts of Maine. Mahoney v. Railroad Co., 63 Me. 69. In Nugent v. Railroad Co., 80 Me. 62, 12 Atl. Rep 797, the court fully discussed this distinction, saying:

"And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But from an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. Railroad Co. v. Curl, 28 Kan. 622, 11 Amer. & Eng. R. Cas. 458."

The distinction was pointed out very clearly by Judge Brewer in Railroad Co. v. Curl, 28 Kan. 622. To the same effect is Briscoe v. Railway Co., 40 Fed. Rep. 274. See, also, Railway Co. v. Washington, (Va.) 10 S. E. Rep. 927, 43 Amer. & Eng. R. Cas. 688.

The conclusion is that the Nashville & Decatur Railroad Company is not liable, and the circumstances under which it was joined as a defendant are such as to make it the duty of this court to hold that it was made a defendant solely for the purpose of depriving the only real defendant of its right of removal.

The motion to remand will therefore be overruled.

BOARD OF COM'RS OF MORGAN COUNTY v. BRANHAM et al.

(Circuit Court, D. Indiana. July 25, 1893.)

No. 8,735.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ADVANCE PAYMENTS TO CONTRACTOR.

A contract provided for a payment of 85 per cent. of the total cost of the completed work when it was, in the opinion of the party of the first part, half completed; such percentage to be carefully estimated by the engineer of said party, but such payment not to exceed $7,480. The party of the first part, relying on the fraudulent representations of the party of the second part that the work was half completed, made a payment of $10,046.68. *Held*, that this discharged the sureties on the bond of the party of the second part.

At Law. Action on a bond by the board of county commissioners of Morgan county, Ohio, against George F. Branham and Enos Hege, principals, and William G. Wasson and Henry C. Adams, sureties. Heard on demurrer by Wasson and Adams to the complaint. Demurrer sustained.

Harding & Hovey, for complainant.

Hawkins & Smith, for defendants.

BAKER, District Judge. This is an action on a bond executed by Branham and Hege, as principals, and Wasson and Adams, as sureties, to the board of county commissioners of Morgan county, Ohio. The sureties, Wasson and Adams, demur to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action against them.

The facts disclosed by the complaint, so far as material to the determination of the question raised by the demurrer, are as follows:

A contract in writing was entered into between the plaintiff, as party of the first part, and Branham and Hege, as party of the second part, by the terms of which the latter agreed to furnish the material and do the work specified therein. That part of the contract having reference to the payments for the work is as follows:

"Payment for said work is to be made as follows, to wit: When said work shall have been, in opinion of party of first part, half completed, said party of first part, or its engineer, shall carefully estimate the work completed, and pay the party of the second part a sum of money equal to 85% of the cost of the completed work, as agreed upon herein: provided, said sum shall not exceed the amount of $7,480.00. And on the completion of the entire work, and its acceptance by party of first part, then full and complete payment, as herein provided for, shall be made to party of the second part."

Branham and Hege, as principals, and Wasson and Adams, as sureties, executed to the plaintiff the bond in suit, for the faithful performance of the contract. Branham and Hege entered upon the construction of the work contracted for, and prosecuted the same until they had completed about one-third part thereof, when they falsely and fraudulently represented to the plaintiff, through its board of county commissioners, that they had fully completed the one-half part or more of said work, and asked to be paid therefor the sum of $10,046.68. The plaintiff, relying upon these false and fraudulent representations, thereupon paid to them said sum of $10,046.68. As a matter of fact, Branham and Hege had not completed more than one-third part of said work, and thereupon they abandoned said work and contract, and neglected and refused to proceed with the same, and left it uncompleted. The plaintiff was compelled to, and did, complete said work, at a cost, in excess of that provided for in the contract, of $13,429.56.

The contention on behalf of the sureties is that they have been released because the plaintiff, without any estimate having been made by it or its engineer to ascertain whether one-half of the work had been completed, paid to Branhan and Hege $10,046.68,—a sum largely in excess of the amount to which they would have been entitled if they had actually completed one-half of the work,—and because, at the time the payment was made, Branhan and Hege had not completed one-half of the work, and hence were not entitled to receive any payment whatever.

It is well settled that a surety is bound only by the strict terms of his engagement, and, as he assumes the burdens of the contract without sharing its benefits, he has the right to prescribe the exact terms upon which he will enter into an obligation, and to insist

upon his discharge if those terms are not observed. An innocent surety is always a favorite subject of legal protection. State v. Cutting, 2 Ohio St. 1; Raymond v. Whitney, 5 Ohio St. 201; Hall v. Williamson, 9 Ohio St. 17. It is not a question whether he is harmed or benefited by a disregard of the terms to which he has assented. Miller v. Stewart, 9 Wheat. 681; Manufacturing Co. v. Kimmel, 87 Ind. 560; Post v. Losey, 111 Ind. 74, 12 N. E. Rep. 121. Where, by the terms of the contract, the principal is to be paid by the debtor or obligee in installments, and the payments are made in advance of the time specified in the contract, the surety will be discharged. Brandt, Sur. (Ed. 1878,) § 102; Id. § 371. Calvert v. Dock Co., 2 Keen, 639, is a case similar to the one at bar. One Streather contracted to build certain works for the dock company, and to furnish the materials. The company was to pay the agreed price of £52,200 in installments, to wit, three-fourths of the costs of the work done to be paid for every two months, on the certificate of the company's engineer, and the residue on the completion of the contract. Warburton and Laycock became sureties upon the bond of Streather for the performance of the contract. Streather entered upon the work, but failed to complete it, and finally abandoned it, and suit was instituted upon the bond. Streather had been paid, from time to time, more than three-fourths of the estimated cost of the work performed, and it was held that thereby the sureties were released. In the course of his opinion, Lord Langdale, M. R., said:

"In this case the company were to pay for three-fourths of the work done every two months. The remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances I think that their situation, with respect to Streather, was so far altered that his sureties must be considered to be discharged from their suretyship."

Leeds v. Dun, 10 N. Y. 469, is a case where the defendant was sued for the price of certain goods sold by the plaintiff to one Woodcock on the credit of the defendant's guaranty. The instrument signed by the defendant stipulated that he would be responsible for the payment of certain bills of goods to be sold on a credit of six months. The goods were sold in part on a credit of six months, and in part on a credit of four months, and it was adjudged that the guarantor could not be holden for any part of the goods so sold. The court, in the course of its opinion, says:

"The recitals in this instrument show, and with every precision, the contract into which the defendant proposed to enter. It was optional with the plaintiff's firm to accept the proposition, and enter into the contract, or to

refuse it. If they accepted the contract, they could only do so on the terms proposed by the defendant. If they did not comply with the terms so proposed, there was no contract made, and there was no meeting of minds between the parties. The contract proposed by the defendant was to guaranty the payment of a debt to be contracted by a third person upon certain terms. The compliance with those terms formed the only consideration of the defendant's contract. The plaintiff's firm did not comply with the terms, for they sold a part of the goods ordered upon a credit of four months, instead of six months."

Bragg v. Shain, 49 Cal. 131, is a case wherein a church society contracted with Shain for the erection of a church, and was to pay for the work and materials $31,850, in installments, payable on the 1st day of each month, to the amount of 75 per cent. of the value of the materials furnished and work done during the preceding month, and the remainder was to be paid when the work was completed. One Bonnet became surety for Shain for the faithful performance of the contract. During the progress of the work the society paid Shain more than the 75 per cent. provided for in the contract. While the work was under way, Bragg, Tobin, and Bonnet furnished Shain materials which were used in the construction of the building, and for which Shain neglected to pay, and they filed liens, and the present suit was instituted to enforce these liens. The trial court decided against Bonnet, holding that, as he was surety for Shain, he could not enforce his lien against the society. On appeal, Bonnet contended that as Shain had been paid by the society more than the 75 per cent., in violation of the terms of the contract, he was released as surety; and this contention was sustained by the court, which held that the failure of the society to retain in its hands the one-fourth part of the contract price, as stipulated in its contract with Shain, operated as a discharge of Bonnet as surety.

The case of Taylor v. Jeter, 23 Mo. 244, was as follows: A. agreed to furnish material and erect a building for B., and B. agreed to pay A. specified sums at particular stages in the progress of the work, the remainder to be paid 60 days after the completion of the building, and its acceptance by B. Upon this contract, C. became surety for A. The building was completed and accepted by B., and although B. received notice, before the completion of the building, of the filing of various mechanics' liens thereon, he paid the contract price to A. before he was bound by the contract to pay the same. B. afterwards had to pay the liens, and sued C. on the contract; but it was held he could not recover, as he had released C. by paying A. before he was bound to do so.

The case of Simonson v. Grant, 36 Minn. 439, 31 N. W. Rep. 861, is similar, in its essential features, to the case of Taylor v. Jeter, supra. Following the cases hereinbefore cited, the court held that the sureties upon the bond were to be considered as released. In the course of its opinion the court says:

"In such cases the surety may be deprived of the inducement which the principal would have to perform the contract in due time, as the contract required."

In the case at bar, over $10,000 were paid to the principals before, by the terms of the contract, they were entitled to receive anything. Such a gross departure from the terms of the contract, to the prejudice of the sureties, operates to release them from the bond in suit, unless the false and fraudulent conduct of the principals in procuring the payment deprives the sureties of the right to take advantage of it. In Bebout v. Bodle, 38 Ohio St. 500, it is held, where a principal debtor, by falsely and fraudulently representing to the creditor that his surety has consented to an extension of time for payment, procures from the creditor an agreement for such extension in consideration that interest be paid, such agreement is, as to the creditor, fraudulent; and he may, upon discovery of such fraud, even after the period of extension has expired, repudiate such agreement, and sue upon the original contract, without refunding or tendering back the interest paid under such invalid agreement. It is rudimentary that fraud vitiates all contracts; and if the plaintiff was induced to make the payment to the principals by their false and fraudulent representations, without any fault or negligence on its part, it may well be that the sureties would be precluded to invoke such payment as a ground for their release from the bond in suit. But such is not the situation of the plaintiff. The contract provides that:

"When said work shall have been, in opinion of party of first part, half completed, said party of first part, or its engineer, shall carefully estimate the work completed, and pay the party of the second part therefor a sum of money equal to eighty-five per cent. of the cost of the completed work, as agreed upon herein: provided, said sum shall not exceed the amount of seven thousand four hundred and eighty dollars."

By the terms of the contract the plaintiff, or its engineer, was required carefully to estimate the amount of work completed before making any payment. The performance of this duty was important, for the protection of the sureties. But, if the plaintiff had the right to rely on the representations of the contractors, that would have been a justification for the payment of no more than $7,480; so that the fraudulent representations, relied on, afford no excuse for the payment to the contractors of the sum of $10,046.68. In no just sense can it be claimed that the plaintiff was induced to make the payment by the fraudulent representations of the contractors. It had no right to rely on such representations, and it was bound, either in person or by its engineer, to make the estimate of the work done for itself. If the plaintiff was misled, it was through its own fault, and the failure to perform what was required of it by the contract. In such case, it cannot shift the consequences of its own fault and want of care onto the sureties. Manufacturing Co. v. Kimmel, 87 Ind. 560.

In the opinion of the court, the demurrer must be sustained, and it is so ordered.

In re BONNER.

(Circuit Court, N. D. Iowa, E. D. August 15, 1893.)

1. UNITED STATES COURT IN THE INDIAN TERRITORY—IMPRISONMENT IN STATE PENITENTIARY.
   The United States court in the Indian Territory has no power to order that a sentence of imprisonment for one year shall be executed in a state penitentiary, as imprisonment in such an institution is limited by Rev. St. U. S. § 5541, to sentences for a period longer than one year. In re Mills, 10 Sup. Ct. Rep. 762, 135 U. S. 263, followed.
2. HABEAS CORPUS—LEAVING PRISONER TO REMEDY BY APPEAL.
   On habeas corpus, the petitioner sought his release on the sole ground that the United States court in the Indian Territory had erred in directing a sentence of imprisonment for one year to be executed in a state penitentiary, but made no complaint as to the jurisdiction of that court over the offense or over the person, nor as to the legality of the proceedings which resulted in the verdict. *Held*, that as the erroneous direction could have been corrected in the trial court, had attention been called thereto, and still might be corrected by the circuit court of appeals, the prisoner should be left to his remedy by writ of error, and his discharge refused. Following Ex parte Frederich, 13 Sup. Ct. Rep. 793, 149 U. S. 70.

At Law. Petition by John Bonner for a writ of habeas corpus. Writ refused.

Johnson, Cruce & Cruce, for petitioner.

C. L. Jackson and John E. Stryker, for the United States.

SHIRAS, District Judge. A petition for the issuance of a writ of habeas corpus, on behalf of John Bonner, was filed some time since, in which it was averred that the petitioner was illegally restrained of his liberty by the warden of the Iowa state penitentiary, at Anamosa, Iowa, in pursuance of a sentence imposed by the United States court in the Indian Territory, which, it was claimed, is illegal and void. Upon the filing of the petition, an order was issued to the warden of the penitentiary, directing him to make a return showing by what authority he held the petitioner in custody, which return was duly made, showing that the petitioner was imprisoned in the penitentiary by virtue of an order made by the United States court for the Indian Territory, directing that a sentence of imprisonment for a period of one year, pronounced against the petitioner for the crime of larceny, should be carried out by confining the petitioner in the Iowa state penitentiary, at Anamosa. The question whether a writ for the discharge of the petitioner should be issued was set down for hearing on July 27th, and counsel have submitted briefs upon the question involved; the position taken by counsel for petitioner being that the court in the Indian Territory could not lawfully sentence the petitioner to imprisonment in a penitentiary for a period of one year.

On behalf of petitioner, reliance is placed upon the case of In re Mills, 135 U. S. 263, 10 Sup. Ct. Rep. 762, in which the supreme court had occasion to consider the extent of the jurisdiction of the United States court in the Indian Territory, in determining whether the creation of that court had deprived the United States district

court in and for the western district of Arkansas of jurisdiction over offenses committed in the Indian Territory, and punishable by imprisonment at hard labor in the discretion of the court. The fifth section of the act of March 1, 1889, (25 Stat. 783,) creating the court in the Indian Territory, provides:

"That the court hereby established shall have exclusive jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or imprisonment at hard labor."

The court held that this section did not deprive the court of the western district of Arkansas of jurisdiction over offenses wherein the punishment might be imprisonment at hard labor, or imprisonment for a period longer than one year, but it further held that:

"A sentence simply of 'imprisonment,' in the case of a person convicted of an offense against the United States, where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary, except in cases in which the sentence is for a period longer than one year. * * * There is consequently no escape from the conclusion that the judgment of the court, sentencing the petitioner to imprisonment in a penitentiary in one case for a year, and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentence, and the orders directing the sentence of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcribed its powers."

Under this construction of the statute, it seems clear that the order of the court in the Indian Territory, directing the sentence of imprisonment for the period of one year to be carried out by confinement in a penitentiary, instead of a jail, was beyond its power to make. In the petition for the writ, no attack is made upon the jurisdiction of the court over the offense charged against the petitioner, and over the person of the petitioner, nor is any exception taken to the legality of the proceedings which resulted in a verdict of guilty brought in by the trial jury.

The sole ground relied upon is that the court exceeded its power in sentencing the petitioner to confinement in the penitentiary. That this position is well taken must be conceded, in view of the ruling of the supreme court in the case of In re Mills, above quoted, and the other cases therein cited. Does it follow, however, that, of necessity, the petitioner is entitled to be discharged upon a writ of habeas corpus? The error of which the petitioner complains is not one affecting the jurisdiction of the court before which he was tried over his person, or over the offense of which he was convicted. The error is one which could readily have been corrected in the trial court, had the attention of the court been called to it at the time the order was made. Furthermore, by writ of error, the petitioner can take the case before the circuit court of appeals, and thus secure the correction of any wrong done him in the premises. The court of the United States for the northern district of Iowa, and the judges thereof, have no appellate power over the proceedings had in the United States court in the Indian Territory; and neither by means of the writ of habeas corpus, nor any

other process, can they correct errors committed in cases triable before that court. Where a party has secured to him the right to carry his case before an appellate court competent to rectify any errors committed to his prejudice, the better rule is to remit him to this remedy, rather than to grant a writ of habeas corpus. The purpose sought to be accomplished by means of the writ of habeas corpus is not the correction of the error complained of, but to compass the discharge of the petitioner from all further imprisonment. In principle, this case comes within the doctrine announced by the supreme court in the recent case of Ex parte Frederich, 149 U. S. 70, 13 Sup. Ct. Rep. 793, wherein it is held that, where the prisoner has open to him the remedy of a writ of error for the correction of whatever injury may have been done by the action of the trial court, he should be put to that remedy, and the writ of habeas corpus should be refused, unless, in the particular case, special facts should demand other action.

Following the ruling in that case, the writ prayed for is refused.

ROBINSON v. GREGG.

(Circuit Court, D. South Carolina. August 18, 1893.)

1. PLEADING—VERIFICATION.
   Under the South Carolina practice, requiring a pleading to show what facts are stated on personal knowledge, and what on information and belief, and also requiring the verification thereto to state that the facts set out in the pleading are true, except as to such facts as are stated on information and belief, and that as to these the party believes them to be true, the complaint and verification must be taken together; and if a complaint shows distinctly what allegations are on information and belief, and what from personal knowledge, a verification stating that the complaint is true, of plaintiff's own knowledge, except as to those matters stated on information and belief, and as to these he believes it to be true, is sufficient.

2. SAME.
   A certificate to the verification of a complaint, stating: "Sworn to and subscribed before me. * * * A. J. R., Clerk of the Circuit Court of the United States. * * * By W. H. S., Deputy Clerk,"—and having the seal of the court attached, is insufficient, in that it purports to be the act of the deputy clerk, rather than that of the clerk, irrespective of the question as to whether or not the clerk has power to administer an oath in a matter disconnected with the court, or the business thereof.

At Law. Action by W. S. O'B. Robinson against Walter Gregg. Plaintiff moves for judgment. Denied.

Johnsons & Hanckel, for the motion.
Abney & Thomas, opposed.

SIMONTON, District Judge. This case comes up upon a motion to take judgment by default for want of an answer. The summons and complaint were served upon the defendant 17th May, 1893. The time for answering expired on the rules day in July, (the 3d.) An answer was filed and served on the plaintiff's attorneys 29th June,

1893. The complaint contained several paragraphs. In one or two of these the facts were stated as on information and belief. In the other paragraphs the statement was made without qualification. The complaint had a verification, in the following words:

"W. S. O'B. Robinson, receiver and plaintiff, above named, being duly sworn, says that the foregoing complaint is true, of his own knowledge, except as to those matters stated on information and belief, and as to these he believes it to be true. Sworn to and subscribed before me this 16th March, A. D. 1893. A. J. Reddick,
"Clerk of the Circuit Court of the United States for the Eastern District of North Carolina, in the Fourth Circuit.
"By Wm. H. Shaw, Deputy Clerk."

The seal of the court is attached. The answer is a general denial, and is not verified. Under the Code of Civil Procedure in South Carolina, (section 177,) when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. The plaintiff bases his motion on this section. The defendant insists that no verification to the answer can be required: (1) Because the verification to the complaint is not in the form required by the law and practice in South Carolina; (2) because the jurat is not properly attested; (3) because, if a verification was originally needed, it has been waived by the plaintiff.

1. According to the practice in the state courts of South Carolina, (which practice, in civil cases at law, this court must follow,) when the verification of a pleading states "that the facts set out in the pleading are true, except as to such facts as are stated on information and belief, and that as to these he believes them to be true," it must be made to appear what facts are stated as of personal knowledge, and what facts are stated on information and belief. Smalls v. Wilder, 6 S. C. 402; Hecht v. Friesleben, 28 S. C. 181, 5 S. E. Rep. 475; Burmester v. Moseley, 33 S. C. 254, 11 S. E. Rep. 786. But this need not be shown in the verification. The whole complaint and the verification must be taken together, and when the body of the complaint shows distinctly what allegations are on information and belief, and what from personal knowledge, the requirements of the law are satisfied. The paragraphs of this complaint made this distinction. The objection to the form of verification is overruled.

2. The next objection is as to the certificate to the verification. It purports to be taken before the clerk of the United States circuit court of the eastern district of North Carolina, and is signed in the name of the clerk, by his deputy. Grave doubts are entertained as to the power of the clerks of the circuit courts of the United States to administer oaths generally; that is to say, in matters totally disconnected with their courts, and the business thereof. No express authority can be found for it. Be this as it may,—and the point is not passed upon,—there is an objection to this certificate which seems insuperable. When an officer is authorized to administer an oath to be used elsewhere, it must appear that the affiant came in person before the officer. This is for identification, that he is the person who really takes the oath. It must also appear that he

was duly sworn; and when the affiant subscribes, or should subscribe, the oath, it must appear that he did subscribe it. The evidence of these three essentials is the language of the officer, and its credibility and authority depend wholly upon his official position and character, and the responsibility thereto belonging. In the present instance we have nothing of the kind. Some one else than the clerk states that the affiant came before the clerk, and was sworn, presumably by him, and subscribed the oath. This statement cannot bind the clerk, and is but secondary evidence of the facts stated. In fact, the most probable conclusions are that the affiant did not come before the clerk, was not sworn by the clerk, and that the affiant did not subscribe the oath before the clerk; that all these were done before the deputy. But the certificate does not say so. We are left to conjecture, and this is not sufficient.

This conclusion renders unnecessary the discussion of the last ground. The motion is refused.

BECKER v. BALTIMORE & O. R. CO.

(Circuit Court, D. Indiana. July 19, 1893.)

No. 8,749.

1. MASTER AND SERVANT—FELLOW SERVANTS—CONDUCTOR AND BAGGAGE MASTER.
   In Indiana a brakeman on a freight train is considered the coservant of the conductor of another train, through whose negligence a collision occurs. Kerlin v. Railroad Co., 50 Fed. Rep. 185, followed.
2. SAME—FEDERAL COURTS—FOLLOWING STATE DECISION.
   The control of the relation of master and servant is reserved to the states, and federal courts, when administering state law upon this subject, should follow the decisions of the state courts. Kerlin v. Railroad Co., 50 Fed. Rep. 185, followed.

At Law. Action by John P. Becker, administrator, against the Baltimore & Ohio Railroad Company, to recover damages for the alleged wrongful death of his intestate while in its employment. On demurrer to the complaint. Demurrer sustained.

L. W. Welker and Wm. L. Taylor, for plaintiff.
J. H. Collins, for defendant.

BAKER, District Judge. The defendant demurs to the second and third paragraphs of complaint for the reason that neither of them states facts sufficient to constitute a cause of action. The plaintiff's intestate was employed by defendant as a brakeman on one of its freight trains, and was killed by the carelessness and negligence of the conductor and other employes of defendant in charge of and operating one of its passenger trains, which, by their carelessness, came into collision with the former. This case presents the precise question raised and decided in Kerlin v. Railroad Co., 50 Fed. Rep.

185. On the authority of that case, and for the reasons therein stated, the demurrer to each paragraph of the complaint must be sustained, and it is so ordered.

In re MARQUAND.

(Circuit Court of Appeals, Second Circuit. May 24, 1893.)

CUSTOMS ADMINISTRATIVE ACT OF JUNE 10, 1890—UNITED STATES CIRCUIT COURT OF APPEALS—REMISSION OF DUTIES—NEW TRIAL.

In a case arising under the customs administrative act of June 10, 1890, (26 Stat. 131,) it is not within the province of a United States circuit court of appeals to grant to or withhold from an importer leave to apply to an officer of customs for a remission of duties levied upon merchandise imported by him, and made the subject of such case; or, if a judgment rendered in such case by a United States circuit court be affirmed by such circuit court of appeals, to direct or suggest the action of such circuit court in regard to a new trial upon newly-discovered evidence or newly-ascertained facts.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Statement by SHIPMAN, Circuit Judge:

At Law. Henry G. Marquand purchased in a foreign country, and on October 13, 1890, imported therefrom into the United States at the port of New York, an antique bronze statuette of Eros, for the purpose of adding the same to, and making it a part of, a collection of antique bronzes which he had been gathering for years, and then had in his house. This statuette was classified by the collector of customs at that port as a manufacture of metal, under paragraph 215 of the tariff act of October 1, 1890, (26 Stat. 582.) The said Marquand, as provided in section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) protested, claiming—First, that this statuette was free of duty, under the provision for collections of antiquities, contained in paragraph 524; and, second, that, if not so free of duty, it was dutiable as statuary wrought, etc., under paragraph 465 of the aforesaid tariff act. The board of United States general appraisers, to whom, pursuant to section 14 of the customs administrative act, the collector transmitted the invoice of this statuette, reversed the action of the collector, and decided that this statuette was free of duty, under the paragraph specified in the first claim of the protest. The United States circuit court, to which, pursuant to section 15 of the customs administrative act, the collector appealed, reversed the decision of the board, and adjudged that this statuette was dutiable under the paragraph specified in the second claim of the protest. The United States circuit court of appeals for the second circuit, to which the said Marquand appealed, affirmed the judgment of the circuit court. 55 Fed. Rep. 642. Thereafter, and before the circuit court of appeals had issued its mandate, the said Marquand, upon an affidavit setting forth new facts, moved this court for leave to present this affidavit to the collector of customs, the United States appraiser, the board of general appraisers, or other officer of the customs, as the court might direct, and for leave to petition the collector or other proper officer to remit the duties assessed upon the Eros upon the facts stated in said affidavit, or upon oral proof to the effect stated; and, in case such relief should be denied, then that the mandate of the court affirming the judgment of the circuit court should contain the language: "Without prejudice to such application, or to an application of the said Marquand for a new trial from the circuit court upon said facts."

Frederic H. Betts, for the motion.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., opposed.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge, (after stating the facts as above.) The application of Henry G. Marquand for leave to present the facts stated in his affidavit to the collector of customs or the board of general appraisers or other officer of the customs, and for leave to petition the collector or other proper officer to remit the duties upon the Eros, and the motion that the mandate contain the language, "without prejudice to such application, or to an application of the said Marquand for a new trial from the circuit court upon said facts," is not granted. It is not within the province of this court to grant or to withhold leave to apply to an officer of the customs for a remission of duties, or, in case a judgment of the circuit court is affirmed, to direct or suggest its action in regard to new trials upon newly-discovered evidence or newly-ascertained facts.

In re KNY et al.

(Circuit Court, S. D. New York. June 27, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—"ABSOLUTE ALCOHOL."

So-called "absolute alcohol," manufactured in Germany, showing 198 degrees of proof, being equivalent to 99.5 per cent. of anhydrous alcohol, imported on the orders and for the laboratory use of certain colleges, and sold by the importers at an advance on the cost price of about 20 per cent., *held* duty free as a scientific preparation imported in good faith for the use of institutions incorporated for educational and scientific purposes, not intended for sale under paragraph 677 of the free list of the tariff act of October 1, 1890, and not duitable as alcohol at $2.50 per proof gallon, under paragraphs 329 and 333 of Schedule H of the tariff act of October 1, 1890.

At Law.

Appeal by the collector of the port of New York from a decision of the board of United States general appraisers, concerning the classification for customs duties of certain so-called "absolute alcohol," which was classified for duty by the said collector as "alcohol, 198 degrees, $4.95," at $2.50 per proof gallon, under the provisions of paragraphs 329 and 333 of Schedule H of the tariff act of October 1, 1890, which provisions are as follows: "329. Brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this act, two dollars and fifty cents per proof gallon." "333. No lower rate or amount of duty shall be levied, collected, and paid on brandy, spirits, and other spirituous beverages than that fixed by law for the description of first proof; but it shall be increased in proportion for any greater strength than the strength of first proof, and all imitations of brandy or spirits or wines imported by any names whatever shall be subject to the highest rate of duty provided for the genuine articles respectively intended to be represented, and in no case less than one dollar and fifty cents per gallon." Against this classification the importers protested, claiming that the article was a scientific preparation for college use, and duty free, under paragraph 677 of the free list of said tariff act, which is as follows: "677. Philosophical and scientific apparatus, instruments, and preparations; statuary, casts of marble, bronze, alabaster,

or plaster of Paris; paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale." The importers procured the matter to be certified to the board of United States general appraisers pursuant to section 14 of the so-called "Customs Administrative Act," of June 10, 1890, and that board proceeded to take certain testimony in relation thereto, from which it appeared that this "absolute alcohol" was made by chemical action by adding lime, and then distilling the liquid over again, by means of which the high percentage of 99.5 of alcohol was obtained; and that it was from two to three times higher in price than the regular alcohol of commerce, running only to 95 per cent. Proof was also offered that this absolute alcohol was imported on the orders and for the use of certain colleges in the United States, and that the importers did not keep the article in stock, nor any other chemicals, and that it was solely to be used for scientific purposes.

The board of general appraisers thereupon rendered a decision, the opinion written by Somerville, general appraiser, in which it was held, referring to the absolute alcohol in question, and citing from the United States dispensatory: " 'In this state it cannot be obtained by ordinary distillation alone, the purest alcohol thus procured still containing 11 per cent. of water. To separate this, it is customary to have recourse to substances having a very strong affinity for water, sufficient not only to abstract it from the alcohol, but to retain it at a temperature at which alcohol will distill over.' The mode of preparing the article is an elaborate chemical process, which is given in the work above cited, and also by expert witnesses examined before the board in the hearing. * * * We make the following findings of fact: (1) The merchandise is 'absolute alcohol,' which is an article of commerce entirely distinct in nomenclature, chemical composition, and uses from alcohol proper, and was imported since October 6, 1890. (2) It contains from 98 to 99 per cent. of pure alcohol, and is used chiefly in the laboratory, either for analytical purposes or for illustrating or teaching scientific principles. It is worth twice as much as common alcohol, and is never, therefore, used for mere industrial purposes. (3) It is a preparation of alcohol, made by removing, by an elaborate chemical process, 7 or 8 per cent. of water, and can be preserved pure only by keeping it in vessels hermetically sealed. (4) The merchandise was imported by the protestants specially, in good faith, for the use of colleges established for educational, scientific, or literary purposes, and for no other purpose, the importers being paid for their services by making an extra charge over prime cost for the merchandise. The importation in case * * * 16654A, for Cornell University, in New York, Wesleyan University, at Middletown, Conn., and Maine State College, in the state of Maine. It follows from the last finding that the goods are 'not intended for sale,' within the meaning of said paragraph 677, by which we understand not intended to be disposed of by sale to any other person than the corporation or society for whose special use the importation is permitted to be made. The protests are sustained, and the decision in each case reversed, with instructions to reliquidate the entries accordingly."

General Appraiser Tichenor dissented from the conclusion reached by the majority of the board for the following reasons: "(1) Alcohol, whether known as 'absolute alcohol' or otherwise, being specially provided for as distilled spirits at a fixed rate of duty per proof gallon in Schedule H of the present tariff act, cannot, in my opinion, be held to be exempt from duty under a general and indefinite provision elsewhere in said act. (2) Alcohol absolute, or pure alcohol, is not, according to my understanding, a philosophical or 'scientific preparation,' within the intent and meaning of paragraph 677 of the existing tariff, but is, in fact, an industrial product of variable character and value, as is shown by the wide difference in the invoice price of the several importations subject of these protests, some of which are at marks 2.30 per kilo, and others at marks 1.85 per kilo. (3) As appears from the papers and testimony in these cases, the alcohol in question was imported by firms engaged in the importation and sale of merchandise of this class; and,

while this was imported by them on the order of the several institutions mentioned, it was sold by them to said institutions at an advance over cost, or at a profit of about 20 per cent. I am therefore of the opinion that the merchandise is dutiable as assessed by the collector." The collector thereupon appealed the case to the United States circuit court, under section 15 of the above-cited customs administrative act of June 10, 1890, and further evidence was taken in the circuit court, from which it appeared that absolute alcohol, running as high in percentage of anhydrous alcohol as the imported article in question, was manufactured to a considerable extent in this country from the ordinary alcohol of commerce by a process of treatment with chloride of calcium, which, having a great affinity for water, absorbed the water from the alcohol, which was slowly distilled over by repeated distillations until the alcohol reached the desired strength; that the absolute alcohol was a regular article of commerce in the markets of this country, and was used considerably for "cutting oils" to make essences, by confectioners and manufacturers; that it was also sold to some extent to wholesale druggists and pharmaceutical chemists. It appeared also to have been used at one time in combination with camphene in producing an illuminating fluid. There was testimony, however, that absolute alcohol of the kind imported, being of a very superior character, was used chiefly, if not entirely, for chemical and laboratory purposes, and by the large universities in the country, and always sold in bottles, to prevent deterioration or absorption of moisture from the atmosphere. Evidence was also produced showing that the proper oaths taken by officers of the colleges for which the importation was made were duly presented to the collector of the port on the entry of the merchandise, which was entered free, and the duty subsequently assessed thereon by the collector. It was admitted that the importers' profit in furnishing the article to the colleges in question was about 20 per cent.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for the collector and the United States.

Comstock & Brown, for the importers.

LACOMBE, Circuit Judge, (orally, after hearing argument.) "I affirm the decision of the board of general appraisers in this case."

In re HAAGER et al.

(Circuit Court, S. D. New York. June 22, 1893.)

CUSTOMS DUTIES—TARIFF ACT OF OCTOBER 1, 1890—DOTTED SWISSES AND FIGURED SWISSES, OR SWISS SPOTS AND SWISS SPRIGS.

Cloths composed of cotton, bleached, ornamented with dots, spots, sprigs, or other figures of cotton that were made in the cloth, in a loom, simultaneously with the manufacture of the cloth, by means of bobbins which operated such times, while the shuttle was weaving the cloth, as the pattern required the production of such figures, and commonly known as "Dotted Swisses" and "Figured Swisses," or "Swiss Spots" and "Swiss Sprigs," are not dutiable at the rate of 60 per cent. ad valorem, as embroideries or as articles embroidered, under the provision for embroideries or articles embroidered contained in paragraph 373 (Schedule J) of the tariff act of October 1, 1890, (26 Stat. 594,) nor, though containing exceeding 100 threads, and not exceeding 150 threads, to the square inch, counting the warp and filling, and valued at over 10 cents per square yard, are they dutiable at the rate of 40 per cent. ad valorem, as cotton cloths, bleached, containing such number of threads so counting, and valued at so much per square yard, under the provision for such cotton cloths contained in paragraph 346 (Schedule I) of the same tariff act, (26 Stat. 591,) but are dutiable at the rate of 40 per cent. ad valorem as manufactures of

cotton not specially provided for, under the provision for such manufactures contained in paragraph 355 (Schedule I) of the same tariff act, (26 Stat. 593.)

At Law. Appeal by the collector of customs from a decision of the board of United States general appraisers.

The firm of Albert Haager & Co. imported by the Gascogne, January 5, 1891, by the Bretagne, January 27, 1891, by the Champagne, March 31, 1891, and by the Werkendam, August 6, 1891, from a foreign country into the United States, at the port of New York, certain merchandise, consisting of cloths composed of cotton, bleached, ornamented with dots, spots, sprigs, or other figures of cotton, and commonly known as "Dotted Swisses" and "Figured Swisses," or as "Swiss Spots" and "Swiss Sprigs." This merchandise was classified for duty at the rate of 60 per cent. ad valorem, as embroideries or articles embroidered by machinery, under the provision for "laces * * * embroideries * * * and articles embroidered by hand or machinery, * * * all of the above-named articles, composed of * * * cotton or other vegetable fibre, or of which these substances or either of them or a mixture of any of them is the component material of chief value, not specially provided for in this act," contained in paragraph 373 (Schedule J) of the tariff act of October 1, 1890, (26 Stat. 594,) and duty at that rate was exacted thereon by the collector of customs at that port.

Against this classification and this exaction the importers duly protested, claiming that this merchandise was not in fact embroidered, and was not known commercially as embroideries; that it was dutiable at the rate of 4 per cent. ad valorem, as manufactures of cotton, under the provision for "all manufactures of cotton not especially provided for in this act," contained in paragraph 355 (Schedule I) of the same tariff act, (26 Stat. 593;) that, if not so dutiable, then that it was dutiable as cotton cloths bleached, colored, etc., according to the number of "threads to the square inch, counting the warp and filling," and the value per square yard, at the respective rates of duty provided for such cloths in paragraphs 344–348, inclusive, (Schedule I,) of the same tariff act, (26 Stat. 591, 592.) Upon the receipt of the importers' protests the collector, pursuant to section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) transmitted the invoices of this merchandise, and all the papers and exhibits connected therewith, to a board of three United States general appraisers on duty at that port. The board of general appraisers, having examined the case thus submitted, found, among other things, (1) that this merchandise was not embroideries, or articles embroidered; that its plain or unornamented portions contained exceeding 100, and not exceeding 150, threads to the square inch, counting the warp and the filling, but that this merchandise, not being homogeneous, in that the number of threads in the part of this merchandise containing the dots, spots, sprigs, or other figures was greater than the number of threads in its plain or unornamented portions, was not, under the decision in the case of Robertson v. Hedden, 40 Fed. Rep. 322, countable cotton cloths, within the intent of the aforesaid paragraphs 344–348, inclusive; and the board of general appraisers decided that this merchandise was dutiable at the rate of 40 per cent. ad valorem, as manufactures of cotton not specially provided for under the provisions for such manufactures contained in the aforesaid paragraph 355, as first claimed in the importers' protests.

The collector, being dissatisfied with this decision, applied, pursuant to section 15 of the customs administrative act, to the United States circuit court for the southern district of New York for a review of the questions of law and fact involved therein. In compliance with an order granted upon this application, the board of general appraisers made their return to the said circuit court, and thereafter a large mass of evidence was taken in behalf of the collector and in behalf of the importers.

From the return and the evidence in the case, in addition to the facts already set forth, it appeared that there was a resemblance to embroidery in the dots, spots, sprigs, or other figures on this merchandise; that, according

to the testimony of the great majority of the witnesses in this case, embroidery, as generally known to trade and commerce, was an ornamentation added by means of a needle or needles directed by hand or machinery to a cloth or fabric after the completion of the cloth or fabric, and articles embroidered, as so known to trade and commerce, were articles that had been ornamented by means of a needle or needles so directed; that as far back as February 1, 1857, the treasury department, in its General Regulation issued at that date, (page 565,) under the head of "Embroidery," promulgated the following definition: "The term tamboured or embroidered * * * can only be properly and safely applied to those fabrics * * * figured or ornamented by the employment of the needle whether directed by the hand or by machinery in the loom or frame; and consequently manufactures * * * figured in the loom or machine which weaves the fabric, as the texture is formed, without the employment of the needle either by hand or mechanical agency are not to be considered as * * * liable to duty * * * as tamboured or embroidered;" that this merchandise was a woven fabric completed in the loom as it appeared in the market,—that is to say, the dots, spots, sprigs, or such other figures that it contained, were made in the cloth, in the loom, simultaneously with the manufacture of the cloth, by means of bobbins which operated at such times, while the shuttle was weaving the cloth, as the design or pattern of the merchandise required the production of such figures, and were not made with a needle or needles directed by hand or machinery; and that, according to the testimony of the great majority of the witnesses in the case, this merchandise was not known to trade and commerce as embroideries, or as articles embroidered.

The evidence further showed that the warp of this merchandise and of other cotton cloths was the threads thereof running continuously from end to end, and the filling, the threads thereof running continuously from side to side, or from selvidge to selvidge; that the threads of the dots, spots, sprigs, or other figures on this merchandise, were not part of either the warp or filling, but were additional to the filling; and that this merchandise contained exceeding 100 threads, and not exceeding 150 threads, to the square inch, counting the warp and filling, and was valued at over 10 cents per square yard. Paragraph 346 (Schedule I) of the aforesaid tariff act (26 Stat. 591) levies a duty of 40 per cent. ad valorem on "all cotton cloth, exceeding one hundred and not exceeding one hundred and fifty threads to the square inch, counting the warp and filling, * * * bleached, valued at over ten cents per square yard."

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for collector,

Contended that this merchandise was dutiable as embroideries, or as articles embroidered, under said paragraph 373, but, if not so dutiable, then that it was dutiable as countable cotton cloths, under said paragraph 346.

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for importers.

LACOMBE, Circuit Judge, (orally.) In this case, as to the question whether or not the articles are embroideries, I think the weight of the testimony is overwhelmingly in support of the conclusion reached by the board of general appraisers; and on the other point I am inclined to adhere to the views expressed in the case of Robertson v. Hedden, 40 Fed. Rep. 322, and for that reason shall affirm the decision of the board of general appraisers.

In re KLINGENBERG.

(Circuit Court, S. D. New York. June 28, 1893.)

CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS' DECISIONS—JURISDICTION OF CIRCUIT COURTS.

The customs administrative act of June 10, 1890, (26 Stat. 131,) confers no jurisdiction upon circuit courts of the United States, on the application of a dissatisfied collector of customs, to review and reverse a decision of a board of general appraisers, involving neither the classification of imported merchandise, nor the rate of duty leviable thereon, but only the value of the paper florin of Austria-Hungary, the currency in which such merchandise was invoiced. Passavant v. U. S., 13 Sup. Ct. Rep. 572, 148 U. S. 214, applied.

At Law. Motion to dismiss, for want of jurisdiction, an appeal taken by the collector of customs from a decision of a board of United States general appraisers.

One A. Klingenberg imported from Austria-Hungary into the United States, at the port of New York, certain merchandise, by the Bohemia and by the Rugia. The merchandise imported by the Bohemia was shipped from various places in Bohemia. The invoice covering this merchandise was consulated at Prague, Bohemia, July 6, 1892. The shipment of this merchandise by vessel to the United States was made from Hamburg, Germany, July 7, 1892, and this merchandise was entered for consumption at the port of New York July 23, 1892. The merchandise imported by the Rugia was also shipped from various places in Bohemia. The invoice covering this merchandise was consulated at Prague, Bohemia, July 9, 1892. The shipment of this merchandise by vessel to the United States was made from Hamburg, Germany, July 10, 1892, and this merchandise was entered for consumption at the port of New York July 26, 1892. The invoices of the merchandise of both these importations set out its value in paper florins of Austria-Hungary, but were not accompanied with consular certificates stating depreciation in value, per paper florin, from that of the gold florin, which (the gold florin) the secretary of the treasury, in his instructions to officers of the customs, issued August 3, 1892, (S 13,091,) declared was the only actual standard of value of that country. The secretary, in these instructions, directed that, in the absence of such certificates of depreciation, these officers should, in determining the value of all imported foreign merchandise, take the value of a paper florin at $0.482, which sum of $0.482, under the provisions of section 52 of the tariff act of October 1, 1890, (26 Stat. 624,) had been estimated by the director of the mint, and on July 1, 1892, (S 13,003,) proclaimed by him (the secretary) to be the value of the gold florin. The collector of customs at that port, the local appraiser having returned the invoice (and entered) amounts of these paper florins as the value in such florins of this merchandise, thereafter converted these amounts of paper florins into United States money of account, at the rate of $0.482 per paper florin, and on the amount of such money of account, so obtained, as the dutiable values of this merchandise, exacted duties of the importer according to the classifications, and at the rates, provided by law. Against the exaction of duties on any amount of such money of account in excess of the amount thereof to be obtained by converting into such money the aforesaid amounts of these paper florins at the rate of $0.32, the importer duly protested, claiming that in estimating the value of the Austrian florin, the currency in which the invoices of this merchandise were made out, the collector should have adopted the value of the standard currency of Austria, viz. the silver florin, as last—July 1, 1892—(S 13,003) proclaimed by the secretary of the treasury, ($0.32,) or the actual value of the Austrian paper florin, and that the collector had no right to adopt the (then) proclaimed value of the gold florin ($0.482) in estimating duties, because this merchandise was not purchased in gold florins,

the invoices thereof were not expressed in gold florins, and gold was not the standard currency in Austria-Hungary.

Upon the receipt of this protest the collector, pursuant to section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) transmitted the invoices of this merchandise, and all the papers and exhibits connected therewith, to a board of three United States general appraisers on duty at that port. The board of general appraisers, upon the case thus submitted, and upon evidence taken by it, found, among other facts: (1) That the invoice value of this merchandise was given in paper florins of Austria-Hungary. (2) That the director of the mint estimated, and the secretary of the treasury proclaimed, on the 1st of July, 1892, (S 13,003,) the value of the standard coin of Austria-Hungary, the silver florin, expressed in the money of account of the United States, to be 32 cents, and that the secretary's proclamation of that date contained the additional information that the value of the gold florin (not the standard coin) was $0.482; that silver was the nominal standard; and that paper was the actual standard, the depreciation of which was measured by the gold standard. (3) That the value of the paper florin was equal to, or greater than, the value of the silver florin, the standard coin of Austria-Hungary, and that this merchandise was not purchased in a depreciated currency. (4) That section 52 of the aforesaid tariff act provides that the value of the standard coins in circulation of the various nations of the world shall be estimated quarterly, etc., and that the standard coin of Austria-Hungary, as proclaimed by the director of the mint and by the secretary of the treasury, July 1, 1892, (S 13,003,) was the silver florin in respect to which the paper florin was not a depreciated currency.

Upon the foregoing facts the board of general appraisers sustained the protest of the importers, and authorized the reliquidation of the entries of this merchandise in accordance with the claim made therein,—that the value of the paper florins in which the merchandise was invoiced should have been taken to be $0.32 per florin. Under such reliquidation, both the classification of this merchandise would be the same as that made, and the rate of duty leviable thereon would be the same as that levied, by the collector. The collector, being dissatisfied with the decision of the board of general appraisers, applied by petition, and without notice to the importer, to the United States circuit court for the southern district of New York for a review of the questions of law and fact involved therein, under that part of section 15 of the customs administrative act which provides "that if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the secretary of the treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteenth of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision."

In compliance with an order granted upon such application, the board of general appraisers made their return to the said circuit court. Thereafter, upon the aforesaid petition, order, and return, the importer moved the circuit court for a final judgment or decree dismissing the appeal of the collector from the decision of the board of general appraisers, on the ground that, under section 15 of the aforesaid customs administrative act, the circuit court had no jurisdiction to entertain or decide such appeal; there being involved in the decision of the board of general appraisers no question respecting the classification of this merchandise, or the rate of duty leviable thereon, but only a question respecting the value of the florin in which the same was invoiced.

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for the motion.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge, (orally.) The case seems to be within the principles of Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. Rep. 572. Motion granted.

In re DUNCAN.

(Circuit Court, S. D. New York. June 27, 1893.)

CUSTOMS DUTIES—TARIFF ACT OF OCTOBER 1, 1890—SUGAR WAFERS—CLASSIFICATION.

Sugar wafers which are made by biscuit makers of flour, sugar, milk, and eggs, flavored with vanilla, and are used exclusively as articles of table food, are not dutiable at the rate of 20 per centum ad valorem as nonenumerated manufactured articles, under the provision for such articles contained in section 4 of the tariff act of October 1, 1890, (26 Stat. 613,) but are free of duty, as "wafers unmedicated," under the provision for such wafers contained in paragraph 750 (free list) of the same tariff act, (26 Stat. 610.)

At Law. Appeal by importer from a decision of the board of United States general appraisers.

One John P. Duncan, doing business under the name of John Duncan's Sons, imported on April 16, 1891, by the Majestic, from a foreign country into the United States, at the port of New York, certain so-called "sugar wafers." These wafers were classified for duty as nonenumerated manufactured articles under the provision for such articles contained in section 4 of the tariff act of October 1, 1890, (26 Stat. 613,) and duty at the rate of 20 per cent. ad valorem, the rate specified for such articles by that section, was exacted thereon by the collector of customs of that port. Against this classification and this exaction the importer duly protested, claiming that these wafers were free of duty, as "wafers unmedicated," under the provision for such wafers contained in paragraph 750 (free list) of the same tariff act, (26 Stat. 610.) Upon the receipt of this protest the collector, pursuant to section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) transmitted the invoice of these articles, and all the papers and exhibits connected therewith, to a board of three United States general appraisers on duty at this port.

The board of general appraisers, having taken evidence, overruled the protest of the importer, and affirmed the classification and the exaction made by the collector. The importer being dissatisfied with the decision of the board of general appraisers, applied, pursuant to section 15 of the customs administrative act, to the United States circuit court for the southern district of New York for a review of the questions of law and fact involved therein. In compliance with an order granted upon such application the board of general appraisers made its return to the circuit court, and thereafter further evidence was taken in that court.

From the evidence accompanying this return, and from the further evidence taken in the circuit court, it appeared that these articles in suit were made of flour, sugar, milk, and eggs, and were flavored with vanilla extract. That they were used exclusively as articles of table food, being of a delicate and luxurious kind; were made only by biscuit makers, and were classed in the line of biscuits. That they were known in the trade as "sugar wafers," or, more specifically, as "vanilla sugar wafers," the word "vanilla" indicating that they were flavored with vanilla extract; and that, while they contained no element of medicinal material, being in fact unmedicated, they were never known in trade and commerce as "wafers unmedicated" or "unmedicated wafers." That there were articles known among druggists and physicians as "medicinal wafers," which consisted of a thin wafer of wheat flour, were brittle when dry, but became flexible and plastic when dipped in water, and which were used to envelop nauseous medicines when administered to persons. That there were articles made from the same ma-

terials, and similar in shape, known as wafers, which were used for sacramental purposes. That there were other articles made from the same materials, and in thin sheets, known to confectioners and bakers as wafers, and used by confectioners to prevent sticky candies from adhering to each other, or to anything with which they might come in contract, and by bakers as a foundation on which cakes and macaroons were placed and baked; and that there were still other articles known as wafers, and used in sealing letters and other documents. That these medicinal wafers, these sacramental wafers, these confectioners' and bakers' wafers, and these sealing wafers were all in fact unmedicated, though neither variety of these wafers was known to trade and commerce as "wafers unmedicated" or "unmedicated wafers." That the term "wafers unmedicated" or "unmedicated wafers" was not a trade or commercial term; and that there were articles containing medicines or supposed medicines, and used for medicinal purposes, that were known to druggists as "medicated wafers," such as cough wafers, bronchial wafers, worm wafers, and other wafers.

Comstock & Brown, (Albert Comstock, of counsel,) for importer.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge, (orally.) These articles are in fact unmedicated. That is not disputed. They are know in commerce as "wafers." That also, I understand, is not disputed. Not only are they known as "wafers," but they are wafers, within the dictionary meaning of the term. That has no new meaning either. It is a meaning of the word evidently centuries old. They are therefore within the express phraseology of paragraph 750, and, though it may seem strange that congress should make this particular food product free, it is not for the court to substitute its own guesses as to what the intention of congress may be, when the language which they have used is so plain upon its face as this phrase is. I shall therefore reverse the decision of the board of appraisers, and direct the classification under paragraph 750, free.

VOM CLEFF et al. v. MAGONE, Collector.

(Circuit Court, S. D. New York. July 24, 1893.)

CUSTOMS DUTIES—CONSTRUCTION OF STATUTES—MEANING OF PHRASE—PROVINCE OF COURT AND JURY

In the construction of tariff laws the ordinary meaning of a phrase in common speech is a question of law for the court; the commercial meaning is a question of fact for the jury.

At Law. Action by Robert Vom Cleff and others against Daniel Magone, collector of the port of New York, to recover duties paid under protest. Verdict was given for defendant. New trial ordered.

Comstock & Brown, for plaintiff.

James S. Van Rensselaer, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge. I have reached the conclusion that there should be a new trial of this case. The jury were correctly

instructed as to their duty in weighing the testimony touching the commercial meaning, if any, of the phrase "steel strips," and there was sufficient evidence as to that to sustain a verdict against the plaintiff. Unfortunately, however, the charge was so framed as to warrant the inference that they might also determine what is the ordinary meaning of the phrase in common speech. Such meaning, however, is a question of law, and is for the court. It is impossible to tell whether the jury found for the defendant because they were satisfied that the phrase had a trade meaning which excluded goods like these, or because they thought that the words "steel strips," as used in common speech, did not include them. If the plaintiff be sound in the contention that his importation is within the dictionary meaning of the words used, he probably could not avail of his exception upon appeal from the verdict as it stands, as the appellate court would be warranted in assuming that the jury decided against him as to the trade meaning.

Verdict is set aside, and new trial ordered.

WILSON et al. v. UNITED STATES, (two cases.)

(Circuit Court of Appeals, Seventh Circuit. May 17, 1893.)

Nos. 16 and 81.

CUSTOMS DUTIES—CLASSIFICATION—HEMSTITCHED HANDKERCHIEFS.

Hemmed or hemstiched handkerchiefs, which are not also embroidered, are dutiable under paragraph 349 of the tariff act of 1890, as "handkerchiefs—composed of cotton or other vegetable fiber," and not under paragraph 373, as "hemstitched and embroidered handkerchiefs." Rice v. U. S., 53 Fed. Rep. 910, followed.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

P. L. Shuman, for importers.

Thos. E. Milchrist, for the United States.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. These cases were submitted together. The question presented is of the proper rate of duty, under the act of October 1, 1890, upon handkerchiefs composed of linen, which were hemstitched but not embroidered. The duty was assessed by the collector at the rate of 60 per cent. ad valorem under paragraph 373 of the act. The duty was paid under protest, the importers claiming in their certificate of dissatisfaction, in the first case, that the proper duty was 35 per cent. ad valorem, as required by paragraph 371, upon "manufactures of flax not otherwise provided for, containing over 100 threads to the square inch," or, if that was not so, then 50 per cent. ad valorem, under paragraph 349, which prescribes that duty upon "handkerchiefs—composed of cotton or other vegetable fiber." No reference to this

paragraph is made in the certificate of dissatisfaction in the second case. The board of general appraisers decided that the duty of 60 per cent. prescribed in paragraph 373 for "hemstitched and embroidered handkerchiefs" was the proper duty, and that decision was affirmed by the circuit court.

Since the argument of these cases, the question has been decided by the circuit court of appeals for the eighth circuit, in the case of Rice v. U. S., (decided January 27, 1893,) 53 Fed. Rep. 910, and we concur in the opinion of that court that a hemmed or hemstitched handkerchief, which is not also embroidered, is not dutiable under paragraph 373 or 371, but is subject to the duty of 50 per cent. ad valorem prescribed by the 349th paragraph of the act.

It follows that the judgment in the first case should be reversed and remanded, with instructions that the duty be reliquidated under paragraph 349, and that in the second case the judgment should be affirmed, and it is so ordered.

In re PRIDGEON.

(Circuit Court, S. D. Ohio, E. D. July 7, 1893.)

No. 654.

CRIMINAL LAW—SENTENCE—EXCESSIVE PUNISHMENT—IMPRISONMENT DOES NOT INCLUDE HARD LABOR—HABEAS CORPUS.

The act of February 15, 1888, (25 Stat. 33,) which prohibits horse stealing in the Indian Territory, under penalty of fine or imprisonment, or both, does not warrant a sentence of imprisonment at hard labor, and a person under such a sentence is entitled to his discharge on habeas corpus.

Application by Sidney S. Pridgeon for a writ of habeas corpus. Granted.

A. H. Johnson and E. C. Irvine, for applicant.
Henry Hooper, Asst. U. S. Atty., for respondent.

SAGE, District Judge. The applicant was indicted by the grand jury of the district court of the first judicial district within and for Logan county, Okl. T., and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States, at the September term, 1890, of said court, to wit, on the day of said term which fell on the 28th of November, 1890, for the larceny of one horse, three fillies, seven mares, and six colts, within that part of the Indian Territory attached to said Logan county for judicial purposes. The territory so attached included a described part of the Cherokee Outlet, and all the lands occupied by the Kansas, Tonkawa, Otoe, and Missouri tribes of Indians, together with part of the land occupied by the Osage Indians, and a portion of the Iowa and Kickapoo and Sac and Fox countries. He was tried, convicted, and sentenced by said court to be imprisoned in the penitentiary at Columbus, Ohio, at hard

labor, for the term of five years, and to pay the costs of prosecution. In pursuance of said sentence he was transported to the Ohio penitentiary, and has ever since been, and is now, a prisoner there.

It is conceded that the only statute under which the court could have had jurisdiction is the act of February 15, 1888, (25 Stat. 33,) and volume 1, Supp. Rev. St. U. S. (2d Ed.) p. 578. That statute provides "that any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than $1,000, or by imprisonment not more than fifteen years or by both such fine and imprisonment at the discretion of the court." That the court had jurisdiction under this act is not conceded by counsel for the petitioner. It is unnecessary, however, to enter upon the discussion of that question, because of the concession on behalf of the government,—which is undoubtedly correct,—that, unless the court had jurisdiction under that act, it had no jurisdiction at all. Assuming, therefore, for the purposes of this case, that the court had jurisdiction under that act, the application must be granted, for the reason that the sentence was imprisonment at hard labor for five years, and the act provides for "imprisonment, not more than fifteen years." The general rule as stated by Justice Field in Re Graham, 138 U. S. 462, 11 Sup. Ct. Rep. 363, is "that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void." Accordingly, it was held in Harman v. U. S., 50 Fed. Rep. 921, that where the penalty provided by a statute was imprisonment at hard labor, and the sentence was imprisonment, hard labor not being made part of the punishment, the sentence was void. See, also, Ex parte Karstendick, 93 U. S. 396; In re Mills, 135 U. S. 263, 10 Sup. Ct. Rep. 762; and In re Johnson, 46 Fed. Rep. 477.

The statement was made upon the hearing that the case of William Skagg, upon which an application, it was announced, is to be made, will present precisely the same state of facts, and this is conceded by the United States attorney. If so, the application will have to be granted in that case, also.

I have purposely avoided the consideration of other questions argued upon the hearing of the application, and confined myself to the discussion of the one which, in my opinion, is decisive.

UNITED STATES v. WILLIAMS.

(District Court, E. D. South Carolina. July 7, 1893.)

POST OFFICE— BREAKING AND ENTERING TO COMMIT LARCENY — INDICTMENT— BUILDING PARTLY USED FOR OTHER PURPOSES.

An indictment under Rev. St. § 5478, charging that defendant broke into a building used in part as a post office, "with intent to commit there-

In larceny," and did then and there steal moneys belonging to the post-office department of the United States, is sufficient without charging that the intent was to commit larceny in that part of the building used as a post office, and that the breaking and entering was into that part. U. S. v. Campbell, 16 Fed. Rep. 233, distinguished.

At Law. Indictment against Prioleau Williams for breaking into a building used in part as a post office, with intent to commit larceny therein. On demurrer to the indictment. Demurrer sustained.

George Von Kolnitz, for the motion.
E. F. Cochran, Asst. U. S. Atty.

SIMONTON, District Judge. The defendant was indicted under section 5478, Rev. St., in these words:

"At a stated term of the district court of the United States for the eastern district of South Carolina, begun and holden at Charleston, within and for the district aforesaid, on the first Monday of July, in the year of our Lord one thousand eight hundred and ninety-three, the jurors of the United States of America within and for the district aforesaid, that is to say, upon their oaths respectfully do present that Prioleau Williams unlawfully and forcibly did break into a building used in part as the post office at Parlers, in the said county of Orangeburg, and in said state, with intent to commit therein larceny, and did then and there steal, take, and carry away moneys belonging to the post-office department of the United States, of the value of two dollars and sixty-nine cents, contrary to the act of congress in such case made and provided, and against the peace and dignity of the United States."

At the call of the case he interposed an objection to the indictment in the nature of a demurrer. His position is this: The indictment charges that the defendant forcibly broke into a building used in part as a post office, with intent to commit larceny therein; that, in order to give this court jurisdiction of this offense, the forcible breaking into must be in that part of the building used as a post office, and not in that part of the building not in such use; that by the terms of this indictment this does not appear, and that the word "therein" may mean any part of the building, only a part whereof is in use as a post office; that this makes the indictment fatally defective.

The indictment is in the words of the section, and, if the language in the section makes out the offense, the indictment must stand. This section is under a subdivision,—"Postal Crimes." The offense defined is "forcibly breaking into or attempting to break into any post office or building used in part as a post office, with intent to commit therein larceny," etc. Clearly, the word "therein," qualifying both members of the sentence, means "in the post office." The last part of the indictment fixes its meaning positively, so that the defendant is not unadvised of the charge against him, and is in no danger of surprise. The defendant quotes in support of his position the reasoning of Judge Deady in U. S. v. Campbell, 16 Fed. Rep. 233. The indictment before Judge Deady charged the defendant with breaking into a building used in part as a post office, with intent to commit larceny "in that building." It did not follow the

language of the statute, but made use of a word of much more wide signification than that used in the statute.

The demurrer is overruled.

UNITED STATES v. WONG DEP KEN.

(District Court, S. D. California. June 30, 1893.)

No. 437.

CHINESE—APPEAL FROM COMMISSIONER'S DECISION.

The right of appeal to a district court, given by Act Sept. 13, 1888, § 13, (25 Stat. 476,) to a Chinese person adjudged by a United States commissioner to be unlawfully in the United States, is not taken away by the "Geary Act" of May 5, 1892, § 3, (27 Stat. 25.)

Appeal from a Commissioner's Decision. On motion to dismiss. Denied.

A. B. Hotchkiss, Francis J. Thomas, and Thomas D. Riordan, for appellant.

George J. Denis, U. S. Atty.

ROSS, District Judge. This is a motion on behalf of the United States to dismiss an appeal taken by the defendant, a Chinese person, from an order made by a court commissioner for the district directing that he be imprisoned at hard labor in the state prison at San Quentin, and thereafter deported to China.

The proceedings before the commissioner were commenced by the filing with him of a verified complaint charging that after the passage of the act of congress entitled "An act to amend an act entitled 'An act to execute certain treaty stipulations relating to Chinese,'" approved May 6, 1882, (22 Stat. 58,) "one Ming Lee Tue did come into the United States from a foreign place, and, having come, has remained within the United States; that the said Ming Lee Tue has been found, and now is, unlawfully within the United States; and that at all the times herein mentioned the said Ming Lee Tue was and is a Chinese laborer."

Upon this complaint a warrant was issued by the commissioner, and the defendant, whose true name was found to be Wong Dep Ken, having been apprehended, an examination of the charge was had before the commissioner, who, from the evidence adduced, found him to be a Chinese person and a laborer by occupation, and who found and adjudged him to be unlawfully within the United States, and therefore ordered:

"First. That said Wong Dep Ken be imprisoned at hard labor for the period of two (2) days at the state's prison of the state of California, at San Quentin, in said state of California;

"Second. That thereafter said Wong Dep Ken be removed from the United States to China; and I order that said deportation of the said Wong Dep Ken be made from the port of San Francisco, within the limits of the northern district of California; and I further order that said Wong Dep Ken be, and he is hereby, committed to the United States marshal for the southern district of California for the purposes aforesaid."

The appeal is from this order, and is taken by virtue of the thirteenth section of the act of congress entitled "An act to prohibit the coming of Chinese laborers to the United States," approved September 13, 1888, (25 Stat. 476.)

In U. S. v. Gee Lee, 50 Fed. Rep. 271, 1 C. C. A. 516, it was decided by the circuit court of appeals for this circuit that such portions of the aforesaid act of September 13, 1888, as depended upon the ratification of a treaty then pending between the United States and the emperor of China, but which failed of ratification, never went into force, but that section 13 of the act was not so dependent, and did become a law. The same conclusion was reached in cases reported in 47 Fed. Rep. 433, (In re Mah Wong Gee,) and 878, (U. S. v. Chong Sam,) and in 55 Fed. Rep. 59, (U. S. v. Long Hop.) The portion of that section which is applicable to the present case reads as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

The circuit court of appeals, in U. S. v. Gee Lee, supra, further held that the phrase "district judge of the district," in section 13 of the act of September 13, 1888, is equivalent to the words "the district court for the district." It is not denied by the counsel for the government that section 13 of the act of September 13, 1888, became a law, or that the defendant's right of appeal exists, if it has not been taken away by subsequent inconsistent legislation. It is contended, however, that that result has been wrought by the third section of the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, known as the "Geary Act," Stat. 1891-92, p. 25. So far from this latter act repealing any of the provisions of any of the former acts on the subject, it starts out by enacting:

"That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act."

Its second section declares the country to which such person or persons, in the event of deportation, shall be sent.

The third section, which it is contended by the government's attorney repeals that portion of section 13 of the act of September 13, 1888, giving the right of appeal from the order of the commissioner, merely prescribes a rule of evidence. Its language is:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner his lawful right to remain in the United States."

This is but placing the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent so arrested. Even if that rule be a violation of any constitutional provision or principle, it would go only to the validity of the judgment appealed from, which is not now for consideration. It could not operate to cut off or take away the right of appeal conferred by an existing provision of law.

The fourth section of the act of May 5, 1892, prescribes the punishment to be inflicted upon those convicted and adjudged to be unlawfully within the United States. It reads:

"That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

It was by virtue of this provision of the statute that the commissioner adjudged the defendant to be imprisoned at hard labor in the state prison at San Quentin for two days, and to be thereafter deported to China. To what extent this section of the Geary act may be a violation of articles 5 and 6 of the amendments to the constitution of the United States will be for consideration on the hearing of the appeal, when the question in respect to the validity of the judgment will arise. Its consideration on this motion would be out of place.

The remaining sections of the act of May 5, 1892, have no application to the present case. From this brief statement of its provisions it is apparent that there is nothing in it repealing by implication the provision found in section 13 of the act of September 13, 1888, giving to the defendant the right of appeal from the judgment of conviction of the commissioner. On the contrary, the Geary act, in its first section, in express terms declares:

"That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the date of this act."

Among the laws in force at the time of the passage of the Geary act, as has been seen, was that provision of the act of September 13, 1888, declaring:

"That any Chinese person or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court; and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

That provision of law is the only provision that I have found in any of the acts of congress in relation to the exclusion of Chinese persons and persons of Chinese descent, providing for the filing of a verified complaint on behalf of the United States charging a Chinese person or person of Chinese descent with being unlawfully

within the United States or its territories, and for the arrest of such person upon a warrant issued upon such complaint by any justice, judge, or commissioner of any United States court. That it is still in force, I consider clear, for the reasons already stated, together with the accompanying provision concerning the hearing on the charge, and the accompanying right of appeal in the event of a conviction before the commissioner.

The motion to dismiss the appeal is accordingly denied.

UNITED STATES v. WONG DEP KEN.

(District Court, S. D. California. July 31, 1893.)

No. 437.

1. CHINESE—GEARY ACT—BURDEN OF PROOF—CONSTITUTIONAL LAW
   The provision of the "Geary Act" of May 5, 1892, § 3, (27 Stat. 25,) throwing upon a Chinese person accused of being unlawfully in the United States the burden of proof, is not in conflict with the federal constitution. In re Sing Lee, 54 Fed. Rep. 334, approved.
2. SAME—GEARY ACT—DEPORTATION—CONSTITUTIONAL LAW.
   The deportation under the Geary act of May 5, 1892, (27 Stat. 25,) of a Chinese person adjudged by a commissioner to be unlawfully in the United States, is not a punishment for crime, within the meaning of the provisions of the federal constitution, securing to persons accused of crime certain rights, including trial by jury. Fong Yue Ting v. U. S., 13 Sup. Ct. Rep. 1016, followed.
3. CONSTITUTIONAL LAW— INFAMOUS CRIME — IMPRISONMENT AT HARD LABOR.
   Imprisonment at hard labor is a punishment rendering the crime for which it is inflicted "infamous," within the meaning of Const. U. S. Amend. 5, providing that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury.
4. CHINESE—GEARY ACT—IMPRISONMENT AT HARD LABOR—CONSTITUTIONAL LAW.
   So much of the Geary act of May 5, 1892, § 4, (27 Stat. 25,) as provides for the imprisonment at hard labor of all Chinese persons adjudged by a commissioner to be unlawfully in the United States, is void, under Const. U. S. art. 3, § 2, par. 3, and amendments 5 and 6, securing the right of trial by jury and other rights to persons criminally prosecuted by the United States.

Proceeding by the United States against Wong Dep Ken, a Chinese person alleged to be unlawfully in the United States. The commissioner sentenced defendant to imprisonment at hard labor and deportation. Defendant appealed to this court. A motion to dismiss the appeal was denied. 57 Fed. Rep. 203. The appeal is now on final hearing. Decree sentencing defendant to deportation only.

George J. Denis, U. S. Atty.

A. B. Hotchkiss, Thomas J. Riordan, and Francis J. Thomas, for defendant.

ROSS, District Judge. This is an appeal taken by the defendant, a Chinese person, from an order made by a court commissioner

for this district directing that he be imprisoned at hard labor in the state prison at San Quentin, and thereafter deported to China. The proceedings before the commissioner were commenced by the filing with him of a verified complaint charging that, after the passage of the act of congress entitled "An act to amend an act entitled 'An act to execute certain treaty stipulations relating to Chinese,'" approved May 6, 1882, (22 Stat. 58,) "one Ming Lee Tue did come into the United States from a foreign place, and, having come, has remained within the United States; that the said Ming Lee Tue has been found, and now is, unlawfully within the United States; and that at all the times herein mentioned the said Ming Lee Tue was and is a Chinese laborer."

Upon this complaint a warrant was issued by the commissioner, and the defendant, whose true name was found to be Wong Dep Ken, having been apprehended, an examination of the charge was had before the commissioner, who, after examination, found him to be a Chinese person and a laborer by occupation, and who found and adjudged him to be unlawfully within the United States, and therefore ordered:

"First. That said Wong Dep Ken be imprisoned at hard labor for the period of two (2) days at the state's prison of the state of California, at San Quentin, in said state of California.

"Second. That thereafter said Wong Dep Ken be removed from the United States to China; and I order that said deportation of the said Wong Dep Ken be made from the port of San Francisco, within the limits of the northern district of California; and I further order that said Wong Dep Ken be, and he is hereby, committed to the United States marshal for the southern district of California for the purposes aforesaid."

The appeal was taken by virtue of the thirteenth section of the act of congress entitled "An act to prohibit the coming of Chinese laborers to the United States," approved September 13, 1888, (25 Stat. 476.) A motion made on behalf of the government to dismiss the appeal was recently denied by the court, for reasons given in an opinion filed on June 30th last. 57 Fed. Rep. 203. The appeal is now for disposition upon its merits.

It appears from the record that the commissioner found from the evidence adduced before him that the defendant is a Chinese person, and a laborer by occupation; that defendant failed to establish, by affirmative proof, to the satisfaction of the commissioner, his lawful right to remain in the United States; and that he did not make it appear to the commissioner that he (defendant) is a subject or citizen of any other country than China. Based upon these facts, the judgment and order appealed from were given, and they rest for their support upon the provisions of the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, known as the "Geary Act," (Stat. 1891-92, p. 25.) The third section of that act is as follows:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by

affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

And its fourth section reads:

"That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

—That is to say, as provided by the second section of the act, which is as follows:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: provided, that, in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China."

It will be observed that by the third section of the act of May 5, 1892, the burden of proof of his lawful right to remain in the United States is placed on the Chinese person or person of Chinese descent charged with being unlawfully in this country. No one questions the power of congress to prohibit the coming into this country of any class of foreigners deemed prejudicial to the interests of our people. Against the coming into the country of Chinese laborers, congress has been legislating for years. The reason for such legislation is an old story, and need not be repeated. But, notwithstanding the enactments upon the subject, the laws have been evaded in many ways. By false testimony and concocted evidence the courts have been imposed upon in cases almost without number, and by sea and land the prohibited class in large numbers have been smuggled into the country in one way or another. To prevent all of this, and give effect to its laws upon the subject, as far as possible, congress deemed it wise by the provision in question to put the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent charged with being unlawfully within their borders. To those not residents of and not familiar with the Pacific slope, and not so much subject to the evils intended to be guarded against by the exclusion acts, "the lines laid down for their enforcement may," as appropriately and well said by Judge Severens in the Case of Sing Lee, 54 Fed. Rep. 334, "seem hard; and because such summary dealings with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe; but, if the power resides in congress to enact such provisions, the discretion whether it will do so rests in the lawmaking power, and the courts must presume it was exercised upon sufficient reasons." In respect to the provision of the Geary act putting the burden of proof on those coming within the class

thus interdicted, I agree with Judge Severens in the case cited, that there is not only nothing in it violative of the provisions of the constitution of the United States, but, for the reasons given by him, and in view of the circumstances already referred to and of others that may be suggested, that the provision in question is not unreasonable. He says:

"The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is not within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most instances impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden on the party who presumably has the best means of proving the fact; but, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the legislature cannot prescribe such a rule of evidence."

That the expulsion from this country of a foreigner who came into it contrary to its laws, and who was thereby excluded, is not subjecting him to prosecution or punishment for crime, is clear. In the late case of Fong Yue Ting v. U. S., 13 Sup. Ct. Rep. 1016, the majority of the supreme court held that the subsequent expulsion of Chinese persons who came into the country by invitation of our government is not the prosecution or punishment of such persons for crime committed. A fortiori, the expulsion of such foreigners as entered the country contrary to and in the teeth of our laws is not to prosecute or punish them for crime committed. It results, I think, that the constitutional, statutory, and common-law provisions and rules in respect to criminal prosecutions have no application to the mere expulsion or deportation of such Chinese persons as came here contrary to and in violation of the laws of the United States.

But it by no means follows that the political right of the government to expel such persons embraces the right to confine them at hard labor in a penitentiary before deportation. If the imprisonment of a human being at hard labor in a penitentiary is not punishment, it is difficult to understand how anything short of the infliction of the death penalty is. It is not only punishment, but punishment infamous in its character, which, under the provisions of the constitution of the United States, can only be inflicted upon a person after his due conviction of crime pursuant to the forms and provisions of law.

"Infamous punishments," said the supreme court in Ex parte Wilson, 114 U. S. 426, 5 Sup. Ct. Rep. 935, "cannot be limited to those punishments which are cruel or unusual; because, by the eighth amendment of the constitution, 'cruel and unusual punishments' are wholly forbidden, and cannot therefore be lawfully inflicted, even in cases of convictions upon indictments duly presented by a grand jury. By the first crimes act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable

with death. Most other offenses were punished by fine and imprisonment. Whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods. Disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States. Act April 30, 1790, c. 9, (1 Stat. 112–117;) Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wils. Works, 380, 381. By that act, no provision was made for imprisonment at hard labor. But the punishment of both fine and imprisonment at hard labor was prescribed by later statutes, as, for instance, by the act of April 21, 1806, c. 49, for counterfeiting coin, or uttering or importing counterfeit coin; and by the act of March 3, 1825, c. 65, for perjury, subornation of perjury, forgery and counterfeiting, uttering forged securities or counterfeit money, and other grave crimes. 2 Stat. 404; 4 Stat. 115. Since the punishments of whipping and of standing in the pillory were abolished by the act of February 28, 1839, c. 36, § 5, (5 Stat. 322,) imprisonment at hard labor has been substituted for nearly all other ignominious punishments, not capital; and by the act of March 3, 1825, c. 65, § 15, re-enacted in Rev. St. § 5542, any sentence of imprisonment at hard labor may be ordered to be executed in a state prison or penitentiary. 4 Stat. 118. What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous; and by the first judiciary act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' Act Sept. 24, 1789, c. 20, § 9, (1 Stat. 77.) But at the present day either stocks or whipping might be thought an infamous punishment. For more than a century, imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America. Among the punishments 'that consist principally in their ignominy,' Sir William Blackstone classes 'hard labor, in the house of correction or otherwise,' as well as whipping, the pillory, or the stocks. 4 Bl. Comm. 377. And Mr. Dane, while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says: 'Punishments, clearly infamous, are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping.' 2 Dane, Abr. 569, 570. The same view has been forcibly expressed by Chief Justice Shaw. Speaking of imprisonment in the state prison, which by the statutes of Massachusetts was required to be at hard labor, he said: 'Whether we consider the words "infamous punishment" in their popular meaning, or as they are understood by the constitution and laws, a sentence to the state prison, for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meager food, and to severe discipline. Some of these a convict in the house of correction is subject to; but the house of correction, under that and the various names of "workhouse" and "bridewell," has not the same character of infamy attached to it. Besides, the state prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital.' Jones v. Robbins, 8 Gray, 329, 349. In the same case, Mr. Justice Merrick, while dissenting from the rest of the court upon the question whether, under the words 'the law of the land' in the constitution of Massachusetts, an indictment by a grand jury was essential to a prosecution for a crime punishable by imprisonment in the state prison, and taking a position upon that question more accordant with the recent judgment of this court in Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292, yet

concurred with the other judges in holding that such imprisonment at hard labor was an infamous punishment. 8 Gray, 370–372. Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, "involuntary servitude for crime,' spoken of in the provision of the ordinance of 1787, and of the thirteenth amendment of the constitution, by which all other slavery was abolished."

In the subsequent case of Mackin v. U. S., 117 U. S. 352, 6 Sup. Ct. Rep. 777, the court said:

"We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment."

Such punishment, as has been said, cannot be inflicted except for crime committed, and after due conviction thereof. By subdivision 3, § 2, art. 3, of the constitution of the United States, it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury."

By the sixth amendment of the constitution it is declared:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

By the fifth amendment it is provided that:

"No person shall be held to answer for a capital or other infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The fifth amendment also provides that:

"No person shall be deprived of life, liberty, or property without due process of law."

That portion of section 4 of the act of May 5, 1892, known as the "Geary Act," providing for the imprisonment at hard labor for a period of not exceeding one year of any Chinese person, or person of Chinese descent, convicted and adjudged by a commissioner to be not lawfully entitled to be or remain in the United States, is, in my opinion, clearly in conflict with the provisions of the constitution of the United States above cited. I am unable to appreciate the force of the suggestion made by the district attorney that the provisions of the federal constitution apply only to citizens of the United States and to aliens permissively therein, and that its protections and safeguards cannot be invoked by an alien who came into and remains in the country in violation of the express laws of the country. One obstacle in the way of adopting that view is that it assumes the very question to be determined, namely, whether the defendant did come and remain in the country contrary to its laws. But, above and beyond that consideration, the constitution, which has potency everywhere within the limits of our territory, covers alike with its protection every human being within it. I do not understand that there is anything to the contrary in any of the opinions delivered in the case of Fong Yue Ting v. U. S., supra. An alien who comes into this country against the

consent of our government, and even contrary to a law expressly excluding him, does not thereby become an enemy of our country. Certainly, so long as he remains within our borders, and so long as our government remains on terms of peace and amity with the country of which he is a subject, he must be regarded as a friendly alien. If such an alien may be arbitrarily deprived of his liberty, surely he may be arbitrarily deprived of his property, and even of his life. Would any one contend that, if the present defendant should commit the crime of murder within the United States, the constitution of these states would not secure to him a trial by jury, and any and every other right thereby guarantied to any other person charged with a similar offense? Certainly not. In the case of Taylor v. Carpenter, 3 Story, 458, which arose in 1844, the defendant objected to the maintenance of the suit on the ground, among other grounds, that the plaintiffs were aliens. But Judge Story answered:

"Be it so; but in the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. * * * There is no difference between the case of a citizen and that of an alien friend where his rights are openly violated."

In the case of Ah Kow v. Nunan, 5 Sawy. 562, Mr. Justice Field, referring to the fourteenth amendment of the constitution of the United States, said:

"That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any person (dropping the distinctive term 'citizen') of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities; and the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment. Since the adoption of the fourteenth amendment, congress has legislated for the purpose of carrying out its provisions in accordance with these views. The Revised Statutes, re-enacting provisions of law passed in 1870, declare that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' Section 1977. They also declare that 'every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' Section 1979. It is certainly something in which a citizen of the

United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, come from what quarter it may, is 'caught upon the broad shield of our blessed constitution and our equal laws.'"

The invalidity of that portion of section 4 of the Geary act providing for the imprisonment at hard labor for a period of not more than one year of the Chinese person or person of Chinese descent found and adjudged to be unlawfully within the United States does not, however, affect the deportation clause of the section, nor any of the other provisions of the act. There is no necessary connection between the deportation of the person and his imprisonment at hard labor for one year, or for any less time. The unconstitutionality of an independent clause of a statute does not render unconstitutional the remainder of the statute.

From the views above expressed, it results that that portion of the order of the commissioner directing that the defendant be imprisoned at hard labor in the state prison at San Quentin for two days should be annulled, and that in all other respects the judgment and order should be affirmed.

Ordered accordingly.

BAINBRIDGE et al. v. KITCHELL EMBOSSING CO.

(Circuit Court, D. New Jersey. July 17, 1893.)

PATENTS FOR INVENTIONS—INVENTION—ANTICIPATION—PICTURE MATS.

Letters patent No. 452,911, issued May 26, 1891, are for an "improvement in material for picture mats," consisting of a material composed of a backing or body of soft paper, and a facing of ornamental paper attached thereto and afterwards embossed, the backing, by reason of its softness, serving as a counter die, thus necessitating the use of but one die. *Held*, that the patent is void because of anticipation, and also for want of invention, in view of the prior state of the art.

In Equity. Suit by Richard W. Bainbridge and others against the Kitchell Embossing Company for infringement of a patent. Bill dismissed.

Edwin H. Brown, for complainants.

H. D Donnelly, for defendant.

ACHESON, Circuit Judge. This bill charges infringement of letters patent No. 452,911, dated May 26, 1891, granted to Richard W. Bainbridge, for an "improvement in material for picture mats." In the specification the patentee states that the "improvement consists in a picture-mat material, composed of a backing or body of soft paper, and an embossed facing attached thereto," and that "preferably there will be a facing on each side of the soft paper." He further says:

"By this improvement I am enabled to produce a material of ornamental appearance, sufficiently thick to form a mat, and yet of such character as to be readily cut to the shape requisite for a mat."

Describing the manner in which the mat material is made, the specification states:

"A designates a number of sheets of soft paper forming a backing or body, and A^1, A^2, designate facings attached thereto. The different sheets or layers of the paper constituting the backing or body may be united by paste or other adhesive substance, and the facings may be attached in the same way to the backing or body."

It is further stated that "the backing or body gives the thickness desired for a mat, and, being soft, enables any one to readily cut through it to form a mat." It is also set forth that "the embossing of the facings, A^1, A^2, is done after their attachment to the backing or body, A," and that this is possible because the material forming the backing or body is of such a soft character that it will serve as the equivalent of a counter die, and consequently enable the embossing of each facing to be done by a single die. This is said to be very important, because the material composed of the backing or body and facing may be rolled out flat after being united, which would be impossible if the embossing were done before the attachment of the facing, for the reason that the operation of rolling out the material flat would in such case smooth out the embossing. This is the whole substance of the specification.

The claims of the patent are as follows:

"(1) As a new article of manufacture, a material for a picture mat, having a backing or body portion consisting of layers of soft paper, united together by an adhesive substance, and a facing of ornamental paper secured thereto, substantially as specified. (2) As a new article of manufacture, a sheet of material for picture mats, composed of a backing or body of soft material, and facings of ornamental paper attached to the outer sides thereof, substantially as specified. (3) The process of making material for picture mats, consisting in forming a backing or body of suitable soft paper, and attaching thereto a facing of ornamental paper, and in subsequently embossing such paper, the backing or body serving as a counter die, substantially as specified."

The defendant, among other defenses, sets up anticipation, and in one instance, at least, that defense has been made out. It is very clearly proved by trustworthy and uncontradicted testimony that in the years 1887 and 1888, the dates being fixed by book entries, before the date of Bainbridge's alleged invention, the A. M. Collins Manufacturing Company, of Philadelphia, made for, and sold and delivered to, George Barrie, of Philadelphia, and to Allen & Ginther, of Richmond, Va., mat boards for pictures, in considerable quantities, which were made by pasting together several sheets of soft paper to form the body of the mat, which was then faced with ornamental paper, and the facing subsequently embossed without the use of a counter die. The process of manufacture there pursued was identical with the method set forth in the Bainbridge patent, and the article produced, of which original specimens are exhibits in this case, corresponds substantially with the description of the patent. Hirner, a mat maker, who cut a portion of that material into picture-mats for Barrie, testifies that "it was an easy-cutting board; it hadn't a hard inner surface to it."

The rebutting proofs really go no further than this: that these exhibits are inferior to the article now manufactured by the plaintiffs. But it appears that the plaintiffs are using "wood pulp" or "wood-pulp board" for their backing or body, and in their printed brief they say:

"Our position is that the patent is really for a mat material, having a backing or body of wood pulp, and a facing or facings applied thereto, and embossed after their union, this material being superior to any other ever produced for the same purpose."

Of this, however, the patent contains not a hint. Moreover, it appears that the material spoken of in the evidence indifferently as "wood pulp" and "wood-pulp board," which is made of different thicknesses as desired, was a well-known article on the market at the time of Bainbridge's alleged invention, and had long been used to form the backing or body of card and mat boards; and it was no unusual thing for mat makers to paste together several sheets of wood-pulp board to form a thick mat. It was old to form the middles of card and mat boards out of strawboard, a soft material, and also of layers of soft paper pasted together. It was common to face the mat material made in any of these ways by pasting thereon plain ornamental paper or embossed paper. Furthermore, it is shown that as early as 1873, and since, De Jonge & Co., in the city of New York, made mat material for pictures out of wood-pulp board, and, at first, faced the material with tinted paper, and embossed the paper after it was pasted thereon; but subsequently they omitted the tinted paper, and coated the wood-pulp board, and embossed the coating. It will be perceived that the patent in suit gives no particular instructions as to the method of embossing, and suggests no new instrumentalities. It merely states that, by reason of the softness of the body of the material, the embossing can be done by a single die. But that was no patentable discovery, and, in fact, was not new in practice. Aside from the mat material made by the A. M. Collins Manufacturing Company, it appears that, prior to Bainbridge's alleged invention, bristol boards, although composed of sheets of hard paper, were embossed without a counter die. Again, the patents to George W. Ray, No. 54,404, No. 61,100, and No. 63,177, dated, respectively, May 1, 1866, January 8, 1867, and March 26, 1867, disclosed a process of embossing paper and materials made out of paper without the employment of a counter die. As far as I can see, there is no substantial difference between the process of embossing shown by Ray and the method actually practiced by the plaintiffs and the defendant respectively. The following extract is from the cross-examination of Mr. Bainbridge, the patentee, when on the stand in this case:

"142 X-Q. How long have you been familiar with the process of embossing papers between plates on one of whose faces patterns consisting of cloth were pasted, and the running the same between heavy rollers? Answer. About ten years. 143 X-Q. How does that process differ from the process which you employ for the purpose of embossing your material? A. The process is the same."

The defendant presents a number of other prior patents here pertinent, but which I will not particularly mention. As already seen, the evidence with respect to the material made by the A. M. Collins Manufacturing Company furnishes a complete defense to the bill; but, independent of that instance of clear anticipation, the proofs, I think, well warrant the conclusion that, in view of the prior state of the art, the patent in suit did not disclose any patentable invention or discovery. Let a decree be drawn dismissing the bill, with costs.

BRICKILL et al. v. CITY OF HARTFORD et al.

(Circuit Court, D. Connecticut. July 3, 1893.)

1. PATENTS FOR INVENTIONS—ACTION AT LAW FOR INFRINGEMENT—PLEADING.
In an action at law for infringement of a patent, defendants, although they plead the general issue, may also maintain a special plea, that the combination covered by the patent was not an invention, and also a further plea, that the combination covered by the patent required for its production nothing but mechanical skill, in view of the prior state of the art.

2. SAME.
In an action at law for infringement of a patent, defenses which have been raised by demurrer to the complaint, and overruled, cannot be made part of the answer without leave of court.

3. SAME.
But in Connecticut the court will allow such defenses to be set up by plea for the purpose of saving a right to review on writ of error to the circuit court of appeals; it being uncertain whether, under the Code pleading, an assignment of error in the ruling on the demurrer is sufficient to secure such right, when the demurrant does not allow final judgment to go against him upon it.

4. SAME.
A plea alleging want of novelty because the alleged invention had been previously patented, on specified dates, to other parties, is insufficient, for Rev. St. § 4920, requires an allegation that the invention had been patented, or described in some printed publication, before the time of the supposed invention.

At Law. Action by William A. Brickill and others against the city of Hartford and others for infringement of a patent. A demurrer to the complaint was heretofore overruled. 49 Fed. Rep. 372. The case is now heard on motions to strike out certain pleas, and on demurrer to other pleas.

Raphael J. Moses, Jr., and Talcott H. Russell, for plaintiffs.
T. E. Steele and Albert H. Walker, for defendants.

TOWNSEND, District Judge. The questions herein are presented upon a motion to strike out the second and fourth pleas, and a demurrer to the third, fifth, sixth, seventh, and ninth pleas, of defendants, in an action at law to recover damages for the alleged infringement of letters patent No. 81,132, granted August 18, 1868, to William A. Brickill, for an improvement in feed-water heaters for steam fire engines. The defendants move to require plaintiffs to reply to the eighth plea, and such other pleas as the

court may permit to remain of record. The demurrer to the complaint, which embraced some of the matters stated in these pleas, was overruled by Judge Shipman, (49 Fed. Rep. 372.)

The first plea is the general issue. The second plea alleges that the combination covered by the letters patent was not an invention when it was produced by the patentee. The plaintiffs claim that this plea is surplusage, as it is embraced within the general issue. Undoubtedly, want of invention appearing on the face of the patent may be taken advantage of under the general issue without notice, or under any other plea, or without any plea. Hendy v. Iron Works, 127 U. S. 370, 8 Sup. Ct. Rep. 1275; Dunbar v. Myers, 94 U. S. 187; Brown v. Piper, 91 U. S. 44; Slawson v. Railroad Co., 107 U. S. 649, 2 Sup. Ct. Rep. 663. But defendants claim that the defense of want of invention, disclosed by evidence as to the prior state of the art, where the combinations constituting such prior art are not the same combination as that described in the patent, and do not anticipate it, must be separately pleaded. Walk. Pat. §§ 446, 599. The circuit court of appeals, in Packing Co. v. Cassidy, 53 Fed. Rep. 259, has decided that the want of invention, considering the prior state of the art, is matter of defense, and may be raised without notice. Robinson on Patents, (section 992,) says:

"While the general issue is permitted in the foregoing cases, it is not incumbent on the defendant to employ it. He may plead specially any or all of his defenses, except that which denies his performance of the infringing act; and this is always his proper course, when he desires to tender a specific issue, to be simply traversed by the plaintiffs."

The same matter cannot be presented both in a special plea, and by a notice under the general issue. 3 Rob. Pat. § 992. Matter which might be made the subject of notice under the general issue may be pleaded specially. Evans v. Eaton, 3 Wheat. 503; Cottier v. Stimson, 20 Fed. Rep. 906; Curt. Pat. p. 357; Cottier v. Stimson, 18 Fed. Rep. 689. I do not see that allowing the second plea to stand does the plaintiffs any material injury, and the defendants insist that without it an important defense would be closed against them.

The third plea alleges that the patent is void because the contrivance is nothing but the combination of old devices, without producing any new mode of operation, and states the prior art which is relied on to support this claim. The plaintiffs contend that this is merely an allegation, in another form, that the combination claimed by the patent is a mere aggregation, and not a combination, and that, therefore, this defense was disposed of by the opinion of Judge Shipman on the demurrer to the complaint. It seems to me that this defense could not have been disposed of on demurrer, because it depends upon proof, not only that the devices composing the combination are old, but also that there is no new mode of operation. The defendants do not here claim an aggregation, but they claim that the combination is not patentable because, its component devices being old, their combined operation is also old.

The fourth plea alleges that the combination covered by the patent required nothing but mechanical skill for its production, in view of the prior state of the art. This seems to be equivalent to the second plea, with the addition of the special matter concerning the state of the art on which defendants rely. It is not included in the 27 defenses enumerated in Walk. Pat. § 440. Defendants' counsel claims that on the trial he can introduce any evidence he pleases of the prior state of the art, to show that, in view of the state of the art, there was no invention. Whether this can be done without notice of the particulars intended to be proved, must be decided on the trial. The object of this plea seems to be to guard against an adverse decision as to the admission of evidence. The suggestions made concerning the second plea apply to the fourth plea.

The fifth and sixth pleas allege that the patent is void because it is for a mere aggregation, and does not particularly point out, and distinctly claim, the part, improvement, or combination claimed by the patentee as his invention. The ninth plea sets up the statute of limitations of the state of Connecticut as a bar to a part of the plaintiffs' claim. Each of these points was raised by the demurrer to the complaint, and overruled by Judge Shipman. They should not be made a part of the answer without leave of court. McClintick v. Johnston, 1 McLean, 414. But the defendants wish to set up these defenses in their plea in order to secure their right to have them passed upon by the circuit court of appeals. It is not certain that such right could be secured by an assignment of error based upon the overruling of said demurrer. The general rule is that, if the demurrant wishes to take advantage of such claim of error, he must let final judgment be entered upon it, for, if he answers after such ruling, he waives any objection to it, except for radical defects. Bliss, Code Pl. § 417. How far this rule prevails, under the practice in this state, is not settled. The policy of the practice act requires that all objections to the complaint should be taken by demurrer, so that all preliminary matters may be reached by preliminary objections, and disposed of before the trial on the merits. Trowbridge v. True, 52 Conn. 197; Merwin v. Richardson, Id. 233; Donaghue v. Gaffy, 53 Conn. 52, 2 Atl. Rep. 397. But the danger and inconvenience attendant upon a final judgment on such demurrer have led to various expedients for preserving all such rights until the appeal after final hearing. Under these circumstances, I think I ought to treat these pleas as filed upon allowance of a motion for leave so to do, especially as plaintiffs demurred to them before making any motion to strike out. Defendants desire that they be allowed to stand, and be overruled upon the trial, but, plaintiffs having demurred to them, they are entitled to have their demurrer decided.

The reasoning of Judge Shipman in the overruling of the demurrers, with which I fully concur, shows that these pleas are demurrable, and I sustain the demurrers on the ground that the

pleas are insufficient. Defendants will not be required to file any further pleading thereto, and I think, by sustaining the demurrers to these pleas because of their insufficiency, all the rights of the defendants on appeal will be saved to them. In any case, I do not see how the demurrers can be overruled.

The seventh plea alleges want of novelty, because the alleged invention had been previously patented, on certain specified dates, by other parties. The dates of the patents so pleaded are prior to the date of the patent in suit. Section 4920, Rev. St. U. S., provides for allegation and proof of a patent, or description in some printed publication, prior to the supposed invention or discovery. If this plea is held sufficient, and these patents pleaded really contain the invention in question, complainants must reply, alleging the real date of invention. This might be a better and fairer mode of pleading, but the real question is that pointed out by the statute,—whether the patents pleaded in defense antedate the supposed invention or discovery,—and I think the statute requires the defense to be so pleaded.

The motions to strike out the second and fourth pleas are denied. The demurrer to the third plea is overruled. The demurrers to the fifth, sixth, seventh, and ninth pleas are sustained, with leave, as to the seventh plea, to plead over within 20 days. The motion to require the plaintiffs to reply to the pleas is denied. Walk. Pat. § 478. If plaintiffs choose not to reply by denial or otherwise, they take upon themselves whatever risk may attend said refusal.

MONITOR MANUF'G CO. v. ZIMMERMAN MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 27, 1892.)

PATENTS FOR INVENTIONS—WIND ENGINES—PATENTABILITY.

The first and second claims of letters patent No. 362,870, issued May 10, 1887, for the combination in a wind engine of a wheel-supporting casting having a tubular spindle, with the wheel mounted on such spindle, the spindle projecting on the plane of the wheel, with the wheel shaft journaled within the spindle, having its outer end keyed to revolve with the wheel, and its inner end connected with the pump rod; and for the combination in a wind engine with the wheel-supporting casting, and the tubular spindle projecting laterally therefrom, having a bearing formed at its inner end of less diameter than the bore of the spindle, of the wheel mounted upon the spindle, the wheel shaft passing through the bore of the spindle keyed to the hub of the wheel, and journaled at its inner end in said bearing, the crank, the pump rod, and suitable connections between the crank and pump rod,—are void for want of invention, none of the elements being new, and there being no invention in their combination.

Appeal from the Circuit Court of the United States for the District of Indiana.

In Equity. Suit by the Monitor Manufacturing Company against the Zimmerman Manufacturing Company, John W. Baxter, Franklin T. Zimmerman, and Elias Zimmerman, to restrain the alleged

infringement of three letters patent. Defendants obtained a decree. Complainant appeals. Affirmed.

The opinion of the circuit court, filed September 28, 1891, was as follows:

Suit for infringement of three patents: The first one in order is No. 258,352, dated May 23, 1882. Infringement is charged of the second claim only, which is in these words: "In a vertical wind wheel, the casting, E, in which the wheel is journaled, and which is curved laterally so as to throw the wheel shaft out of line with the vane, and thus enable it to swing around out of the wind, substantially as shown." The second patent to be considered is reissue No. 10,834, granted May 10, 1887. Infringement is charged of claims 6, 7, and 8, which are in these words: "(6) The combination, with the casting having a tubular spindle projecting therefrom, provided with annular grooves and openings leading from the bore through to the outer side, and an oil cup located at the inner end of the spindle, and communicating with its bore, of the wheel hub having an enlarged axial opening to receive said spindle, and the wheel shaft fastened in the outer end of the hub, and extended through the spindle, and connected with the pump rod, whereby oil from said oil cup lubricates the wheel shaft and the wheel hub, substantially as described. (7) The combination, with the casting having a tubular spindle provided with annular grooves and radial openings extending from its bore, of the wheel hub having an enlarged axial opening to receive the tubular spindle, the shaft keyed to the outer end of the hub and passed through the spindle, with the enlarged axial opening, and lubricating said hub and shaft, substantially as described. (8) The combination with the casting having a tubular spindle projected therefrom provided with annular grooves and radial openings, and an oil cup located at the inner end of the spindle and communicating with its bore, of the wheel hub having an enlarged axial opening to receive the spindle, the shaft keyed to the outer end of the hub and passed through the spindle, and the oil reservoirs, disposed around the hub, and communicating with the large opening, substantially as described, and for the purpose specified." The third patent embraced in the bill is No. 362,870, dated May 10, 1887. Infringement is charged of claims 1, 2, 3, and 4, which are as follows: "(1) In a wind engine, the combination, with the wheel-supporting casting having a tubular spindle projecting laterally therefrom, of the wheel mounted on said spindle, which spindle projects about an equal distance on each side of the plane of the wheel, and the wheel shaft journaled within the spindle, having the outer end keyed to revolve with the wheel, and having the inner end connected with the pump rod, substantially as and for the purpose described. (2) In a wind engine, the combination, with the wheel-supporting casting and the tubular spindle projecting lat rally therefrom, having a bearing formed at its inner end of less diameter than the bore of said spindle, of the wheel mounted upon the spindle, the wheel shaft passing through the bore of said spindle keyed to the outer end of the hub of the wheel, and journaled at its inner end in said bearing, the crank, the pump rod, and suitable connections between the crank and pump rod, substantially as set forth. (3) In a wind engine, the combination of the wheel-supporting casting having a tubular extension projecting therefrom, and having a bore in line with the extension, the inner end of which is enlarged, forming a recess, a sleeve having a bore of less diameter than the bore of the tubular extension, seated in the recess, leaving a space between the bottom of the recess and the inner end of the sleeve, the wheel hub mounted on the tubular extension, and a shaft keyed to the hub and projecting through said extension, and having a bearing in the sleeve, substantially as described, whereby the sleeve may be replaced without necessitating the removal of the wheel from its bearing, substantially as set forth. (4) In a wind engine, the combination of the wheel-supporting casting having a tubular spindle projecting laterally therefrom, the wheel mounted thereon, and having the spindle projecting about an equal distance on each side of the plane of the wheel, the two series of radial lubricating boxes, one series being located on one side of the plane of the wheel, the other series on the other side of

the plane of the wheel, the boxes of one series alternating with the boxes of the other series, the wheel shaft keyed to the outer end of the wheel hub, passing through the spindle and lubricated by said boxes, that portion of the shaft on each side of the plane of the wheel being lubricated by its respective set of boxes, substantially as set forth."

These claims, both by reason of the prior art, and on account of the minute and numerous details of description used, are necessarily extremely narrow, and show invention, if at all, only in the specific forms of construction and combination described; and, this being so, the evidence does not show infringement, unless it be of the first and second claims of patent No. 362,870. If those claims are valid, it is conceded that they have been infringed. Their validity, however, is denied; and in view of patent No. 217,125, issued to C. Lohnes, and Nos. 233,178 and 244,968, issued to J. S. Adams, it is clear that they are void of invention. The only feature of novelty asserted for the first claim is that the spindle on which the wheel is mounted "projects about an equal distance on each side of the plane of the wheel," and, for the second claim, the novelty is supposed to be in "the tubular spindle * * * having a bearing formed at its inner end of less diameter than the bore of the spindle." Neither of these things are new, and there was no invention in introducing them into the combinations described. It follows that the bill should be dismissed for want of equity.

C. P. Jacobs and V. H. Lockwood, for appellant.

R. S. Taylor, for appellees.

Before GRESHAM, Circuit Judge, and BUNN and JENKINS, District Judges.

PER CURIAM. The decree appealed from is affirmed upon the grounds stated in the opinion of the court below.

PALMER et al. v. MILLS et al.

(Circuit Court, D. Connecticut. June 29, 1893.)

No. 728.

PATENTS FOR INVENTIONS — VALIDITY — PRELIMINARY INJUNCTION — QUILTING FABRICS.

Letters patent No. 308,981 and No. 308,982, issued December 9, 1884, to Frank L. Palmer, are for improvements for stitching comfortables by machinery. Owing to the commercial advantages given by these patents, complainants, who owned them, were enabled to practically command the entire business of this country in this kind of quilts. The validity of the patents had never been denied, except by one other party who, after suit brought for infringement, compromised the same, and has ever since paid a royalty. *Held*, that on an application for preliminary injunction, where infringement was plain, the patents would be presumed to be valid, and the injunction granted, unless defendants gave a sufficient bond to secure any damages decreed against them.

In Equity. Bill by Frank L. Palmer and others against Crefeld Mills and others for infringement of patents. On motion for preliminary injunction. Order allowing injunction unless bond be given.

E. H. Brown, for complainants.

J. E. Maynadier, for defendants.

TOWNSEND, District Judge. This is a motion for a preliminary injunction restraining the infringement of claims 14 and 24 of letters patent No. 308,981, and of claims 2, 3, 4, 12, and 15, of letters patent No. 308,982, granted to Frank L. Palmer, December 9, 1884, for sewing or quilting fabrics. The following facts appeared upon the hearing: The complainants' patents provide for a novel and useful mode of stitching comfortables by machinery. The commercial advantages of these improvements have enabled complainants to practically command the entire business of this country in this class of quilts. No one has heretofore disputed the validity of said patents, except the R. T. Palmer Company. Complainants brought suit against said company, and said suit was settled by the grant of a shop right in consideration of the payment of a royalty. Said agreement is still in force, and said royalty has been annually paid. A comparison of the machines of defendants with those of complainants shows them to be substantially the same. If the sewing machine of complainants' model, while in operation upon its quilt, be grasped and held fast, and the pattern be allowed to move, the model becomes the working model of defendants' machine, performing the same functions in the same way, with the same result.

The only vital question in the case is as to the validity of complainants' patents, in view of the prior state of the art. But, in view of the considerations already suggested, it seems that said patents should be assumed to be valid upon this hearing. As was said by Judge Lacombe in Sessions v. Gould, 49 Fed. Rep. 856:

"The contention that, in view of the prior state of the art, they do not disclose any patentable invention, is not sufficiently clear and convincing to overthrow the case made out by the patents themselves, and the public acquiescence in their validity. The defense of prior public use * * * should not be disposed of on ex parte affidavits, but reserved for final hearing."

There is nothing in the case to show that complainants will not be sufficiently protected by a suitable bond. They have already granted to their only other competitor a license to make and use machines embodying the improvements claimed in said patents. One of the defendants, whose financial responsibility is unquestioned, has offered to give such bond as may be required for all damages, profits, and costs which may be decreed against either the individual defendants, or the defendant corporation. There can be no irreparable damage, in such a case, where the value of the royalty can be ascertained, provided the responsibility of defendants is guarantied.

Let an order be entered, granting a preliminary injunction, unless the defendants shall, within 10 days, file a satisfactory bond for $10,000, conditioned for the payment of any final money decree which may be rendered in favor of complainants.

NATIONAL FOLDING BOX & PAPER CO. v. PHOENIX PAPER CO., Limited, et al.

(Circuit Court, E. D. New York. May 18, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRIOR ADJUDICATIONS.
   In a suit for infringement of a patent, where it appears that the courts of other circuits have already sustained the validity of the patent as against all the defenses now made save that of anticipation by reason of certain patents not before in evidence, and have also found that defendants infringed, the court will accept those decisions, and examine only the anticipation alleged.
2. SAME—VALIDITY—ANTICIPATION—PAPER BOXES.
   Letters patent No. 171,866, issued January 4, 1876, to Reuben Ritter for an improvement in paper boxes, were not anticipated by prior inventions, and are valid.

In Equity. Suit by the National Folding Box & Paper Company against the Phoenix Paper Co., Limited, and others, for infringement of a patent. Decree for complainant.

Walter D. Edmonds, for complainant.

Billings & Cardozo, (R. B. McMaster, of counsel,) for defendants.

BENEDICT, District Judge. This is an action founded upon the second claim of letters patent No. 171,866, dated January 4, 1876, issued to Reuben Ritter, for an improvement in paper boxes. The patent has expired. The main defense in the case is a defect in title, although the defenses of lack of novelty in invention and noninfringement are set up in the answer. The patent has been several times examined by the courts of the United States, and the question of the validity of the patent has been passed upon by this court. See Box Co. v. Nugent, 41 Fed. Rep. 139; National Folding Box & Paper Co. v. American Paper Pail & Box Co., 48 Fed. Rep. 913, 51 Fed. Rep. 229. Moreover, the infringement here complained of has been before the circuit court of New Jersey, and also before the circuit court of the southern district of New York. The question of title raised in this case has also been passed upon by the circuit court for the southern district of New York. National Folding Box & Paper Co. v. American Paper Pail & Box Co., 55 Fed. Rep. 488. Under these circumstances, the only question open for consideration on this occasion is whether certain patents set up in this case, which were not set up in the former cases, can affect the decision. At the argument these patents were not seriously relied upon, as it seemed to me, and upon examination I find nothing in them which impugns the validity of the patent In regard to the title of the complainant in the patent in question, my opinion coincides with that of Judge Coxe, who examined the question.

There must be a decree for the complainant for an accounting.

NORWEGIAN STEAMSHIP CO. v. WASHINGTON.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 136.

1. MARITIME LIENS—STEVEDORE'S SERVICES—PRESUMPTIONS.
   The services of a stevedore in stowing cargo in other than the home port are services of a maritime nature, and the presumption is that they were rendered on the credit of the vessel.
2. SAME—CHARTER PARTY.
   The mere fact that a vessel is under charter by a charter party which makes the charterers liable for the expenses of loading and unloading is not sufficient to exempt the vessel from liability to one who renders services as a stevedore at the request of one whom he supposes to be the owner's or charterer's agent. The burden is on the vessel to show that the stevedore had knowledge of the terms of the charter party.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Frederick S. Washington against the steamship Kong Frode (the Norwegian Steamship Company of the South, claimant) to recover for services rendered as a stevedore. There was a decree for libelant, and the claimant appeals. Affirmed.

Statement by LOCKE, District Judge:

The steamship the Kong Frode, owned by the appellant herein, a corporation of Christiana, Norway, was on the 9th of November, 1891, chartered by the United States & Honduras Trading Company for the term of 12 calendar months. The charter party provided that the owners should appoint the master, provide the crew, and pay for all provisions and wages; the charterers to pay for coals, fuel, port charges, pilotages, and all other charges whatsoever, and £700 sterling per month for her use and hire. Before this charter had expired, the charterer, the United States & Honduras Trading Company, rechartered her to Ross, Howe & Merrow, of New Orleans, to load three cargoes of general merchandise to Havana and other ports in Cuba at charterers' option. By this charter party the charterers were to pay freight at fixed rates per sack or bushel; "the vessel to pay for stevedoring, and all other customary charges on cargo." While loading under this charter, the libelant, as he alleges, was hired and employed by the master to load and properly stow the cargo into the steamship, and did load and properly stow the cargo, which, at the agreed rates for which lading and stowing was done, amounted to $369.75. Upon the presentation of the bill the master signed the same, "attesting" it. Upon presenting the bill to the firm whom the libelant supposed to be the agents of the vessel, and at whose place of business,—the master being present,—he had made the agreement to perform the work, payment was refused, and he commenced suit against the steamship in an action in rem. The master gave bonds for the release of his vessel, and filed exceptions to the libel, which being overruled, an answer was filed, admitting that libelant was hired and employed to perform the services charged, and that he did properly store the said cargo, but denies that the price was the agreed price, or that any agreement for price was made, but that the price charged was exorbitant and excessive, and more than the services of libelant were worth, and averring, further, that the steamship was at the time under a time charter, and the services of the stevedore were to be paid for by the charterers, and that the libelant had full knowledge of these facts at the time he performed the services.

The testimony showed that the first charterers, Messrs. Andress & Mitchel, under the name of the United States & Honduras Trading Company, had put their business as charterers into the hands of Hoadly & Co., of New Or-

leans, and that through their representative, Mr. Wood, the libelant was procured to load the vessel, but before the final determination of the business the agency was transferred to Ross, Howe & Merrow, to whom the vessel had been rechartered, and Hoadly & Co. refused to pay any further bills.

Upon the hearing, judgment was given for the libelant for the amount of the bill, with interest from judicial demand and costs, from which judgment an appeal has been taken, assigning as error that the court erred in not holding that the steamship was under a charter party which exempted her from liability for stevedores' charges, and the stevedore having been employed by the charterers, under a contract with the charterers, the stevedore had no lien on the vessel; that the court erred in not holding that the libelant knew that the vessel was under a charter party, and that he knew he was engaged by the charterers, and that the fact that he presented his bill to the charterers clearly proves that the services were performed by the libelant on the credit of the charterers, and not on the credit of the vessel, and therefore the libel should have been dismissed; that the court erred in not holding that the services of the stevedore did not inure to the benefit of the ship, but inured to the benefit of the charterers, and that there was no lien on the vessel in favor of the stevedore, and in not holding that the libelant's bill was exorbitant and excessive.

Guy M. Hornor, for appellant.

O. B. Sansum, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) Where a necessary maritime service, or a necessary service which gives a maritime lien, is rendered to a foreign vessel upon the application of the master, or in his behalf, the presumption is that it is rendered upon the credit of the vessel, and the burden of proof is upon him who contends otherwise. The Grapeshot, 9 Wall. 141; The Lulu, 10 Wall. 192; The Patapsco, 13 Wall. 329. It has been settled as the rule in this circuit that a stevedore's services, rendered to a ship in taking in, stowing, and discharging cargo, are services of a maritime nature, and, when rendered in other than a home port, a maritime lien will result. Dennett v. The Main, 2 C. C. A. 569, 51 Fed. Rep. 954. Such services have in numerous cases been deemed as necessary to enable a vessel to pursue the general business of the transportation of cargo and the earning of freight, for which the vessel is intended, as any other class of maritime services. The Canada, 7 Fed. Rep. 119; The Velox, 21 Fed. Rep. 479; The Gilbert Knapp, 37 Fed. Rep. 209; The Onore, 6 Ben. 564.

The duties of consignees or agents of ships, or the agents of charterers or owners, are so similar and undistinguishable that without some positive knowledge of their relations, contracts, and agreements, it is impossible to determine to which class an agency may belong; and the fact that a merchant purchases supplies, or procures services to be rendered a vessel, raises no presumption that he therefore sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances, in ordinary practice, the material man or stevedore contracts with, and takes his bill for payment to, the agent of the

ship, whether he represents the owners or charterers, without the intervention of the master; but by so doing he does not abandon his right to look to the vessel in event of a nonpayment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties, in each particular case.

Examining this case in the light of these general principles, we fail to find any affirmative proof that the libelant was informed of the character or conditions of the charters, or either of them, or the responsibilities of the vessel or charterers, or in any way gave the agent personal credit, to the exclusion of the vessel, or that the circumstances are shown to be such that he should be held to have done so. The final charter—the one under which he was loading at this time—specified distinctly that the vessel should pay for the stevedoring; and, had he known of this, it was in no way compulsory upon him to go back of that, and find to whom the term "the vessel," there used, referred,—whether owners or previous charterers; and, were he ignorant of the provisions of either charter, it cannot be presumed he knew of, or contemplated, any paymaster but the vessel. There is nothing that shows that he knew what relation Hoadly & Co., through whose instrumentality he was employed, held to the vessel, any more than that they were the agents of Andress & Mitchel, whom he says he supposed to be the charterers' or owners' agents,—some one who looked out for the business. His testimony upon this point is:

"The charterers or the agents of the ship, who handled the business, made the agreement." "Andress & Mitchel, and John G. Woods, were the agents of Hoadly & Co., who were the managing owners here." "I made the contract with the agents of the ship." "The owners' agents at that time, I suppose, were Andress & Mitchel."

He states plainly that he did not know they were the charterers, as that did not concern him.

It is not enough to show that an agent who employs labor or procures supplies for a vessel is a charterer, and under that charter liable for the bills incurred, but it is necessary that the creditor also be aware of the relation, and furnish the supplies or services with such an understanding. The Patapsco, supra.

There is nothing in the case that raises the presumption that libelant performed the services upon the credit of Andress & Mitchel, and intended to look to them for his pay. They do not appear to have been residents of New Orleans, but are described as "two men from New York, who had opened an enterprise between this [New Orleans] and Honduras." Any property or credit they may have had in New Orleans, by which it might appear libelant had probably trusted them, is not shown. Not only is there a lack of affirmative proof that Washington was aware of the relations of vessel and charterer, and intended to waive his admiralty lien, but everything tends to strengthen the presumption that he intended to rely upon it. His bill was made against the vessel; he procured the attestation of the master; and, al-

though it was presented to Hoadly & Co., it was as agents of Andress & Mitchel, whom he considered agents for the owners. In the cases of The Stroma, 53 Fed. Rep. 281; The Golden Gate, 1 Newb. Adm. 313; The Aeronaut, 36 Fed. Rep. 499; and the other cases relied upon by respondent,—the charterers were owners pro hac vice, and the libelants' agents knew them to be such. Here, such is not the case. The owners appointed and paid master and crew, and held control of the vessel subject only to the terms of the charter party. The charterers were not special owners. Nor do we find that the libelant knew the conditions of the charter party, or that by it the charterers were to pay for stevedoring.

Nor do we find the rates charged to have been exorbitant or unreasonable. They appear to have been less than were paid by some merchants, and the same as paid by all the vessels consigned to the same agents; and the preponderance of evidence is very largely in favor of their being but fair, just, and reasonable.

We find no error in the judgment of the court below, and it is affirmed, with costs.

WILSON v. CHARLESTON PILOTS' ASS'N et al.

(District Court, E. D. South Carolina. July 8, 1893.)

1. PILOTS—LIABILITY—TUG AND SCHOONER.
A pilot engaged to take a schooner under tow to sea is liable for any damage resulting to the schooner from his negligently taking his place upon the tug instead of on the schooner, although he does so at the request of the master of the schooner.

2. SAME—ORDINARY DILIGENCE.
A pilot is not liable for damage to the vessel in his charge unless caused by his failure to use ordinary diligence, i. e. the degree of skill commonly possessed by others in the same employment.

3. SAME—FAILURE OF MASTER TO OBEY PILOT'S ORDERS.
A pilot engaged to take a schooner to sea from the harbor of Charleston, S. C., stationed himself on the tug, and ordered the schooner to follow the tug closely. On reaching the Swash channel the tug headed S. E., (the wind being S. W., and the current from south to north,) thereby properly proceeding down the channel S. E. by E. ⅜ E., and on the south side thereof. The schooner had raised her mainsail and jibs by order of the pilot, but now, without orders, raised her foresail, and bore off to the north side of the channel, where she grounded. The wind was fair enough to take the schooner out by her sails alone. *Held*, that the pilot was not liable.

4. TOWAGE—LIABILITY OF TUG—NEGLIGENCE OF TOW—END OF CONTRACT.
The master of a schooner knowingly engaged a tug of inferior power to tow him to sea from Charleston harbor. In passing down the Swash channel, the schooner being under sail, with a breeze sufficient to take her to sea without the aid of steam power, she negligently ran aground on the north side of the channel, and thereafter negligently lowered her mainsail, making it impossible for the tug to get her off. *Held*, that the tug did not contribute to the accident, and was not liable for any further service under the contract of towage.

In Admiralty. Libel by Samuel P. Wilson, master of the schooner Kate V. Aitken, against the Charleston Pilots' Association and others, for negligence resulting in the loss of the schooner while

in the charge of one of respondents' agents. Exceptions to the libel were overruled. 55 Fed. Rep. 1000. Libel dismissed.

Bryan & Bryan, for libelant.
Smythe & Lee and J. N. Nathans, for respondents.

SIMONTON, District Judge. This is a libel in personam against the members of the Charleston Pilots' Association (not incorporated) and the owners of the steam tug Relief. It was brought by the master of the schooner Kate V. Aitken, which grounded on the bar of Charleston, while leaving that port, in tow of the Relief, and in charge of S. G. Bringloe as pilot, and a member of and designated for that duty by the Charleston Pilots' Association. She became a total loss. The case has taken a wide range. To understand it in all of its aspects, the facts must be stated in detail.

No person can engage in the business as pilot on the bar and harbor of Charleston unless he possesses a commission or license for that purpose from the state, called a "branch." This license is granted to a number limited by law, after tests of the fitness of the applicant, the execution by him of a bond, and his qualification on oath. Gen. St. S. C. § 1260 et seq. The rate of compensation is fixed by law. Pilotage is compulsory on all vessels coming from other than home ports. The duties of pilots are carefully laid down. The reason for the existence of this privileged class is to secure safety to vessels entering or departing a port. Up to a recent period there were engaged in this service on this bar from 10 to 12 vessels, owned by different persons, and the pilots in these vessels cruised for long distances to the northward, southward, and eastward, stimulated by competition. For the purposes of mutual convenience, increased profit, decrease of expense, and diminution of toil and exposure the pilots formed the association, and adopted printed articles of agreement. Three pilot boats, and none other, are used in this service by all the pilots. They are hired by the association, which also victuals and mans them. A certain number of pilots do duty in rotation on these vessels, watching for and piloting in inward-bound vessels. The bill for this service is made out in the name of, and the money is paid to the Charleston Pilots' Association. When a vessel is ready for sea she is not taken out, as formerly, by the pilot who brought her in, or by some pilot substituted by him, but by a pilot designated by the association. The association has a regular office rented by it, where are the president and secretary and treasurer. A roster is kept in this office of the pilots, members of the association, and their tours of duty, presumably made out by, or under the direction of, or with the acquiescence of, the president. Outward pilotage is paid to the association, and all moneys earned by pilotage are deposited in a common treasury, in the name of the association. Each month the expenses of the boats, salaries, rents, and all common expenditures are paid out of this common fund. The net result is divided equally among the active members of the association. One of the questions made in the case is, is this association a copartnership,

and as such responsible for the loss of this schooner while in charge of Mr. Bringloe? This will be disposed of hereafter.

The Kate V. Aitken, a three-mast schooner of ——— tons, entered the port of Charleston with a cargo of coal on 26th February last, in charge of Mr. Aldert as pilot, a member of the pilots' association. A bill made out in the name of this association for the pilotage was presented to and paid by the schooner on that day. She discharged cargo, and went up Ashley river. Taking in a cargo of dry phosphate rock, she was towed down by the tug Relief on 8th March, and anchored off the battery. Her master sent notice to the office of the pilots' association of his intention to go to sea, and S. G. Bringloe was designated as pilot to take him to sea. About 9 o'clock A. M. of the 9th March the pilot boarded the schooner from the tug Relief. This tug had been engaged by the schooner. Her master would have preferred a larger tug, and endeavored to employ one; but, owing to some courtesy existing between her tug master and the Relief, he found himself without choice on that day. Anxious to get to sea, he made no further objection to the Relief. When the pilot boarded the schooner he asked her master whether he preferred the pilot to be on the tug or on the schooner. It seems that it was the usual practice to put the pilot on the tug, unless the master of the vessel otherwise wished. On this occasion the master quickly and emphatically expressed his preference that the pilot should be on the tug. Perhaps it is well to say in passing that if disaster occur because the pilot is on the wrong boat he cannot excuse himself by reason of any preference of the master. He is employed because of his supposed knowledge of all that is necessary to take a vessel to sea. The pilot then went to the tug, after giving instructions as to the paying out the hawser to be used as a tow line. He specially directed that the hawser be passed over the port, which was the lee bow, and that the tow should follow the movements of the tug strictly. During the night before there had been a heavy blow. When the tug and her tow started there was a good breeze blowing from the south and west. From this it was evident to the pilot that when they were crossing the bar they would have the wind abaft the beam, and at the same time would encounter a current moving athwart the channel. The velocity of this current was about one to one and a half knots per hour. Presumably because he knew this, the pilot ordered the line to be passed over her lee bow, so that her head should be kept to windward. The day was bright and clear, the wind moderate enough, blowing from S. W. by W., growing more fresh as they approached the ocean. The tow line was about 70 fathoms,—420 feet; the schooner was 125 feet long, and the tug was 66 feet. The tug and tow proceeded towards the bar. The master of the schooner took sole charge of the wheel, and remained at it, keeping her well aft of the tug. After they had passed Ft. Sumter the schooner raised her mainsail and jibs by order of the pilot. They passed through the jetties at the top of the high water, and entered the Swash channel, the speed over the ground being four miles an

hour. The exit of this channel is a straight cut, dredged out by the government, about 90 or 100 feet wide and ——— feet long. Its course is S. E. by E. ⅛ E. On the north side of the channel the banks of sand descend abruptly to the channel. On the south side they shelve gradually. The day mark of the channel is the range of Ft. Sumter light house with St. Philips Church steeple in Charleston. The north side of the channel is in a line with the northeast angle of the fort and the steeple. The south side of the channel is in the line with a mark on the fort and the steeple. When the tug entered this narrow part of the channel, the pilot, who had been closely watching the tug and tow, and giving directions constantly to the former, standing upon the top of the house, saw that the schooner seemed to be following him properly, as, indeed, she had been doing all the time. He was then proceeding down the channel. As he was encountering a current athwart his course, and had the wind on his starboard beam, he put the head of the tug, as he says, to S. E. by S., or, as the tug master says, to the S. E., so that by the resolution of forces he could go in the direction of the channel S. E. by E. ⅛ E. At that point the pilot put his glass up, in order more carefully to observe the range, and see that he was keeping it. He had the tug well on the south side of the channel, possibly a little south of it, and, as we have seen, the tow following him. After he had observed the range with his glass, and seeing that he had the steeple well to the south of the mark on the fort, he took the glass down, looked at the schooner, and found that she was over his port quarter on the north side of the channel, and, the instant after, the tow grounded on the bank. Just before this the master of the schooner, without orders from the pilot, hoisted his foresail, and as soon as he struck, —likewise without orders,—he lowered his mainsail. He had, he says, carefully followed all the movements of the tug, and had obeyed all orders of the pilot up to that time. When she grounded he for the first time observed the range, and found her outside of and north of the channel. When the schooner grounded, the wind and the swell put her further up on the shoal. She resisted all the efforts which the tug at once put forth to get her off. Soon after she bilged, was deserted, and became a total wreck.

The tug Relief had towed the schooner on the day before the accident down Ashley river to her anchorage, and was well known to libelant. She is a small tug, quite old,—thirty-odd years,—and her propeller was worn. She had lost power. But she was regularly employed in towage, and carried vessels to sea quite as large as or larger than the Aitken. She had power enough for this purpose. But she probably did not have sufficient power to pull the schooner that day off that shoal. Perhaps she was not put to a fair test on that occasion. When the master lowered his mainsail and left his jibs up, his heel being aground, he drove her head up on the shoal as on a pivot, and counteracted all efforts of the tug to pull her off. The Confidence or the Hercules, two large tugs of that port, might either of them have done this. But the

master was not obliged to go to sea with the Relief, and he knew when he employed her that she was smaller than and had not the power either of the Confidence or the Hercules. Still he employed her. The libel charged her want of power as a fault contributing to the accident as thereby being unable to perform the towage contract.

The questions in this case are: Is the pilot, S. G. Bringloe, responsible in damages for this accident? If so, is the Charleston Pilots' Association, of which he is a member, responsible for his acts? Did the tug contribute to the accident?

1. Is the pilot responsible in damages for this accident? He was in control of the movements of the tug and of the tow. Macl. Shipp. 277. He was charged with the safety of the schooner, and of all that she carried, being bound to use due diligence and care and reasonable skill in the exercise of his important functions. He is answerable if the schooner suffered damage through his default, negligence, or want of skill, while her helm was under his control. Id. 278. He was not an insurer, and is only chargeable for negligence if he fail in due knowledge, care, or skill in avoiding obstructions known or which should have been known to him. The Margaret, 94 U. S. 496; The James A. Garfield, 21 Fed. Rep. 475. If he used his best judgment and skill in avoiding known dangers, he cannot be held liable, although the result may show that this judgment was wrong. Mason v. Ervine, 27 Fed. Rep. 459; Campbell v. Williamson, 1 Phila. 198. "It is settled that if the occupation be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence." Curtis, J., in The New World v. King, 16 How. 469. An eminent text writer, whose name is authority, lays down the principle:

"Every man who offers his services to another, and is employed, assumes to exercise in the employment such skill as he possesses, with a reasonable degree of diligence. In all these employments where peculiar skill is requisite, if one offer his services he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded he commits a species of fraud on every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully and without fault or error. He undertakes for good faith and integrity, but not for infallibility; and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent on mere error of judgment." Cooley, Torts, 647.

This is the law of this case. Did this accident happen because the pilot failed to exert needful skill, either because he did not possess it or from inattention? Did he display negligence, bad faith, or dishonesty? Assuming, for the sake of the argument, that he occasioned the accident, was it consequent on his want of skill, negligence, bad faith, or dishonesty, or on a mere error of judgment? Mr. Bringloe has been in the practice of his business as a pilot on this bar for over 40 years. He is hale and vigorous, and in full possession of his faculties. He has always borne

an excellent reputation for caution and skill as a pilot, and his habits are steady. He frequently sounds and knows the bar, and is well acquainted with this new channel. On the day of the accident all the testimony shows that he was alive and vigilant, constantly attentive. He began by putting the tow line on her lee bow, thus aiding her head to the wind and current. He put up her mainsail to the same end, just before they were about to encounter the current. The wind being fair,—fair enough to take the schooner out by her sails alone,—he thus aided any defect of power in the tug. He kept himself on a prominent lookout on the tug the whole way, and observed all the movements of the schooner. At the moment of the accident he was watching and verifying the range by the landmarks. There is a total absence of evidence tending to show want of knowledge, want of care, or want of skill, or bad faith, except the fact of the accident itself. This is not a case in which the fact of the accident is conclusive of the cause. If the grounding arose from the act of the pilot, it was by an error of judgment. The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one assuming a responsibility as an expert possesses a knowledge of facts and circumstances connected with the duty he is about to perform, and if he brings to bear all his professional experience and skill, weighs these facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, the want of success, if due to such course of action, would be attributed to error of judgment, and not to negligence. But if he omits to inform himself as to facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then, if failure is caused thereby, this would be negligence. The Tom Lysle, 48 Fed. Rep. 693. But it does not appear that the accident was occasioned by an error of judgment on the part of the pilot. He took position on the tug in accordance with the custom of the pilots of this bar. Some of them testifying in this case say that it is the most proper position for the pilot, and the libelant concurred in this opinion. When the pilot left for the tug he instructed the libelant to follow him, and watch closely his movements. The libelant, a skillful and experienced seaman, master of the schooner, took and kept the wheel. He showed that he understood his instructions by following them out correctly down to the Swash channel. All the witnesses agree in this. When in this channel the tug was well over on its south side. Owing to the wind from the S. W., and the current from S. to N., the tug was heading S. E., or S. E. by S., and under the resolution of forces she was actually proceeding down the channel S. E. by E., $\frac{3}{8}$ E. The proper place for the tow, if she obeyed instructions, was also on the south side of the channel, and, regulating her movements by those of the tug, she should have headed S. E., or S. E. by S., and so acted upon by two forces she would have followed the tug in the direction she was actually going, down the channel, going over nearly the same ground, holding a weather position.

and giving ample room for leeway. This was her position and direction just before the accident, for when the pilot observed her immediately before this he saw her over the starboard quarter of the tug. When he took down his glasses and looked at her he found that she was bearing off the port quarter, on the north side or beyond the north side of the channel, and then she got aground. How this occurred can only be conjectured. It may have been owing to the fact that by the raising of the foresail the schooner got improper leeway, or perhaps the rising sail obscured the vision of the master at the wheel, and so prevented him from keeping the schooner well up. Whatever may have been the cause, one thing seems most probable: that obedience to the order of the pilot did not cause it. It does not appear that the pilot is responsible in damages for the accident.

2. The conclusion reached on this first point renders any discussion of the liability of the Charleston Pilots' Association unnecessary. No opinion is expressed upon the nature of this association, whether it be a copartnership or not.

3. Did the tug contribute to the disaster? She was under the control and direction of the pilot, and obeyed all orders which he gave. Up to the moment of the disaster she had pulled the schooner successfully against a flood tide, and they had attained a speed of four miles an hour over the ground, both being completely under control. There could not have been displayed any want of power, as she was aided by the schooner under sail, in a breeze which could have carried her to sea without any aid of steam power. It must be noted that the schooner did not merely touch bottom in the channel, as vessels often do, and pass on. She struck a shoal outside of the channel. From the configuration of the bottom at that point this shoal descended abruptly to the channel, forming so to speak a bluff under water. When the schooner stranded on this shoal, the tug could not pull her off. And if she could have done so under ordinary circumstances, the master of the schooner made it impossible by hauling down his mainsail. The towage services ended at this juncture. If the tug had rendered any other service it would have been in the nature of salvage. No fault can be imputed to the tug.

The libel is dismissed.

THE JULIA.

BUTLER et al. v. THE JULIA.

SIX OTHER LIBELS v. SAME.

(District Court, E. D. South Carolina. July 12, 1893.)

1. MARITIME LIENS—PRIORITY—ORDER OF BRINGING SUIT IMMATERIAL.
   The priority of maritime liens is determined according to their nature, and not according to the order in which suits are brought to enforce them.
2. ADMIRALTY—PRACTICE—INTERVENING LIBELS—ADVERTISEMENT.
   When a vessel libeled by a material man has been taken possession of by the court, and advertisement has been made, other material men may

intervene by libel praying warrants of arrest in order to detain the property in case security be given for its release, but in such case further advertisement is unnecessary.

3. MARITIME LIENS — UNDER GEN. ST. S. C. § 2389 — DISTRIBUTION — SPECIAL PRIVILEGE TO LABORERS.
Under Gen. St. S. C. § 2389, etc., providing that, where the proceeds of a sale are insufficient to satisfy the claims of certain lien creditors, labor shall have a percentage one-third greater than material men, only laborers are entitled to such increased percentage. The privilege does not extend to money paid by a material man for labor in putting in materials.

4. ADMIRALTY—PROCTORS' COSTS.
Where a vessel is libeled by material men, and thereafter other material men file libels in the nature of interventions to be perfected if the vessel is released, otherwise to operate on the balance of the proceeds of the sale, proctors' costs should not be allowed on such subsequent suits.

In Admiralty. Libels by S. B. Butler, John F. Riley, William Johnson & Co., John Conroy & Co., the Steinmyer Lumber Company, Frederick Drews, and others against the steamer Julia for seamen's wages, and for materials. The vessel was sold, and seamen's wages and costs paid. Heard on exceptions by Butler and Riley to the master's report. Exceptions overruled.

C. B. Northrop, for exceptors.

SIMONTON, District Judge. This case comes up on exceptions to the report of the special master.

The steamer Julia was engaged in trading between the city of Charleston and the adjacent waters, carrying freight. She was libeled and arrested at the suit for wages of certain of her crew. She was also libeled by two material men, S. B. Butler and John F. Riley, in separate libels, on each of which a warrant of arrest was issued. The same proctor represented the crew and these two material men, and, in advertising the warrant of arrest under admiralty rule No. 9, he inserted the libels of the latter also. A number of libels were then filed by material men, in each of which warrants of arrest were issued, but in no instance were any of these followed by publication. This is the home port of the Julia. The material men claim under a statute of the state of South Carolina, Gen. St. § 2389 et seq. This statute gives a lien to any person for labor performed, materials used, or labor and materials furnished in the construction of vessels, or for provisions, stores, or other articles furnished for or on account of any ship or vessel in this state, the lien to be next to seamen's wages. If the claims be held by more than one person, they are marshaled, and the proceeds of sale distributed without preference. If these proceeds be insufficient, the distribution is pro rata, except that labor shall have a percentage one-third greater than material men.

The Julia has been sold under order of this court in the libels for wages. After paying the wages and costs, the proceeds are largely insufficient to pay all the material men. The master has reported a taxation of the costs to be paid, allowing each material man proctors' costs. The remainder, he reports, should be distributed

pro rata. One of the libelants, Riley, is a master mechanic. In his bill for repairs he itemizes and charges so much for labor and so much for materials.

Butler and Riley except to the report. Both claim priority over all other material men, because they filed the first libels; because, also, they were the only libelants who advertised; and Riley insists that the master was wrong in not recognizing the preference claimed for the labor items in his bill.

No question has been made as to the constitutionality of the South Carolina statute. That question has not been considered, and is not now decided.

The first question is, have the material men who filed the first libels secured thereby priority of payment out of the proceeds in the hands of the court? This, as we have seen, is the home port of the Julia. But for the state statute these libelants would have no lien, (The Young Mechanic, 2 Curt. 405;) and the nature and extent of the lien is measured by the state statute, (The Mary Gratwick, 2 Sawy. 344.) It would seem, therefore, that if the state statute which creates the lien gives it to all material men alike, and puts them on an equal footing, this court, administering the lien, would do likewise. It is insisted, however, that, although the state statute creates the liens, when they come into this court they are treated and enforced as maritime liens, and that, with regard to maritime liens, the preference is under the rule prior petens,—first come, first served. There is respectable authority for this with regard to maritime liens. Ben. Adm. § 560; Cohen Adm. p. 197. But these writers are overruled by authority, as well as by reason. They do not state the law correctly. The true doctrine is that liens like these have equal rank, are not affected by the order in which the suits were brought, and share pro rata. The J. W. Tucker, 20 Fed. Rep. 129, in which all the cases are quoted and the rule stated; The Arcturus, 18 Fed. Rep. 743; The Grapeshot, 22 Fed. Rep. 123; Vandewater v. Mills, 19 How. 82. And Mr. Henry, in his Admiralty Jurisdiction, shows that this is the true doctrine. Indeed, the rule cannot be otherwise. A maritime lien is jus in re; a right in property in the res, enforceable against all the world. The suit in admiralty enforces this lien, which does not owe its origin to, or its existence because of, the suit, and therefore does not take rank from the suit. In this it differs from liens created by attachment. "Incumbrances created by attachment must take rank, in the absence of positive provisions of law to the contrary, according to the dates of such attachments; but incumbrances created by maritime liens are marshaled according to the causes from which such liens spring; that is, they subsist and bind the property, not in virtue of the legal process used to enforce them, but by operation of the law which creates them, and fixes them on the property the moment the debts are incurred." The Young Mechanic, 2 Curt. 413.

The next question is, are the other material men in court, none of them having advertised? The reason for the advertisement is

plain. In order to give the court complete jurisdiction, so that a decree for sale will secure clear title, the notice is given to all the world. In the present case the court took possession of the res, and this advertisement was necessary. Having been made, the jurisdiction was complete. No further advertisement was necessary,—indeed, we may say, would have been proper,—unless the claimant had under the first libels given security, and released the vessel. The libels filed after her arrest and the advertisement were interventions. They do not demand the redelivery of the vessel, and seek only the payment of a claim in the ultimate disposition of the case. The Two Marys, 12 Fed. Rep. 152. They were properly in the form of a libel, and properly prayed warrant of arrest, and as properly the warrants were in the hands of the marshal, not, however, to be acted upon immediately, but "for the purpose of securing the further detention of the property in case security be given for its release, under Act March 3, 1847, c. 55; or, in the event of its discharge from arrest in the mean time for the purpose of having it again arrested to answer this new demand." 2 Conk. Adm. 540.

The next question is as to the claim set up by Riley for increased percentage for his items of labor. Riley is a contractor, and in making out his bill, and in ascertaining its total, he charges in the sums paid by him for the labor in putting in the materials. The state statute gives the lien to any person, for labor performed, for materials used, or for labor and materials furnished. This clearly distinguishes the three classes,—the laborer, the party furnishing the materials to be used, and the person furnishing labor and materials. The increased percentage is given to those having liens in the first class, for labor; that is to say, the laborer.

The exceptions are overruled.

The special master has allowed costs of proctors in all the cases. With the exception of the claims of Butler and Riley, the subsequent proceedings were all interventions, inchoate suits, to be perfected in case the Julia was released, and if she be not released, but sold, then to operate upon the balance of the proceeds of sale. The parties themselves show their own construction of their action. No decree by default was taken in any case. They went at once into marshaling the remainder of the proceeds. No proctors' costs are allowed in the cases reported, except in the Butler and Riley claims.

Let the case go back to the special master, for the purpose of restating the division in accordance with this opinion.

MILBURN v. THIRTY-FIVE THOUSAND BOXES OF ORANGES AND LEMONS et al.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.

1. DEMURRAGE—DELAY BY CONSIGNEE—CUSTOM OF PORT—COMMERCIAL USAGE.
In a charter party the words "to discharge with customary dispatch, * * * cargo to be * * * discharged according to the custom of the

port," do not include a custom whereby all cargoes of fruit are sold at auction by one firm, not more than one cargo being sold in one day, and no cargo being discharged until it has been thus sold, since such custom manifestly has its origin in the sale, and not in the discharging, of cargoes; and for demurrage caused by such a custom the cargo is liable.

2. SAME—LIQUIDATED DAMAGES.
Where a charter party provides for demurrage at a stipulated rate per day, payable day by day, and the master makes daily demand for the amount due, interest from the time of such demand should be included in an allowance for demurrage.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by John D. Milburn, owner of the steamship Tiverton, against 35,000 boxes of oranges and lemons, Phelps Bros. & Co., claimants, for demurrage. The district court rendered a decree for libelant, but disallowed a claim for interest. Both parties appeal. Reversed.

Statement by LACOMBE, Circuit Judge:

The Tiverton, a British steamship, was chartered to the claimant's Liverpool firm, to carry a cargo of green fruit and other lawful merchandise from Mediterranean ports to New York, by a charter party dated October 16, 1890. The following provisions of the charter are relevant: "To discharge at charterers' covered wharf, * * * and there deliver the same, agreeably to bills of lading, and so end the voyage." "To discharge with customary dispatch." "The cargo * * * to be stowed and discharged according to the customs of the ports." "And shall pay demurrage at the rate of thirty pounds sterling per day, to be paid day by day, for each and every day said steamer is detained over the said time, as hereinbefore stated." "To be consigned at port of discharge to Messrs. Phelps Brothers & Co." A cargo consisting almost entirely of oranges and lemons was loaded aboard at Mediterranean ports, and bills of lading issued therefor, whereby, among other things, it was agreed: "Simultaneously with the ship being ready to unload, * * * the consignee of said goods is hereby bound to be ready to receive the same from the ship's side, * * * and, in default thereof, the master or agent of the ship * * * are hereby authorized to enter the said goods, * * * and land, warehouse, or place them in lighter, without notice to, and at the risk and expense of, the said consignee," etc.

The Tiverton arrived at New York on December 29th and notified Phelps Bros. & Co. the next day of her readiness to discharge. She was duly entered at the customhouse, and permits for discharge issued. The charterers thereupon ordered her to their Mediterranean piers, Brooklyn, where she was duly berthed at 3 P. M., December 30, 1890, on the south side of the northerly one of the two covered piers owned by the charterers, and was unobstructed. There was no other vessel on the opposite or northerly side of the pier where the Tiverton lay, but the steamer Thomas Melville lay at the southerly side of the charterers' southerly pier. The charterers assigned their regular stevedore to the discharge of the fruit, and he was present when the steamer was docked. Both of these piers were covered, and steamers lying at either had equal advantages for discharge, simultaneously, and without interfering with each other. By the custom of the port, January 1st was a holiday. The temperature was proper for the discharge of green fruit on January 2d and 3d, and the steamer Thomas Melville was discharged on those days. Although the Tiverton had equal facilities, and was in all respects ready to discharge, her cargo was left aboard, and received no attention. The weather after Saturday, January 3d, became cold, and the discharge of the Tiverton was not completed until January 13th, or nine days after the discharge of the Thomas Melville. During the winter fruit cargoes are discharged only when the thermometer indicates 28 degrees F., or over. Proof was made upon the trial of a custom in the fruit trade at this port.

which has existed for many years. All such cargoes are sold at auction, and by a single firm of auctioneers. As soon as the steamer arrives at Sandy Hook, the consignee reports her at the auctioneer's store, where a list is kept, and they put down the hour and minute of arrival. During the summer vessels discharge irrespective of the list. In the winter, however, a day is set for each vessel in turn. If when that day comes the thermometer indicates 28 degrees, the auctioneers sell the cargo of the vessel to which that day was assigned, the sale beginning at noon. Discharge commences in the morning of the day of sale, and proceeds, weather permitting, till completed. No other cargo is sold on that day. If the next day is favorable, the cargo of the next vessel is sold, whether the discharge of the one sold the day before is completed or not. No sales, however, are made on Saturday. By this method the consignee of the fruit turns it over from the ship to the buyer, without himself warehousing it. The ship holds it till a purchaser is found, acting as a temporary warehouse meanwhile, and the purchaser is not found, or even sought for, till the day comes, when the auctioneers, having at their convenience sold all earlier cargoes, one a day, are prepared to offer this one on the open market. The only reason why discharge of the Tiverton was not begun on January 2d was because the cargo of the Melville, which had arrived earlier, was offered for sale on that day. The only reason why discharge was not begun January 3d was because fruit cargoes are not sold on Saturdays.

The libelant filed his libel for demurrage at the charter rate of $150 per day for detention, making in all the sum of $1,350. Interest thereon was disallowed by the district court, and a partial appeal against such disallowance was taken by the libelant. The claimant has appealed from the decree in favor of the libelant.

Wm. H. Cochran, for appellant.

E. B. Convers, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge, (after stating the facts.) There is no question of fact in this case. The existence of the custom set up in defense is conceded, and the only point to be decided is whether it is imported into the contract between the parties by the language they have used. The learned district judge did not discuss this point in the brief memorandum he filed with his decision. He had precisely the same custom before him, however, in the case of Steam Co v. Suitter, 17 Fed. Rep. 698, and there held that the existence of such usage of trade did not affect the right of the shipowner to insist upon reasonable promptness in discharging; that it was "unreasonable, and contrary to public policy, to permit the time of discharging a ship of her cargo to depend upon the ability of a single auction house, in the accumulation of business and of other engagements, to effect a sale of such cargo for the owners thereof." The question whether a clause in the charter party providing for "discharge with customary dispatch" was affected by a substantially similar custom at the port of New Orleans, where it was the practice of fruit dealers to receive their fruit from the vessels no faster than they could sell it at the wharves, was also carefully considered by the district and circuit courts in the eastern district of Louisiana. Lindsay v. Cusimano, 10 Fed. Rep. 302, 12 Fed. Rep. 503, 505. It was therein held as follows:

"The obligations of the owners and charterers, where the charter party is silent as to time to be occupied in discharging, are reciprocal; each shall

use 'reasonable dispatch.' This obligation is here qualified by changing 'reasonable' into 'customary' dispatch. This enlarges the source of delay, and makes it include all those usages at the port of delivery which the carrier cannot control,—such as the working hours, the order in which vessels must come up to the wharf, the observance of holidays, the allowance of three days to obtain a berth, provided one cannot be sooner obtained; but here their force stops. They cannot be held to include any delay which is purely voluntary on the part of the charterers, although such delay is customary in the fruit trade. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the custom prevailing at the port. This is the substance of the decision in Kearon v. Pearson, 7 Hurl. & N. 386. There the question was as to the meaning of the words 'usual dispatch' as applied to loading. Martin, B., before whom the case was tried, whose ruling was affirmed by all the judges, says, page 387: 'They meant that the vessel should be loaded with the usual dispatch of persons who have a cargo ready at Liverpool for loading.' Here these words 'customary dispatch' meant the usual dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which these charterers might claim the right to decline to receive, simply because it was more advantageous to postpone. * * * Delivery should take place with dispatch, limited or qualified by the customs prevailing at the port of delivery, which created barriers not under the control of the party who here urges them." 10 Fed. Rep. 303.

The distinction thus pointed out is a sound one. The custom here set up to sell only one fruit cargo a day, and none on Saturdays, is not an outgrowth of the business of discharging ships, but rather of the business of selling their cargoes. It is manifestly intended to prevent a glut in the market, to keep up prices by holding back newly-arrived fruit till the earlier arrivals have been absorbed by the consumer. It does not interfere with a discharge of the ship, as did the customs as to hours and times of labor, as to routine of access to a single elevator, as to a second change of berth,—which have been held applicable in the cases cited by the appellant. The consignee could have discharged this cargo in seasonable weather on January 2d and 3d, removed it from the dock and warehoused it; and, when the only excuse he gives for not doing so is that, by the custom of his trade, he could not sell it in the ordinary way to consumers until other fruit had been first so sold, he may not turn the ship into a temporary warehouse to hold his goods until he finds a market for them. We do not determine whether the custom of selling fruit by a single firm of auctioneers, and in restricted quantities, which seems to have existed many years, is or is not reasonable, but do hold it is not the kind of custom which the use of the phrase "customary dispatch in discharging" imports into the contract of affreightment between the parties, being concerned, not with the business of discharging, but with the business of selling, and not creating any impediment to a discharge with dispatch, which the charterer would not have overcome by the use of mere ordinary diligence.

Inasmuch as the charter party contains an express agreement to pay demurrage at the rate above named "in case the steamer is detained over the said time, as above stated," and the steamer was detained nine days over the time agreed upon for unloading, viz. such time as would be required for discharge with customary dis-

patch, the district court correctly awarded demurrage to the libelant.

Such award, however, was without interest, and the refusal to allow it is assigned as error by the libelant. Upon this point the decisions of the eastern and of the southern districts of New York are not harmonious. The Alexandria, 10 Ben. 101; Johanssen v. The Eloina, 4 Fed. Rep. 573; The J. A. Dumont, 34 Fed. Rep. 428. It is unnecessary to add anything to the discussion of the subject contained in those opinions. The amount of the demurrage is liquidated by the contract. Claimants stipulated to pay it day by day, in case they detained the vessel beyond the stipulated time. It was their duty to pay it when they so detained her, and to pay it day by day for each day of such detention, as they contracted to do. The master of the Tiverton demanded daily the amount due. In similar cases interest follows recovery, and there is no adequate reason why demurrage should be subject to any different rule.

The decree of the district court is reversed, and cause remanded, with instructions to decree in favor of the libelant for demurrage, as found by said court, with interest thereon from date of demand, and costs of the district court and of this court.

In re MYERS EXCURSION & NAVIGATION CO.

(District Court, E. D. New York. July 7, 1893.)

1. SHIPPING—LIMITATION OF LIABILITY—EXCURSION BARGE.
   A barge without motive power, which is used for transporting excursion parties on New York harbor and adjacent waters, is within the limited liability acts of the United States.
2. SAME—BARGE WITHOUT MOTIVE POWER — MAY BE SURRENDERED WITHOUT TUG.
   A barge without motive power, which is used for carrying excursion parties about New York harbor and adjacent waters, may be surrendered by her owners, under the limited liability acts of the United States, without the surrender of the tug towing the barge at the time of the loss, though the tug belongs to the same owners.
3. SAME—UNSEAWORTHINESS — CAPACITY TO WITHSTAND STORMS OF ORDINARY VIOLENCE.
   A barge used to carry excursion parties on New York harbor and neighboring waters is unseaworthy when not in a condition to withstand without serious injury to her passengers the violent thunderstorms which are of frequent occurrence in that locality.
4. SAME—OWNERS CHARGED WITH KNOWLEDGE—LIMITATION OF LIABILITY.
   Where the unseaworthy condition of an excursion barge would be shown by a proper examination, her owners are charged with knowledge thereof, and any injury to passengers resulting therefrom is not without the "privity or knowledge" of the owners so as to entitle them to the benefit of the limited liability acts of the United States.

In Admiralty. In the matter of the petition of the Myers Excursion & Navigation Company for limitation of liability as owners of the barge Republic. Petition dismissed.

Wing, Shoudy & Putnam, for petitioner.

Raphael J. Moses, Jr., Fernando Solinger, and George W. Cottrell, for respondents.

BENEDICT, District Judge. The barge Republic was hired, under an excursion contract made on March 2, 1891, to convey an excursion party to Cold Spring grove and back to New York on August 12, 1891, for the sum of $260. The barge, in pursuance of that contract, on that day took on board the excursion party, and was towed to Cold Spring grove by the steambcat Crystal Stream, owned by the same owners. Early in the afternoon the barge reached a wharf on the east side of the harbor at Cold Spring grove, where she was made fast to the end of the wharf, the port side of the barge being next to the wharf, and the Crystal Stream being fast to her upon her starboard side. Just as the barge was about to leave the wharf on the return trip, the excursionists being on board, but the lines not cast off, a thunderstorm came up from the westward, striking the barge on her starboard side. By the force of the wind, the roof of the hurricane deck on the starboard side was raised off its fastenings and doubled over against the two masts of the barge and the pilot house. The pilot house turned over, the two masts broke, and these masts, together with the broken portion of the hurricane deck, fell upon the other side of the hurricane deck, which was thereby crushed down upon the passengers collected underneath it, and 13 of the passengers were in this way killed. The owners of the barge, being sued for the injury to these passengers, filed their petition in this court to have their liability limited, and surrendered the barge to the custody of the court. In their petition they set up that the injuries to the passengers alluded to were not caused by any negligence on the part of those owning or in charge of the Republic, but to unavoidable accident.

The following objections are raised to the granting of the relief prayed by the petitioners:

First. That the Republic was not a vessel intended to be embraced in the limited liability acts. In my opinion, this objection is not well founded. As I understand the limited liability acts, they were intended to relieve from liability barges engaged in any kind of navigation, and they cover the barge in question.

The next objection taken is that the tug Crystal Stream, being the motive power of the barge Republic, should also have been surrendered. This objection is without foundation. The petitioners do not seek to limit any liability they may be under as owners of the Crystal Stream, and there is nothing in this proceeding to prevent the parties injured from proceeding against the Crystal Stream or her owners, if so advised.

The third objection is that the Republic was unfit for the employment in which she was engaged, and that the injuries sustained by her passengers were due to her unseaworthy condition. Upon this question a mass of testimony has been taken, both in regard to the force of the wind and the construction and condition of the barge. After a careful consideration of the testimony relating to the effects of the wind on other objects near the place where the barge was when struck by the wind, and the evidence tending

to show that the hurricane deck was not properly fastened to the stanchions and deck below, and the evidence in regard to the condition of the masts which fell, and which are clearly proved to have been unsound, and in regard to the condition of the stanchions, and the method of fastening the deck to them,—the effect of which testimony does not seem to be overthrown by the testimony upon these points produced in behalf of the petitioners,—my conclusion is that the objection under consideration is well taken. Undoubtedly the law requires that a barge engaged in the occupation of carrying excursion parties around and about the harbor of New York shall be sufficient to endure without serious injury—certainly without such injury as was done to the hurricane deck of this barge—any wind that may be naturally anticipated in the course of such a voyage. It is conceded on all hands that the accident in question was not caused by any fault in navigating or mooring the barge. It was entirely due to the wind that struck the hurricane deck. Violent thunder storms are frequent in and about this harbor. Wind of great force is to be anticipated in this navigation; and in my opinion the wind that struck the barge on the occasion in question was no greater than is to be anticipated in this locality. No doubt there are winds that nothing can withstand, and against which the owners of such vessels cannot be expected to be prepared; but my conclusion is that the wind that struck this barge, while violent, did not exceed in violence any that might be reasonably expected in these waters. A vessel not strong enough to endure in safety such a wind as this barge encountered is, in my opinion, unseaworthy, and the injuries done to her passengers must be held to have arisen from the unfit and unseaworthy condition of the barge.

But the limited liability statutes of the United States exempt the owners of the barge from liability beyond the value of the barge and her freight then pending for loss and damage resulting as above stated, provided such loss occurred "without the privity or knowledge of the owners;" and the question arises whether loss and injury resulting from the unfit condition of the barge at the time she started upon the voyage in question occurred without the privity or knowledge of her owners, within the meaning of these statutes. The barge was owned by a corporation, so it was the duty of this corporation, before dispatching the vessel upon the voyage in question, to know by the examination of some duly-appointed officer whether the vessel was in a fit and seaworthy condition for the intended voyage. A proper examination of the vessel surely would have disclosed the unsound condition of the masts, which, by falling under the weight of the portion of the hurricane deck, which first gave way, largely contributed to the loss of life that ensued. Such an examination would have disclosed the fact that the fastenings of the hurricane deck were insufficient. The petitioners cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were

bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. An owner of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it was within his power to know.

My decision, therefore, is that the petition must be dismissed, and the injunction dissolved.

In re HARRIS et al.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. LIMITATION OF LIABILITY—GIVING OF BOND—STIPULATION FOR INTEREST.
   In a proceeding for limitation of liability, where a bond is taken for the appraised value of the vessel, pursuant to admiralty rule 54, it is proper for the court to require that such bond shall include a stipulation for interest from the date thereof.
2. SAME—COSTS.
   Where, in a proceeding for limitation of liability, the owners of the vessel unsuccessfully litigate the question of any liability on her part, they are chargeable wth the costs of such litigation. The Wanata, 95 U. S. 600, followed.
3. ESTOPPEL—PAYMENT OF INSURANCE POLICY — SUBROGATION — EXCEPTION IN POLICY—EFFECT OF.
   An insurance company having paid a loss caused by the stranding of a lighter in charge of a tug, through the negligence of the latter, took an assignment of the claim of the insured, and libeled the tug for the loss. *Held*, that the insurance company was not estopped from alleging negligence on the part of the tug because of an exemption in its policy against liability for all loss arising from want of ordinary care and skill in navigating the insured vessel.
4. SAME.
   Nor was the company estopped because of a statement in a receipt given by the assured that, at the time of loss, the lighter was in charge of the tug, nor because of a protest by the master of the tug, among the proofs of loss, stating that the stranding was due solely to the extraordinary and irresistible force of the flood tide, and ought not to be attributed to any default in navigation.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Petition by Charles F. Harris and others, owners of the steam tug Howard Carroll, under the act of March 3, 1851, limiting the liability of shipowners. From a decree for libelants, petitioners appeal. Affirmed.

E. D. McCarthy, for appellants.

Jos. F. Mosher, for the insurance company.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On December 26, 1889, a loaded car float, belonging to the New York, New Haven & Hartford Railroad Company, in tow of the steam tug Howard Carroll, was stranded upon a rock in the East river, causing damages to the float and its cargo. On March 19, 1890, the Aetna Insurance Company, of Hartford, Conn., insurers of the railroad company on the cars

and their contents, filed a libel in rem against the tug for such damages and expenses of salvage, alleging that the stranding was occasioned by the negligence of the persons in charge of and navigating the tug. Thereupon, on March 22, 1890, the petitioners filed their libel and petition, praying that they might be held entitled to the benefit of the act of March 3, 1851, limiting the liability of shipowners. An order was entered directing an appraisement of the interest of the petitioners in the steam tug, her tackle, etc., and freight, which interest was duly appraised at $4,150. Petitioners thereupon, on March 28, 1890, filed a bond, with sureties, stipulating, upon the order or decree of the district court or of any appellate court, to pay into said court, subject to its order, the sum of $4,150, with interest from the date of the bond. Petitioners protested against being required to stipulate for interest, but the district court would accept nothing else or different.

The proceeding to limit liability was conducted according to law and the practice of the admiralty. Petitioners defended against any claim for liability, contending that the stranding occurred without any fault or negligence of their own, or of those in charge of the navigation of the tug. The district court, however, held that the stranding was caused by the neglect and want of care of those in charge of the Howard Carroll, and decreed that various claims for damages and debts against the tug, aggregating some $12,000, were duly proven. It thereupon decreed that the petitioners and their sureties should pay into court the amount of their stipulation for value, to wit, the sum of $4,150, with interest from the date of the bond; that the costs and expenses of the proctors for petitioners in the proceedings for limitation of liability should be paid from the fund, but not any costs or expenses incurred by reason of the denial of all liability; and that the Aetna Insurance Company and the New York, New Haven & Hartford Railroad Company, with whom the owners of the tug had litigated the question of liability for the damages resulting from the stranding, should recover from such owners the costs of that litigation. The petitioners appealed to this court, and have raised and argued here three assignments of error.

1. Appellants contend that the district court erred in requiring a stipulation for interest from the date of the bond upon the appraised value of ship and freight, and insist that, in proceedings under the act of 1851, interest upon such value can be exacted only from the date of the final decree. Several cases are cited in support of this contention, (The Ann Caroline, 2 Wall. 538; The Wanata, 95 U. S. 600; The Manitoba, 122 U. S. 97, 7 Sup. Ct. Rep. 1158; The Jose E. More, 37 Fed. Rep. 122;) but they are not controlling, because in no one of them did the bond provide for interest, and the obligors in a bond conditioned only to pay the stipulated value upon decree could not be liable for interest until the decree fixed their liability. But it is further contended that, upon principle, the owners can in no event be held liable for anything beyond the value of the vessel and freight; that, therefore, the

stipulation, being for illegal interest, is void, being unsupported by any consideration, upon the principle that stipulations given pursuant to law are not enforceable beyond the demands of the law, no matter what promises they may contain. The statement in appellant's brief that "section 4 of the act of 1851 (now sections 4284, 4285, Rev. St. U. S.,) says that all claims against the shipowner shall cease from and after the time when he surrenders his vessel, or gives a bond for her value," is not entirely accurate. The statute contains no provision for the giving of a bond. It is only upon a transfer of his interest in the vessel and freight to a trustee appointed by the court that claims against the owner are declared by the statute to cease. It is the fifty-fourth rule in admiralty, which, presumably for the relief of the shipowner who might wish to put his vessel to some use, provides as follows:

"Rule 54. * * * And thereupon the court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act."

Under this rule the right to elect that he will transfer his interest, and thus limit his liability in the way provided by the statute, is expressly reserved to the owner. If, however, he prefer to avail of the alternative offered by the rule, and to substitute the appraised value for the res, it is left to the discretion of the court to determine whether such value shall be paid into court in cash, or secured by a bond. If it is paid in cash, the fund may be invested, and increased by accumulations of income during the continuance of the litigation; and, as the fund thus held by the court belongs to the creditors, its increment (to the extent of their claims) will also belong to them. Where, however, it is not paid into court, it remains in the hands of the debtor, and, for the use of a fund not belonging to him, it is but fair and just that he should pay. The Favorite, 12 Fed. Rep. 213. In cases, therefore, where the owner elects not to transfer, and asks to be allowed to receive his vessel upon stipulating to pay the appraised value of his interest at some future day, instead of substituting the money for the res, it is eminently proper that he should be required to stipulate for interest from the time when he thus releases his ship till the money which takes its place is required for final distribution among the creditors, whose fund it is; and there is nothing in either the statute or the rule which expressly or inferentially forbids the court to require him so to do. The additional liability thus incurred arises, not because of the original offense, but because the owner has chosen substantially to borrow from his creditors the money, which, under the rule, is to take the place of the offending vessel.

2. The appellants contend that the district court erred in award-

ing against the owners the costs of the litigation in which they contested, unsuccessfully, the right of the insurance company and of the railroad company to recover anything. This contention is unsound. The case of The Wanata, 95 U. S. 600, is abundant authority for the proposition that defending owners in cases such as this are liable for costs.

3. The appellants also assign it as error that the district court decreed in favor of the Aetna Insurance Company, and did not adjudge that said company, "being subrogated to the rights of the assured only, was estopped to allege negligence on the part of those in charge of the Howard Carroll at the time of the accident." That the stranding of the barge was caused, as the district judge found, by the neglect and want of care of those in charge of the tug, is not controverted upon this appeal. The policy of insurance contains this clause: "Excepting all perils, losses, or misfortunes arising from * * * want of ordinary care and skill (such as is common in said navigation) in lading or navigating said lighters," etc. The loss was paid upon an adjustment, which states on its face that it is subject to subrogation. At the time of payment the railroad company gave a receipt stating that, at the time of loss, the float was in charge of the Howard Carroll, and assigned all claim of the railroad company for damages arising from or connected with such loss. Among the proofs of loss was a protest made by the master of the tug, stating that the stranding was due solely to the "extraordinary and irresistible force of the flood tide, * * * and ought not to be attributed to any default in navigation." In these facts, however, we find no support for the contention of the appellants. The clause above quoted from the policy was manifestly inserted for the benefit of the insurer, and might be waived by it. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co., 17 Fed. Rep. 919. The equities between insurer and insured are not a matter with which the wrongdoer has any concern. Whether the insurance company paid because it thought the tug was blameless, or because it doubted whether negligence on the part of those on the tug was within the terms of the exception, or because it supposed it to be good business policy to pay the railroad company, notwithstanding the exception, and to endeavor itself to recover from the tug, does not appear, and has nothing to do with the case. It did pay the loss, which, but for the exception, it was bound to pay, and took an assignment which subrogated it to whatever right of recovery for the loss the insured might have against third persons. In the presentation to the insurance company by the insured of the protest of the tug's master, above quoted from, and in the receipt by the railroad company of payment for its loss from the insurance company, we find no estoppel which will inure to the benefit of the original wrongdoer, to whom no misleading statement was made, and whose conduct has been in no way influenced by the transactions between insurer and insured. An estoppel in pais only operates in favor of a person who has been misled to his injury. Ketchum v. Duncan, 96 U. S. 666. Nor do the facts make out an

estoppel, as appellants contend, "from considerations of universal right * * * and sound public policy." Having settled between themselves, upon consideration of their contract and the facts in the case, which of them—insurer or insured—should first bear the loss, the person thus injured now seeks reimbursement from the wrongdoer, whose negligence caused the damage. It would be against "universal right and sound public policy" to be astute to relieve the wrongdoer from all liability for his conceded fault because the injured parties have adjusted their mutual equities in some manner satisfactory to themselves, and in no way affecting himself. He is bound to make satisfaction for the injury he has done, without inquiry as to the relative equities of the parties claiming the damages. The Monticello v. Mollison, 17 How. 152.

The decree of the district court is affirmed, with interest and costs.

THE ORIZABA.

BEEBE et al. v. THE ORIZABA.

(District Court, S. D. New York. June 24, 1893.)

COLLISION—STEAM AND SAIL—CROSSING COURSES—LOOKOUT—FOG—SPEED.

A steamer coming up the bay of New York ran into and sank a pilot boat which was crossing her course nearly at right angles from port to starboard. The evidence indicated that the steamer was seen from the pilot boat at the distance of some 1,000 to 1,300 feet; that the pilot boat was not seen on the ship till she was within 100 yards. The ordinary lookout men were not stationed, the mate alone being on watch, and the rate of the steamer's progress was some seven knots. *Held*, that the steamship was solely in fault for the collision, both for not having an adequate lookout in thick fog, and for speed in fog in that locality.

In Admiralty. Libel for collision. Decree for libelants.

Wing, Shoudy & Putnam, for libelants.

Carter & Ledyard and Edmund L. Baylies, for claimants.

BROWN, District Judge. Between 10 and 11 o'clock in the forenoon of February 6, 1893, the steamship Orizaba, bound in from sea by way of the swash channel, came in collision in a fog, about three miles above the monument on the Romer shoals, with the libelants' pilot boat, which was at that time sailing eastward, close hauled, in a light wind, on her port tack, and crossing the line of the Orizaba's course at about right angles. The pilot boat was struck on her starboard side a little forward of the main rigging, cut down nearly to her keel, and sank in a few moments afterwards. The above libel was filed to recover the damages.

The fog came on about the time the steamship passed the Romer beacon monument. She was intending to come to anchor a little above the point of collision. The evidence leaves no doubt that the steamer was seen from the pilot boat from 1,000 to 1,300 feet distant; but the pilot boat was not seen by the steamer, it is said, until within about 100 yards. The ordinary lookout men were not

stationed. The mate was the only man on lookout, and until shortly before the collision, he was occupied with other duties forward. It is suggested as a reason why the pilot boat was not seen as soon as the steamer was seen, that the fog was probably lighter near the water, but denser on the level of the Orizaba's deck, which was 25 feet above the water line. While such a state of fog is, no doubt, possible, still the distinctness with which the steamer seems to have been perceived from the pilot boat at a much greater distance, makes this explanation less probable than that it was caused through the divided duties of the mate, and the lack of another person on lookout having no other duty to perform. If the fog, moreover, from the level of the steamer's deck was so extremely dense that the pilot boat could not be seen at a distance of over 100 yeards, I think, as stated in the case of The Colorado, 91 U. S. 698, that the lookout should have been doubled in a place where there were so many vessels passing, a practice quite common in thick fog in less frequented thoroughfares. In either aspect, I am constrained to find that an adequate lookout was not maintained by the steamer.

As respects the speed of the steamer I find it impossible to adopt so low an estimate as that stated by her officers and pilot, namely, from 3 to 4 knots. Her full speed of 75 or 80 revolutions per minute gives, according to the testimony, from 13 to 14 knots per hour. This agrees with the calculations from her pitch of 21½ feet, and an average slip of 12½ per cent. The evidence of the assistant engineer is very precise and positive, that for the last 8 minutes before reversing, the engine was making 40 revolutions per minute; that would be her ordinary "slow" speed, and would give at least 7 knots per hour. The distance traveled from the monument, viz.: about 3 miles, in 15 minutes, allowing for the flood tide, also agrees with the above result, based on the assistant engineer's testimony. Had the steamer been going at the rate of only 4 knots, as contended for the claimant, she would have been fully stopped on reversing full speed within the distance of 100 yards, (The Normandie, 43 Fed. Rep. note pp. 161, 162,) whereas the force of the blow and the depth of the cut leave little doubt that at collision she was still moving through the water at the rate of at least 2 or 3 knots. The evidence of the assistant engineer shows also that there was quite an appreciable interval during which the engine was reversing full speed before collision, though the steamer's own witnesses differ much on this point; and this would indicate that the steamer was previously going at least 7 knots. Upon all the circumstances I have no doubt, therefore, that she was going at that rate; and that rate in so dense a fog and in that locality was at her own risk.

The evidence is insufficient to establish fault in the pilot boat; both because the wind was so light that I think nothing effectual could have been done by her to avoid collision had she made the attempt; and also because there was not any such time for deliberation after the Orizaba was perceived and her course certainly

known, as would throw upon the pilot boat the responsibility of undertaking any sudden change in her course in a fog. Her situation was evidently in extremis from the first.

Decree for the libelants, with costs.

THE ALICE STRONG.

GREENHALGH et al. v. THE ALICE STRONG.

(District Court, N. D. Ohio, E. D. May 23, 1893.)

No. 1,995.

1. ADMIRALTY—PRACTICE—ASSIGNMENT TO PROCTOR OUT OF PROCEEDS—LIEN.
An assignment by the libelant in an admiralty case, who has reasonable assurance that he is entitled to recover a certain amount, of a definite sum to his counsel for professional services, to be paid out of any recovery that might be had, is sufficiently certain, and on sufficient consideration, to support a lien on the proceeds. Kendall v. U. S., 7 Wall. 113, distinguished.

2. SAME—PRIORITY.
The lien of such an assignment has priority over the claim of a judgment creditor in a state court, who subsequently files his intervening petition in admiralty, after the court has decided that libelant is entitled to recover some amount on his libel.

In Admiralty. Libel by Robert Greenhalgh against the steam barge Alice Strong. Heard on exceptions to an intervening petition by Thomas R. Toare and M. Thomas against the proceeds. Exceptions sustained.

Goulder & Holding, for libelant.

Ong & Hamilton, for respondent.

RICKS, District Judge. This case is now before the court upon the exceptions of the libelant to an intervening petition filed by Thomas R. Toare and M. Thomas against the proceeds of the barge Alice Strong, which are now in the registry of the court. These exceptions are filed by the proctor for the libelant, who claims as the basis for his exceptions that on the 26th day of January, 1893, the libelant gave to him, by written assignment, an interest, to the extent of $300, in any decree which he might recover against the respondent. This written assignment was duly filed on the date named, and minute of the filing was made upon the docket of the court. On the same day an assignment was likewise filed by the libelant, in favor of John Thomson, in the sum of $136.75, for which amount the libelant assigned, by written instrument, an interest to that extent in any decree which might be entered in his favor in this case in this court. Similar memorandum of the filing and execution of the assignment was made upon the dockets of the court. The intervening petition of Toare et al. was filed on the 6th day of May of this year, some time after, according to the opinion of this court, libelant was entitled to a decree for some amount against the respondent. Said petition avers that the petitioners are judgment

creditors of the libelant in this case to the amount of $269.10, for which sum they recovered a judgment before a justice of the peace in and for the county of Cuyahoga, and that upon said judgment they filed a creditor's petition in the court of common pleas, seeking to reach whatever surplus proceeds there might be due the libelant in this case in this court, by injunction and process served upon the libelant.

It is first important to consider whether the assignments of the libelant made to Goulder and Thomson are valid and binding. I see no reason for doubting either the consideration for which those assignments were made, or the fact that they are effective, in law, in transferring to the assignees an interest, to the extent named, in whatever fund or decree there might be found in libelant's favor. It is contended that the assignment being for only a part of the decree, and the decree being for an uncertain amount, it did not convey any such interest to the assignees as gives them priority of lien on the fund in question. Cases are cited by counsel to support this proposition, but these cases rest upon quite a different principle. They are cases in which the claim assigned was unliquidated, had not been consented to by the debtor party, and were vague and uncertain in amount. In the case of Kendall v. U. S., 7 Wall. 113, the claim was for fees due the Kendalls for prosecuting a claim due from the United States to a certain band of Indians. The United States had not recognized the validity of Kendall's claim. The Indians had not agreed upon the sum due the claimant, and there were therefore these two elements wanting, necessary to a valid assignment. So, in the other cases cited, the same principle is adjudicated. But here we have a claim, the amount of which is assented to by the assignor; the consideration, the court knows judicially, is, at least in part, just and meritorious; and the decree or fund out of which the assignment was to be paid is sufficiently definite to support a lien or transfer from the assignor. I do not understand counsel to contend that the consideration is not good. Services were rendered the libelant in this case, and in other cases, as stated in the assignment. In the absence of proof to the contrary, and in view of the professional services rendered in this case, of which the court can take judicial notice, I think there is no trouble in disposing of the question as to there being a valid consideration for this assignment. At the time the assignment was made, this case had been tried, and was taken under advisement by the court. The libelant claimed—with reasonable assurance, certainly—that he was entitled to recover a certain amount from the respondent. The interest assigned was certainly not, therefore, so vague and mythical as to be wholly insufficient to support an assignment.

I therefore think that the assignees, Messrs. Goulder and Thomson, having shown an assignment long prior to that of the judgment secured by the interveners, have the first lien upon the funds in the registry of the court, in this case. This is sufficient to dispose of this controversy.

Counsel for the interveners are very anxious that the court should dispose of the question of their right to intervene as judgment creditors against the fund in this case. This is a very interesting question, and, if the court had more time at its disposal, I would be glad to consider and decide fully this question; but it is well enough to call attention to a few general principles which may throw some light upon this question. In the Lottawanna Case, 20 Wall. 201, the supreme court of the United States held:

"Beyond doubt, maritime liens upon the property sold by the order of the admiralty court follow the proceeds; but the proceeds arising from such a sale, if the title of the owner is unincumbered, and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or of insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors. Such proceeds, if unaffected by any lien, when all legal claims upon the fund are discharged, become, by operation of law, the absolute property of the owner."

The consideration for the judgment which the interveners set up in this case is not disclosed in their petition, but I assume that it was not a maritime lien, or it would have been so averred. It is not even, I assume, a claim against the respondent, which was recognized as a lien under the laws of Ohio, and which this court might enforce in a proceeding in admiralty; otherwise, that would have been so averred. I assume, therefore, that it is a judgment against the libelant, which is justly due, and purely a proceeding in personam. The most that this court could do, under such conditions, would be to hold the fund here, and distribute the same according to the priority of the liens, as might be established by proof. It certainly would not transfer this fund to another court, to be there distributed as an insolvent or trust fund.

As before stated, and for the reasons stated, I do not propose now to determine finally whether the interveners have such a lien as would entitle them to ask for any part of the proceeds in the registry of the court in this case. In view of the principles established by the supreme court in the Lottawanna Case, the claims against the libelant, set up in the intervening petition, not being maritime liens, and the proceedings being purely in personam, it is questionable whether counsel for the interveners has brought himself in such a relation to the fund in this case as would authorize this court to pay over any part of the same to said interveners, against the protest of the libelant. The court can marshal the fund in the registry only between lienholders and owners. The Edith, 94 U. S. 519.

THE MINNIE SMITH.

QUEBEC STEAMSHIP CO. v. THE MINNIE SMITH.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

COLLISION—STEAM AND SAIL—CONFLICTING EVIDENCE.

The steamer C., on a course S. by E. on the open sea, sighted the schooner M., sailing on a course N. by W. ½ W. On behalf of the steamer,

her second officer testified that the schooner was sighted at 4:20 A. M., two miles distant, without lights; that no change of course by the steamer seemed necessary; that when next noticed, 10 minutes later, about two steamer lengths from the C., the schooner suddenly altered her course to N. E., across the steamer's bows, whereupon the C. put her helm hard a-port, turning about 20 degrees, and reversed her engines at full speed. Testimony on behalf of the schooner was very full, to the effect that both her lights were in good order and burning; that the steamer's white light was first seen about half a point on the starboard bow; that both colored lights were seen at a distance of two miles; that the schooner's course was then changed to N. N. W., so as to show only the starboard light; that the steamer from this time was sheering about, showing each colored light alternately; that the schooner's mate, becoming alarmed, summoned the captain on deck, and at the distance of one-quarter of a mile fired a shotgun, whereupon the steamer suddenly changed her course to port, and the vessels collided. The port bow of the steamer struck the port quarter of the schooner at an angle of five points. *Held*, that the preponderance of evidence showed the steamer alone was in fault.

Appeal from the District Court of the United States for the Southern District of New York. Affirmed.

Wilhelmus Mynderse, for appellant.

W. W. Goodrich, for claimants and libelees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the district court for the southern district of New York, which dismissed the libel of the Quebec Steamship Company, owner of the steamship Caribbee, against the schooner Minnie Smith, to recover damages for a collision between said vessels in the Atlantic ocean, about 330 miles from Bermuda, on April 15, 1891. The collision took place about daybreak, the sky being clear, and the wind blowing moderately from the southeast.

The Caribbee was on a voyage from New York to the West Indies, and the Minnie Smith was bound from San Domingo to New York. The vessels were two or three miles apart when the schooner, whose course was N. by W. ½ W., first sighted the steamer, whose course was about S. by E. The sailing vessel was making about 3 or 4 knots per hour. The speed of the steamer was about 10 knots per hour.

The theory of the libelant, as stated in the libel, and in the testimony of the second officer of the Caribbee, who was in charge of her navigation at the time of the collision, is that the schooner was sighted about 20 minutes past 4 o'clock, about 2 miles distant, without lights; that no apparent necessity for a change in the course of the steamer existed, and none was made; that when the schooner was next noticed, about 10 minutes afterwards, and about a couple of steamer lengths from the Caribbee, she suddenly altered her course across the steamer's bow, and headed northeast, whereupon the Caribbee's helm was put hard a-port, her heading turned about 20 degrees, and an order was given to reverse the engines at full speed, when the port bow of the steamer came in col-

lision with the schooner, and the latter was struck on the port quarter. The steamer's position is that there was no necessity for either vessel to change her course, and that she did not change, until she was compelled to do so by the schooner's sudden and inexcusable attempt to cross the steamer's bow.

The testimony on the part of the schooner is very full, and is to the effect that both her lights were in good order and burning; that the steamer's white light was first seen about half a point on the schooner's starboard bow, and thereafter, when the vessels were two miles apart, both colored lights were seen. The schooner's course was then changed to N. N. W., so that the steamer might only see the starboard light, and know which way she was going; that from that time the steamer was sheering about, showing both lights, and each light alternately, until the mate, who was in charge, became alarmed, summoned the captain on deck, and afterwards, when she was distant about one-fourth of a mile, fired a shotgun to attract her attention; and that at the time of the gun firing she suddenly again changed her course to port, and the collision occurred.

The testimony for the libelant does not satisfy the mind that any vigilant attention was paid by the steamer to the schooner, while, in the language of the district judge, "those on board of the schooner show every evidence of vigilance, alert attention, and care."

The steamer was watched from the moment that her white light was first seen. Her singular movements, which brought each colored light alternately into view, created anxiety. The captain was summoned, and the gun was fired in order to arouse the wheelman, if he was asleep. The order of events, and the circumstances which took place on board the schooner, show that at the time the careless navigation of the steamer justly created alarm, and now lead to the conclusion that upon the steamer rested the fault which caused the unnecessary collision.

The witnesses agreed that the port bow of the Caribbee struck the port quarter of the Minnie Smith, the angle between the port sides of the two vessels being about five points. How this could have happened without a change of course by both vessels to the eastward, which each vessel denies, it is not easy to understand. We concur with the district judge, who said that "any such change [of at least five points to the eastward] by either alone, and especially by the steamer, involves very great difficulty and improbability in navigating so as to come into collision." But we also concur with him in the conclusion that the greatly preponderating evidence on the part of the claimant "must prevail, and the steamer held the responsible cause of the collision, even though the angle of collision were made up in part by some porting of the schooner in extremis, though the evidence does not warrant that finding."

The decree of the district court is affirmed, with costs.

THE G. L. ROSENTHAL.

THE E. D. MERRITT.

FOSTER et al. v. THE G. L. ROSENTHAL and THE E. D. MERRITT.

(District Court, S. D. New York. May 31, 1893.)

MARITIME LIENS—CHARTER—TOWAGE AGREEMENT—TIME CONTRACT—BREACH OF—INDIVISIBILITY OF CONTRACT.

Where the owner of tugs made an agreement to tow libelant's boat on her various voyages throughout an entire season, and entered upon such contract, and afterwards, near the end of the season, willfully abandoned it, and refused to take libelant's boat, *held*, that the tugs were answerable in rem for the damages attending the breach of contract.

In Admiralty. Libel to enforce lien for breach of contract. Decree for libelants.

Lamb, Osborne & Petty, for libelants.
Hyland & Zabriskie, for respondent.

BROWN, District Judge. In the spring of 1892, the owner of the tugs Rosenthal and Merritt contracted to tow the libelants' boat, the Retsof, during the canal season of 1892, between Rochester and New York, bringing salt from Rochester to New York, or to points on the Hudson river as directed, at the rate of 90 cents per ton on all down trips, and to deposit with the libelants $25 on each round trip as a guaranty of good faith; the same to be held by the libelants until the contract was completed. It was also agreed that the tugs should be at the eastern end of the canal as soon as the season opened.

The libel alleges a delay of 10 days in arriving at the canal at the beginning of the season; the performance of the contract thereafter until November; and that then the respondent willfully abandoned his contract and took other boats. A lien is claimed for the damages.

The evidence does not sufficiently show that the libelants actually suffered any damage by the delay in arriving at the canal at the opening of the season, in consequence of the crowd of boats in waiting there. Deposits to the amount of $125 having been made with the libelants, pursuant to the contract, and the damages arising from the abandonment of the contract in November being $225, there remains a balance of $100 with interest, for which the libelants are entitled to a decree, if the action in rem is maintainable.

The claimant contends that the only principle upon which a lien against the boat is maintainable for her breach of contract, is the mutuality of the remedy between the ship and cargo; and that

inasmuch as for the last voyage there was no cargo taken on board upon which a lien could be enforced for freight or towage, there is no counter lien for the damage to the libelants arising from the abandonment of the last trip.

If this argument were admissible, it would amount simply to allowing the ship to take advantage of her own wrong. It is not pretended that there was no cargo for shipment; its readiness is proved. The act of abandonment was willful, and from no other motive, apparently, than to secure higher compensation near the close of the season. The claimant should, therefore, be deemed estopped from alleging any such lack of mutual remedy.

The contract in the present case is not a separate contract for independent voyages, but a contract for a service during the entire season. The proofs show that the rate of compensation was a rate adopted with reference to the whole season; the rate for the first part being in excess of the market price. The requirement of a deposit was intended as a guaranty against precisely such fraudulent conduct as Hazard, the master, was guilty of in the end. As respects a lien for breach of contract, this case is not distinguishable from other time charters. If the charterer in all such cases had no remedy against the vessel for an abandonment, after she had entered upon a contract contemplating numerous voyages, except for an abandonment of the particular voyage on which some cargo might have been actually taken on board, his remedy against the ship for breach of charter would be practically destroyed. Such I do not understand to be the law; but rather the rule stated by the present Mr. Justice Brown in the case of The Ira Chaffee, 2 Fed. Rep. 401, where he says:

"It must now be considered as settled that if the ship enters upon the performance of its work, the ship becomes pledged to the complete execution of the contract, and may be proceeded against in rem for a nonperformance."

Actions in rem are not uncommon in this court for the breach of time charters, of which The Calabria, 24 Fed. Rep. 607, is an example. No question was there made of the jurisdiction of the court to proceed in rem, although no breach of the charter was established; and the decision was affirmed on appeal. In the case of The Baracoa, 44 Fed. Rep. 102, it was assumed that after the vessel had entered upon the performance of her time charter for three years, the charterer could recover damages for breach of the express covenants of the charter as respects draft and speed, although after trial he had for those breaches rejected the vessel; the charter "forming a continual contract, and the breaches being continuing breaches."

The contract in this case being evidently a single indivisible contract, and the boats having entered upon the performance of it, I must hold them answerable in rem for the damages attending the breach and refusal to continue it till its termination.

Decree for the libelants for $100, with interest and costs.

THE C. E. CONRAD.

THE RHODA AND CHARLIE.

FOSTER v. THE C. E. CONRAD and THE RHODA AND CHARLIE.[1]

(District Court, S. D. New York. May 31, 1893.)

MARITIME LIENS—UNAUTHORIZED POSSESSION OF BOAT—BREACH OF CONTRACT BY WRONGDOER—LIABILITY OF BOAT.

Where one obtained possession of boats without the owner's consent or authority, and afterwards, in his own name, entered into contracts of towage in regard to such boats, which contracts he subsequently violated, *held*, that mere possession, without right, is not even apparent legal authority, and one who deals with the wrongdoer in possession does so at his peril, and no lien against the boats was created by such breach of contract.

In Admiralty. Libel by Pell W. Foster against the C. E. Conrad and the Rhoda and Charlie to enforce lien for breach of contract. Libel dismissed.

Lamb, Osborne & Petty, for libelant.
Hyland & Zabriskie, for claimants.

BROWN, District Judge. In this case, which in some respects resembles that of Foster v. The Rosenthal, 57 Fed. Rep. 254, it appears that Hazard, the master, under a contract for the purchase of the boats, had obtained possession of them from the owner without his consent or authority, and then made in his own name the contract to carry the libelant's goods for the breach of which the libel is filed.

I doubt whether merely proceeding to Rochester with the intention of taking the libelant's salt, and on arrival there going elsewhere for a different cargo, would constitute such an entry on the performance of the contract, as would bring the case within the rule of a partial execution of the charter, sufficient to sustain a libel in rem for the breach of the contract. Aside from that, however, the uncontradicted evidence shows that Hazard had not the least authority to make any charter, or contract binding on the boats; that possession of them had never been delivered to him by the owner, nor any consent given that he should navigate them or make any contract of carriage. He had no authority real, implied, or apparent; for mere possession without right or the consent of the owner, is not even apparent legal authority. The libelant in dealing with him, dealt, therefore, at his peril. It follows that the libel must be dismissed; but as the claimant, the true owner, has obtained actual possession of the boats by means of these very libels, not previously knowing where the boats were, the libel may be dismissed without costs.

[1]Reported by E. G. Benedict, Esq., of the New York bar.

BLAIR et al. v. HARRISON et al.[1]

(Circuit Court of Appeals, Seventh Circuit. June 10, 1893.)

No. 64.

1. ATTORNEY AND CLIENT—FEES—LIEN ON JUDGMENT.
Where the amount due on a judgment recovered for the purchase price of property sold by plaintiff to defendant is paid into a court of equity for distribution, plaintiff's attorneys are entitled to receive therefrom the money due them for meritorious services rendered to plaintiff in other suits growing out of such purchase, where such services were rendered with the expectation that they would be paid for out of the proceeds of such judgment. 51 Fed. Rep. 693, affirmed.

2. PARTNERSHIP—WHAT CONSTITUTES—EVIDENCE.
Proof that two men owned a ranch and herd of cattle jointly, that they managed the ranch together, rendered accounts in their joint names, and referred to themselves as a company, is sufficient to show that they were copartners, although they had no articles or agreement of copartnership. 51 Fed. Rep. 693, affirmed.

3. SAME—SETTLEMENT BETWEEN PARTNERS—RIGHTS OF CREDITORS.
A settlement between copartners which determines their respective interests in a certain partnership fund is conclusive as to the rights of their individual creditors to that fund. 51 Fed. Rep. 693, affirmed.

4. SAME—VACATING SETTLEMENT—EVIDENCE.
A settlement between copartners, who are both capable men, of a business amounting to hundreds of thousands of dollars, and involving many items of account depending upon the memories of the copartners, should not be opened at the instigation of their creditors, after the death of one of the copartners, even though there is a strong prima facie showing of mistake in the settlement. 51 Fed. Rep. 693, affirmed.

5. SAME—RIGHT OF PARTNER TO PLEDGE FIRM PROPERTY.
One of two copartners cannot pledge the partnership property to secure his private debt, except to the extent of his interest therein. 51 Fed. Rep. 693, affirmed.

6. EQUITY PLEADING—AMENDMENT.
After the announcement of the final decision of the chancellor upon the merits of a case, it is proper to refuse to permit the pleadings to be amended, so as to meet objections which were raised at the hearing, two months before the decision was rendered, especially where such amendment would not affect the grounds on which the decision is based. 51 Fed. Rep. 693, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Bill in the nature of a suit of interpleader brought by John Claflin and others, composing the firm of H. B. Claflin & Co., against Jessie I. Bennett, John A. Blair, Samuel J. Garvin, John C. Harrison, Robert L. Dunman, and others. A decree was rendered in favor of Harrison and Dunman. An appeal was taken by Blair and Garvin. Affirmed.

For opinion of the lower court in this case, see Claflin v. Bennett, 51 Fed. Rep. 693.

A. B. Wilson, E. F. Thompson, and C. B. McCoy, (Gardiner Lathrop and John N. Jewett, on the brief,) for appellants.

Charles M. Osborn, (S. A. Lynde and S. B. Ladd, on the brief,) for appellees.

[1] Rehearing pending.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP, District Judge.

PER CURIAM. The decree appealed from is affirmed, upon the grounds stated in the opinion of Judge Blodgett in the court below.

WOOD et al. v. PERKINS.

(Circuit Court, D. Massachusetts. August 22, 1893.)

No. 3,120.

1. EQUITY—JURISDICTION—ABSOLUTE CONVEYANCE—TRUST ARISING UPON CONTEMPORANEOUS AGREEMENT.
   Respondent, by a written agreement, in consideration of conveyances to him of certain "mining locations," promised to pay to complainants certain stock in a "mining pool." Oral agreements between the parties provided that respondent was to form the pool, but the conveyances were absolute on their face. *Held*, that the facts created a trust, and equity had jurisdiction of a bill to enforce the delivery of the stock.
2. SAME—SALE OF TRUST PROPERTY—PROCEEDS CHARGED WITH THE TRUST.
   Equity jurisdiction was not defeated by the fact that respondent had disposed of the stock for cash. The equitable remedy would extend to the liquidated and certain sum so received, although, in the state where the suit was brought, an action for money had and received lies for what is due in equity and good conscience.
3. SAME—ORAL AGREEMENT—CONSIDERATION.
   Equity jurisdiction is not defeated in such a case by the fact that the trust agreement was oral, and without consideration, since the conveyances to respondent executed the verbal agreement in part, and were a sufficient consideration therefor.
4. SAME—CONTEMPORANEOUS ORAL AND WRITTEN AGREEMENTS.
   The fact that complainant alleges two contracts—one written, and absolute on its face, the other oral, and purporting to create a trust—will not defeat the jurisdiction of a court of equity to enforce the trust, when it appears that the two contracts were parts of the same transaction.
5. SAME—LACHES—EXPRESS TRUST.
   Lapse of time, unless exceptionally great, is no defense to a suit to enforce an express trust, when the acts charged against respondent amount to a complete breach of trust, and have been industriously and fraudulently concealed. Speidel v. Henrici, 7 Sup. Ct. Rep. 610, 120 U. S. 377, distinguished.

In Equity. Bill by Alvinus B. Wood and others against Thomas H. Perkins to enforce a trust. Heard on demurrer to the bill. Demurrer overruled.

Henry S. Dewey, for complainants.
Francis Peabody, Jr., for defendant.

PUTNAM, Circuit Judge. The respondent in this case received from two of the complainants, and the assignor of the other, a deed or deeds of several tracts of mineral lands on the north shore of Lake Superior. The rights, as spoken of in some places, were "mining locations," but whether strictly such, or whether the land was held, the interests were hereditaments, and partook of the realty; so that, for the purposes of the case at bar, they stand the

same, in either event. The deed or deeds conveyed to the respondent, absolutely, whatever interests the grantors possessed. They were made on the strength of the written executory contract, which will be referred to again, and the parol agreement and understanding set out in the bill.

The written agreement was dated March 15, 1872, and took the form of a mere promise by the respondent, by which, in consideration of the conveyance to be made him in accordance with the agreement, he stipulated to pay the grantors, on or before the 1st day of the next May, "fifteen thousand dollars ($15,000) in stock, or five shares in Perkin's Silver Land Pool, north shore, Lake Superior, containing fifty-two hundred twenty-eight and one-half (5,228½) acres, purchased from A. B. Wood and others." There appeared, therefore, on the face of this agreement, merely a promise on the part of the respondent to deliver certain stocks, as the consideration for a conveyance to him of the mining locations as stipulated, to be enforced by an action at law, or possibly, under some circumstances, by a bill for specific performance; and so far the transaction does not disclose a trust, in the technical sense of the word, or in any sense. The bill, however, sets out sufficient, in addition to this written agreement, to explain the whole transaction, which, of course, is permissible in equity.

This shows that the interests were in fact received by the respondent for the purpose of making up a pool, in connection with other interests; that the pool was to be divided into shares of $3,000 each; and that the assignors were to receive certain shares as their proportion of the whole. Taking the whole transaction, it appears that the land, or whatever the hereditable interest was, was transferred to the respondent in form absolute, to be held and applied by him for the uses of the parties who conveyed to him. The instrument of conveyance was absolute on its face, while the duty imposed upon the respondent was partly by parol, and partly by a separate written contract. All this created a strict trust, such as the common law anciently took no notice of, and such as included a cestui que trust, whose only remedy was by a subpoena issued out of chancery.

The bill alleges, in substance, that, while the respondent turned into the pool the interests which were conveyed to him, he failed to take out for the grantors the shares to which they were entitled, but received in lieu thereof $3,000 for each share in money, and has never paid over the same, or any part of it, to the original grantors, or to the assignee of one of them, now a party complainant. It further alleges that the respondent, since receiving such money, has held it as trustee; and it continues that "he now holds said money, and the interest on the same from the time he received it, as the trustee and agent of said complainants." So far as this bill is concerned, the court takes no notice of the words "and agent," but rejects them as surplusage. The result is that the respondent, being strictly a trustee, in accordance with the arrangement which has been described, instead of performing his

trust, violated it, and has received, in lieu of what he should have received under his trust, a sum of money as the proceeds of his tortious breach of duty. Upon fundamental principles of law, the grantors were entitled to proceed by bill against him, as an equitable tort feasor, and claim the value of the interest which he unlawfully disposed of, or, at their option, to waive the tort, and claim the proceeds, as they have done in the pending suit; and thereupon the proposition is pressed on the court that, the claim being now one merely for a sum certain, the complainants have ample remedy at law, by an action of assumpsit or otherwise. and there is therefore no justification for a proceeding in equity.

If the case was one in which, according to the ancient distinctions between law and equity, there had been a concurrent remedy both at law and in equity, this proposition would have force, and perhaps could not be met; but as the underlying right is purely equitable in its nature, for which there was no remedy at common law, chancery will still issue its subpoena, notwithstanding the property which was originally subject to the trust has been converted into money. The same equity attaches to the latter which originally attached to the former. This principle is so fundamental that no citation of authorities touching it is necessary. The fact that in Massachusetts an action for money had and received lies for what is due in good conscience and in equity in no wise affects this conclusion, as it is conceded that that action is exceptional, and arose originally from the fact that the courts in Massachusetts had no equitable jurisdiction.

Respondent urges that the arrangement set forth in the bill is void because it was verbal, because there was no consideration for respondent's promise, and because there were differing and conflicting contracts,—one verbal and one written. The first two propositions are met by the fact that the transaction was executed by the conveyance already referred to, and the last one by the further fact that equity will regard the whole transaction, into whatever forms its various parts may be divided. The objection, also urged, that one of the complainants was improperly joined, because he was an assignee with whom the respondent never made any agreement, is clearly ineffectual, under the circumstances of this case. The bill sets out that the assignment to him covered the proceeds of the sale, and the shares which were to be returned in lieu of the land, and in equity the assignment was not of a mere contract, but of an equitable estate. Had it been merely the former, yet, by the well-settled rules of equity, the assignee, having an exclusive interest, would be the proper and only party complainant.

The respondent also presses the fact of the lapse of time intervening between the conveyance to the respondent, which was on or about the 22d day of March, 1872, and the efforts made by the present complainants to secure the proceeds of the trust, which resulted in the present suit. Several answers to this objection are at once apparent on the face of the bill, as it is framed. Whether the facts developed on further proceedings will essentially modify

the present case cannot be foreseen. The respondent is in error in referring to the statute of limitations, because—First, it ordinarily does not apply to an express trust, at least until it has been openly repudiated; and, second, it has no relation to a cause of action which is purely equitable. The rule on this point is succinctly stated in Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 436, 448, 13 Sup. Ct. Rep. 944, 948, as follows:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law. In many other cases they act upon the analogy of cases at law; but, even when there is no such statute governing a case, a defense founded upon the lapse of time and the staleness of a claim is available in equity."

On the face of the bill there is a complete answer to this defense, even if it could bring to its support the express language of the statutes of limitation, because the act charged against the respondent was a clear breach of trust,—a fraud in equity,—and, as the correspondence shows, was industriously, and therefore fraudulently, concealed.

With reference to the defense of laches, which is the proper form of defense with regard to a claim of this character, the concealment of respondent's breach of trust, already referred to, is an ample answer. Another answer is found in the fact that in his letter of March 9, 1889, set out in the bill, he fully recognized the trust, by stating therein that he had no objection to reconveying, and taking up the receipt which he gave, although he again industriously concealed the fact that he had already obtained a consideration for the interests intrusted to him. In no view of the case can the rule be invoked that interested parties are sometimes put on inquiry touching a breach of trust, or quasi trust, even though they have no actual knowledge of the facts, because the lack of inquiry in this case has not resulted to the detriment of the respondent. There has been no changed condition of circumstances, such as form a frequent basis for the application of the rule of laches, as, for example, in Johnston v. Mining Co., 148 U. S. 360, 13 Sup. Ct. Rep. 585, as the entire controversy relates to money received into the possession of the respondent, and there ever afterwards retained.

These observations touching laches relate to the lapse of time shown by the bill in suit, covering a period only from 1873 to 1888. During this time the complainants rested apparently secure in the belief that whatever might represent their interest was in the hands of the respondent, and that, though they had been disappointed in the results of the development of the mining rights, they still might hope for realization. Of course, there are cases like Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. Rep. 610, where the lapse of time is so very great, even as against express trusts, that equity courts will take no action whatever. The court has not forgotten that class of cases, and does not intend to exclude them by anything contained in this opinion.

One ground of demurrer is that the bill is a mass of inferences, assertions, and matters of evidence. With reference to this the

court is compelled to observe that the bill is not drawn with due regard to the proper principles of equity pleading. Nevertheless, there is sufficient on its face from which it can be understood, and, in the absence of specially assigned grounds of demurrer, the court will not take upon itself the burden of reshaping it.

Demurrer overruled. Bill sustained. Costs to abide the result. Respondent to plead or answer on or before October rules, next.

McGEORGE et al. v. BIG STONE GAP IMP. CO.

(Circuit Court, W. D. Virginia.. August 19, 1893.)

1. CORPORATIONS—INSOLVENCY — RIGHTS OF BONDHOLDERS—CONDITION NOT TO SUE.
   A condition in a trust deed given to secure the bonds of a corporation, providing that the bondholders shall not bring suit without notice in writing to the trustee, nor without a request to the trustee to sue, made by the holders of one-fifth of the outstanding bonds, is binding upon the bondholders in the absence of proof showing fraud or mismanagement on the part of the corporation.
2. SAME—IMPROVEMENT COMPANY—POWER TO AID OTHER CORPORATIONS.
   The Big Stone Gap Improvement Company, which was organized by Act Va. Feb. 14, 1888, to buy and sell lands, erect, sell, and lease buildings, to grade and improve streets, to furnish gas, electric light, and waterworks, to construct and operate street railways, furnaces, and mills, and to acquire by purchase or subscription the stock or bonds of any mining, manufacturing, water, gas, street-railway, or other improvement company, has power to give part of its stock to a railway company in order to enable the latter to complete its line to the property of the Big Stone Gap Improvement Company.
3. ESTOPPEL—STOCKHOLDERS OF CORPORATION—ASSENT TO ACTS COMPLAINED OF.
   Stockholders, after voting for and approving of an appropriation of corporate funds to a purpose fairly within the scope of the corporate powers, will not, in the absence of fraud, be heard to complain thereof in a court of equity.
4. CORPORATIONS—RIGHTS OF STOCKHOLDERS—SUIT IN EQUITY.
   Stockholders cannot proceed in chancery to protect their equitable rights, unless the corporation has been dissolved, or has itself been prevented from proceeding by the misconduct of its officers.
5. SAME—RECEIVERS—APPOINTMENT—INSOLVENCY NOT CONCLUSIVE.
   The appointment of a receiver for a corporation is a remedy within the discretion of a court of equity, and does not necessarily follow upon proof of the corporation's insolvency. The appointment should not be made unless it is also shown that loss will ensue to the parties in interest if the company continues in the management of its own affairs.

In Equity. Bill by William McGeorge and others against the Big Stone Gap Improvement Company, praying an injunction and the appointment of receivers. A temporary injunction was granted, and provisional receivers appointed. The cause is now heard on bill and answer. Bill dismissed.

F. S. Blair, for complainants.
Bullitt & McDowell and St. John Boyle, for defendant.

GOFF, Circuit Judge. This suit was brought by William McGeorge, Jr., in his own right and as trustee, John C. Bullitt, Samuel

Dickson, Joseph I. Doran, Joseph B. Altimus, George Burnham, Charles C. Harrison, William Pepper, John H. Dingee, Samuel W. Colter, Jr., and Henry Lewis, citizens of the state of Pennsylvania, suing for themselves and all other creditors and stockholders of the Big Stone Gap Improvement Company, who will become parties and contribute to the expense hereof, against the Big Stone Gap Improvement Company, a corporation created by the laws of the state of Virginia, a citizen of said state, having its principal office and place of business at Big Stone Gap, in Wise county, Va. On the 26th day of May, 1893, upon reading the bill, affidavits, and exhibits filed therewith, I granted an order appointing H. C. Wood and J. K. Taggart provisional receivers of all the property of the defendant, and I directed that notice of such action be served upon the company, and ordered that it appear on the 13th day of June, 1893, and show cause, if any it could, why such appointments should not be made permanent. An injunction also issued as prayed for. On the day ordered, defendant appeared by counsel, and tendered its demurrer and answer to the bill, together with affidavits and exhibits.

Prior to the filing of the same, John C. Bullitt, Samuel Dickson, and Joseph I. Dale, who are named as complainants in the bill, through counsel, stated to the court that their names had been used as such without their authority, and filed a motion to strike the same from the bill and record of this cause. On considering the same, it appearing that there had been a misunderstanding among several of the complainants about the use of said names, and a misconstruction of the authority given relative thereto, it was ordered that the names mentioned be stricken from the bill, and that as to said parties the suit stand dismissed; and for like reasons it was at the same time ordered that the names of Bullitt, Dickson, and Dale, as counsel for complainants, be withdrawn from the bill and record of this cause.

It is stated in the bill that the Big Stone Gap Improvement Company was organized under the laws of the state of Virginia, its object being to lay off and sell town lots. That about $1,000,000 in first mortgage bonds and $1,500,000 in capital stock were issued to the original holders of the lands that had been conveyed to the company, the complainants being part of them; and also that $1,000,000 in stock was retained by the company as treasury stock. That the present management of the company has exercised almost absolute authority over the affairs of the company since its organization. That the funds and assets of said company have been wasted, misappropriated, and diverted to purposes wholly foreign to that for which the company was organized, to the great loss and injury of complainants. That the company has defaulted for five years in the payment of interest on its bonds, and is also in default in the payment of state, county, and municipal taxes. That by the mortgage given on the property of the company to secure the issue of bonds it was provided that whenever $50,000 should accumulate from the sale of lots or otherwise, 5 per centum should

be paid upon the principal of each and every bond; and the charge is made that this has not been done. That the management of said company, being largely interested in the South Atlantic & Ohio Railroad Company, donated $500,000 of the treasury stock of defendant company to said railroad company for the purpose of securing the completion of that road to Big Stone Gap. That the same was a misappropriation of the funds of the defendant. That part of said stock had been issued and delivered to the railroad company, and that the residue would be at once, if the present management of the defendant was continued, or any notice of this suit be given its officers. That the company is insolvent, and that its officers still pay themselves large salaries for the discharge of their respective duties, and that their continuance in the management of the same will increase its liabilities. That unless an injunction issues restraining them, and an order is passed appointing receivers, great and irreparable injury will result to complainants, who themselves, and through others represented by them, own over one-half of all the bonds and stocks issued by the defendant company. That many persons claiming to be creditors of the company have brought suits against it; and that it is for the interest of all creditors, stockholders, and persons concerned in the property that the court should take all the assets of defendant into custody, and administer them as a trust fund for the benefit of those entitled to share therein. The bill was sworn to. Numerous exhibits were filed, duly authenticated, and several affidavits as to the truth of the charges made were presented. On these allegations of mismanagement, waste, and misappropriation of assets, with the charge of irreparable damage, and the fear of an additional delivery of stock improperly donated, the injunction issued, and receivers were appointed.

The answer denies that the funds and assets of the company have been wasted, misappropriated, or diverted to purposes other than those for which it was organized. It claims that the donations made and the assistance rendered by the defendant to other enterprises were for the purpose of increasing the value of its property, and to carry out the object for which it was organized, and that they were so made with the assent of all the stockholders and bondholders, the complainants included. It admits that the company has failed to pay the interest due on its bonds since July 1, 1890, and that it has not paid certain taxes, but it denies all charges of fraud and mismanagement, and claims that the defendant's inability to pay is the result of its misfortune, caused by hard times, and the consequent depression of real estate. It claims that the assets of the defendant are valuable, and will, if time is given, more than pay all its liabilities. I do not think it necessary to here set forth all the claims, explanations, and charges in the answer contained. They will be, in effect, alluded to and disposed of, as I state the conclusion I have reached.

I find that the defendant was organized to purchase and sell lands in Wise county, Va., and, among other things, to erect build-

ings and sell or lease them; to grade and improve streets; to furnish gas, electric lights, and waterworks; to construct and operate street railroads; to lay out its lands into lots, streets, and parks, and improve and sell the lots; to erect, own, and operate furnaces, mills, and manufactories, and acquire by subscription or purchase the stock or bonds of any mining, manufacturing, water, gas, street-railway, or other improvement company within the territory owned by it; to issue and sell its bonds and secure the same by mortgages on its property; to subscribe to and hold shares in the capital stock of any railroad company or other corporation; and to do other things not necessary to be here mentioned. It was organized by an association of landowners composed of about 20 persons and corporations that had purchased lands at Big Stone Gap, expecting to profit by the advance in price occasioned by the building of railroads into the coal and iron fields adjacent thereto. The original cost to them of the lands averaged about $25 per acre, (excepting one small part thereof,) and about 2,000 acres of the same was conveyed to the defendant, for which the grantors received $1,000,000 in first mortgage bonds, and $1,500,000 in full-paid stock of the company. It thus appears that the associated landowners, who in the manner I have described became the stockholders and bondholders of the defendant, received $2,500,000 in stock and bonds for lands that had cost them, with the exception mentioned, (and that immaterial,) about $50,000. It seems that there never was as much as one cent of cash capital paid in by any of the stockholders, the land alone constituting the capital; and that, subject to the $1,000,000 mortgage. The stock and bonds were apportioned among the former landowners according to a valuation of their respective holdings, agreed to by them, each stockholder receiving for every $1,500 of stock held by him one bond of the denomination of $1,000. The bonds were payable in the gold coin of the United States on the 10th day of May, 1898, and bore 4 per cent. interest per annum, payable semiannually. By the terms of the mortgage executed to secure the bonds it was provided that 75 per cent. of the amount of all sales of lots made by the company should be paid over to the trustee named therein, for the purpose of extinguishing the bonded debt, and the remaining 25 per cent. was to be used as an improvement fund by the company. It was also provided in the mortgage that as soon as $50,000 should accumulate in the hands of said trustee from the sale of lots or otherwise, a dividend of 5 per cent. should be paid on the principal of the bonds; and I may remark here that the charge in the bill that this dividend has not been paid is not true. It is shown by the evidence that the fund applicable to this dividend has been regularly set apart for that purpose, and paid to the bondholders, or on their account; and that they have now received in such payments, respectively, sums several times greater in amount than was paid out by them for the lands.

The company, after organizing under the provisions of a special act of the legislature of Virginia approved February 14, 1888, pro-

ceeded to carry out the purposes for which it was formed by purchasing said lands, dividing the same into lots, streets, avenues, and parks; by building houses, waterworks, electric light works, street railways, and other improvements required by the citizens of Big Stone Gap. It did this either directly through its own officers and with its own funds, or indirectly by taking stock in and assisting other corporations duly organized for certain purposes. It has sold of its real estate over $600,000 worth of lots, or the aggregate of cash and purchase-money notes received from such sales exceeds that sum. The greater part of this has been used in defraying expenses, developing the property, assisting other enterprises, and paying dividends, while a considerable portion thereof is still held in the shape of notes given by the purchasers of lots for the deferred payments due thereon.

It was provided in the mortgage that—

"No suit, action, or proceeding in law or in equity for the foreclosure of this mortgage or deed of trust, or the execution of the trusts thereof, or for any other remedy, shall be brought or instituted except by, through, or in the name of the trustee for the time being, and then only after notice in writing to the trustee of default having occurred and continued as aforesaid, upon the request in writing of one-fifth in amount of the holders of bonds then outstanding, and the offer to the trustee of adequate security and indemnity against the costs, expenses, liabilities, and charges to be incurred therein or thereby; and such request and offer of indemnity are hereby declared to be conditions precedent for the execution of the powers and trusts of this mortgage or deed of trust to any action or cause of action for the foreclosure, or for any other remedy hereunder."

It must be kept in mind that the complainants are not proceeding as creditors of the defendant, except as they may be regarded as such from the fact that they are bondholders. What are their rights as bondholders, under the facts and the mortgage mentioned? Before considering that question I will say that the allegations of fraud and mismanagement made in the bill are not, in my judgment, sustained in a single instance, and that consequently the complainants must stand alone on their rights and privileges as bondholders and stockholders, unaided by the help that courts of equity give in cases where fraud and misconduct is shown on the part of the officers of the company complained of. And also we must remember that the rules applicable to the appointment of receivers in cases where bonds are secured by an ordinary trust, where no special and restrictive stipulations are found relative to foreclosure proceedings, do not apply to this case. In the deed of trust made by the defendant to secure the bonds held by complainants the requirements I have quoted are found, and they were placed there with the knowledge and approval of complainants, in order to enhance the value of the bonds secured, aid the credit of the company, and enable the holders of the bonds to dispose of them advantageously. They are part of the consideration offered by the company and accepted by the bondholders when the contract was made, and they are as valid as the other provisions of the trust, and as binding on the bondholders as those other stipulations are on the company. State v. North-

ern Cent. R. Co., 18 Md. 193. This requirement of the deed of trust has been entirely ignored by the complainants as bondholders, although, in the absence of proof showing fraud or mismanagement on the part of the company, it is binding upon them. They have not given the notice in writing to the trustee of the alleged default, nor has any request to institute suit been made by one-fifth of the holders of the outstanding bonds, and neither has the trustee been offered security against costs and charges. No ground whatever is shown why the court should ignore the manner of procedure provided by the parties themselves for their mutual protection. I therefore hold that, as bondholders, complainants, on the case as now made, have no standing in this court, and cannot have until they have first exhausted the remedies provided for them in the trust, or have shown their inability to do so because of the fault of the defendant or of its management.

The complainants claim that they and the interests they represent own over one-half of the capital stock of the Big Stone Gap Improvement Company. This is denied in the answer, defendant insisting that complainants do not own over one-tenth part of such stock. In order to sustain the allegations of the bill in this regard, complainants insist that the 7,336 shares of said stock now owned by the Virginia, Tennessee & Carolina Steel & Iron Company should be classed with them, as opposed to the present management of the defendant company. It appears that at the last two meetings of the stockholders of defendant there were controversies relative to the representation of said stock, it being claimed by complainants that J. M. Bailey, as receiver of the Virginia, Tennessee & Carolina Steel & Iron Company, was entitled to represent and vote the stock owned by said company, while other stockholders held that Haskell and Conklin were the legally appointed receivers of that company, and that J. B. Richmond, its attorney, was the proper person to represent and vote its stock. This court in this proceeding will not determine the questions involving the rights of those claiming to be receivers of said company, nor will it decide who was entitled to represent the stock held by that company in the Big Stone Gap Improvement Company. The decision of those matters would not dispose of the questions now in controversy; in fact they have no proper connection with the present issue. Complainants, by this contention, seek to show that a majority of the shares of stock of defendant is opposed to its present management, and in favor of the course pursued by them. If such be the fact, it is worthy of consideration, and should not be overlooked by the court. The controversy as to the stock owned by said iron and steel company may be solved as claimed by the complainants, and still their position in the matter now under consideration would not be sustained. I think that a majority of the stock of defendant company not only refuses to indorse the action of complainants, but actively and strenuously resists it. As the complainants have invited the consideration of this rule they will not object to its proper application to

the facts of this case. There is an absolute failure to sustain the allegation in the bill that the complainants and the interests they represent own over one-half of the stock of the defendant company. This claim, under all the circumstances of this case, should not have been made, or, if relied upon, all the facts connected with the controversy on which it is based should have been set forth by complainants, in order that the court might be fully advised, and not misled.

As stockholders, the complainants are interested in the proper management of the company, in the payment of all its liabilities, in the sale of its real estate, and the distribution of its assets. They charge that the funds of the company have been wasted, and its assets misappropriated and diverted to purposes wholly foreign to those for which it was organized, to their loss and injury. I do not find that these charges are sustained. The appropriations, donations, and subscriptions to stock by the company to the various purposes and enterprises set forth in the bill were all made with the assent of the stockholders, including complainants, most of whom voted for them, as they were in the line of the enterprise in which the company was engaged, and to which the stockholders were committed. It was simply an effort to carry out the object had in view when the company was organized, for which the one-fourth portion of the income received from the sale of lots was set apart, as was provided in the charter, and nominated in the bond. I find that the stocks and bonds held and owned by defendant, issued by other corporations, were purchased and secured with the one-fourth part so received, and not with trust funds to which the bondholders were entitled. The directors of the defendant seem to have advised fully with its stockholders and consulted with its bondholders, more so than is usually done; and, as the evidence discloses, they were always governed by the advice received. It is true that a number of the enterprises that were assisted with the funds of the company have not as yet developed into remunerative investments by demonstrating their dividend-earning capacities. Still the evidence shows that the officers honestly endeavored in these instances to enhance the interest of the company, and that in their efforts they had the approval of the stockholders and the commendation of the present complainants.

It is clearly shown that complainants were not only aware of the proceedings had at the meetings of the stockholders and directors, when the expenditures now complained of were authorized, but that they gave them their cordial support. Will they now be permitted in a court of equity to complain of those things which they did, to charge others with wrongdoing, when those others have simply done that which they were directed by complainants to do? Stockholders of a corporation that has been managed without fraud will not be permitted, after they, for reasons of their own, have become dissatisfied with the plan of organization or the management thereof, to force the abandonment of the business, and compel the

majority of the shareholders to submit to the will of the minority, by the decree of a court of equity. If they had this power it would frequently be exercised to the detriment of the corporation, the very existence of which might be thus destroyed, or the value of its stock seriously impaired. Rival companies might make it to the interest of this minority so to act, or the stock of a corporation might be purchased with such object in view, and the result would be that the security relied upon by those investing in corporate property would be seriously impaired.

The charters under which corporations are organized, and the laws by virtue of which they are created, provide the way in which they shall be managed, as well as the mode of voting the stock and the manner of electing the officers thereof; and, if these provisions have been fairly complied with, then there is no ground for the interference of a court of equity on the complaint of a dissatisfied minority shareholder. If he disapproves of the management that has been conducted without fraud and under the requirements of the law, his only remedy is to elect new officers in favor of another policy by appealing to the stockholders, or, failing in that, to sell his stock and retire. Certainly the equity courts of the country will not undertake to manage it for him, nor will they, under such circumstances, take jurisdiction for the purpose of closing up the affairs of the corporation. Such power is never exercised in the absence of a statute giving the jurisdiction, and I find no such enactment applicable to this case. In the absence of such legislation the business matters of a corporation can only be controlled, or its charter privileges taken from it, by the proper and usual proceedings in such cases provided in the courts of law. Chancellor Kent, in a leading case on this subject, said:

"I admit that the persons who from time to time exercise the corporate powers may, in their character of trustees, be accountable to this court for a fraudulent breach of trust, and to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined." Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371.

"It cannot be concealed," said the chancellor in Bayless v. Orne, 1 Freem. Ch. (Miss.) 173, "that to decree the prayer of complainants' bill would be to decree a dissolution of the corporation. In this respect it differs materially from bills which have frequently been entertained by courts of equity at the instance of stockholders against the directors of a corporate company to compel them to account for the improper use of funds, or to restrain them from violating their trust. That a court of equity, as such, has not jurisdiction or power over corporate bodies for the purpose of restraining their operations or winding up their concerns is, I think, well settled by various authorities." See, on this subject, Verplanck v. Insurance Co., 1 Edw. Ch. 84; Attorney General v. Bank of Niagara, 1 Hopk. Ch. 354; Neall v. Hill, 16 Cal. 145.

In Treadwell v. Salisbury Manuf'g Co., 7 Gray, 393, it is said:

"Indeed, it is too well settled to admit of question that a court of chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Their rights and duties are regulated and governed by the common law, which in most cases furnishes ample remedies for any excess or abuse of corporate powers and privileges, which may injuriously affect either public or private rights. It is only when

there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction, that a bill in equity can be maintained against a corporation. And this rule is applicable to stockholders as well as to other persons." See Ang. & A. Corp. § 312; Grant, Corp. 71, 271; Mozley v. Alston, 1 Phil. Ch. 790; Hodges v. Screw Co., 1 R. I. 350; Baker v. Railroad Co., 34 La. Ann. 754.

The rule is also well established that a corporation claiming redress for wrongs must proceed through its regularly appointed agents. It is only when the company has been dissolved, or is prevented from proceeding by the misconduct of its officers that the stockholders may themselves proceed in chancery for the protection of their equitable rights. If the directors refuse to act, or are themselves guilty of a wrong that the majority of the stockholders refuse to correct, equity will interfere at the suit of a stockholder. Mor. Priv. Corp. § 239, 381, 386; Moore v. Schoppert, 22 W. Va. 282, 291; Hawes v. Oakland, 104 U. S. 450, 460; Foss v. Harbottle, 2 Hare, 493. In this case the complainants allege that they control a majority of the shares of stock of the defendant. If that is so, they will have no trouble in calling a stockholders' meeting of the company and therein so voting their stock as to correct the wrongs of which they now complain, and fully protect their interests in the future. Unless they are mistaken in this claim, it seems strange that they have not so acted before this, provided they believed the company was mismanaged.

The appointment of a receiver—always in the discretion of the court—will not be made if it is for the best interest of those concerned that the property in controversy should remain in the hands and under the control of the owners thereof. This discretion of the court should be a reasonable one, governed to a great extent by the facts as they are presented in each particular case, as no rule generally applicable has been or can be established. Nor will this discretion be controlled by the technical legal rights of the parties, but all the equities of the entire case will be considered. The power of appointment is extraordinary in its nature and far-reaching in its effects, and will be resorted to with the utmost caution, and only under such circumstances as demand summary relief. Williamson v. Railroad Co., 1 Biss. 206; Crawford v. Ross, 39 Ga. 44; Furlong v. Edwards, 3 Md. 112; Verplank v. Caines, 1 Johns. Ch. 57. Mr. Justice Bradley, in Vose v. Reed, 1 Woods, 650, says:

"But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

In the case of Tysen v. Railway Co., 8 Biss. 247, Mr. Justice Harlan, applying these principles, refused to appoint a receiver, although there had been default in the payment of interest on bonds, and insolvency was in effect admitted. The circumstances in that case demonstrated, as the facts in this case do, that the appointment of a receiver would imperil the interests of others whose

rights were entitled to as much consideration from the court as those of the complainants. The appointment of a receiver does not necessarily follow upon the insolvency of the corporation being proven, and will not be made unless it is also shown that loss will ensue to the parties in interest if the company continues in the management of its affairs. Union Trust Co. v. St. Louis, etc., R. Co., 4 Dill. 114; Tysen v. Railway Co., 8 Biss. 247.

My conclusion is that sufficient cause has not been shown to justify the court in appointing permanent receivers in this case. Certainly the complainants, as bondholders and stockholders, have given the court no such facts as authorize it to retain the possession and control of defendant's property, and they sue in no other capacity, not claiming to be general creditors, and not making the trustee a party, nor charging him with fraud or failure to discharge his duties. The charge in the bill that many persons claiming to be creditors of defendant have instituted suits for the recovery of their claims is not supported by the evidence. That the company is indebted to various parties is conceded, but its creditors do not seem to be pressing for the collection of the sums due them, but, on the contrary, appear to favor the policy insisted on by the majority of the bondholders, stockholders, and directors of pursuing the present plan of management, and depending upon the return of the prosperity with which they were heretofore favored, and which they confidently, and not without reason, expect, as the best means of protecting the common interests of all concerned in the Big Stone Gap Improvement Company.

The order granted in this cause on the 26th day of May, 1893, appointing provisional receivers, was founded on the allegations of the bill as to the misconduct of the officers of the defendant company, and the misappropriation of its funds by them, and was intended to prevent great and irreparable injury to the stockholders by the improper use and delivery of $500,000 in amount of the treasury stock of the company; the complainants representing that they and others represented by them owned over one-half of all the bonds and stock issued by the defendant. These allegations were supported by affidavits and exhibits. From the conclusion I reach it is evident that I find that the complainants were mistaken in several particulars, and that the inference drawn by some of them from the circumstances alluded to are not justified by the facts, at least as they are now presented for my consideration.

I will now pass a decree dissolving the injunction herein heretofore granted, and directing the provisional receivers to restore to the Big Stone Gap Improvement Company all of its property now in their hands; requiring them to make a report of their proceedings as such receivers to this court preliminary to the settlement of their accounts and their discharge as such officers; refusing the prayer of the bill, which, after the court has passed on the receivers' accounts, will be dismissed, at cost of complainants.

ST. PAUL & N. P. RY. CO. v. ST. PAUL, M. & M. RY. CO. et al.

(Circuit Court, D. Minnesota, Third Division. August 24, 1893.)

1. PUBLIC LANDS—GRANTS IN AID OF RAILWAYS—ACTS OF CONGRESS AND MINNESOTA LEGISLATURE—EXCESSIVE CONVEYANCE VOIDABLE.
Under the acts of congress granting lands to Minnesota to aid in the building of railways, and the acts of the territorial and state legislatures granting such lands to railway companies, the lands so granted were required to be selected from a territory coterminous with the railroad, and the governor of Minnesota had authority to make deeds of land as fast as the roads were constructed. *Held*, that such deeds conveying lands in advance of the point to which the road was actually constructed were not void, but only voidable.

2. SAME—REVOCATION OF GRANT BY MINNESOTA—CONSTITUTIONAL LAW.
The lands were held by Minnesota in trust only for the purpose of aiding in the construction of railways; and where the governor of the state erroneously conveyed to a railroad company certain lands lying beyond the point to which the road had been constructed, and several years thereafter elapsed without the construction of such road, it was the right and duty of the state legislature to declare such lands forfeited without merger or extinguishment, and to grant them anew for the same purpose, as was done by the act of March 1, 1877.

3. SAME—SECOND GRANTEE — RIGHT OF ACTION—WHEN ACCRUED—ACT MINN. MARCH 1, 1877.
Under Act Minn. March 1, 1877, declaring forfeited to the state certain lands theretofore conveyed to railway companies, and granting such lands to another company, the second grantee, upon compliance with the conditions of the grant, was enabled to maintain an action to recover such lands or to quiet title thereto; but such right of action accrued only so fast as the company constructed its road, and limitation and laches would run against it only from that date.

4. SAME—INCLUSION OF FORFEITED LANDS IN PRIOR MORTGAGE.
Under the acts of congress granting to Minnesota lands in aid of railways and the acts of the legislature of Minnesota granting such lands to railway companies, mortgages of the property of the grantee companies with "the lands appertaining to the roads" do not include lands erroneously conveyed to such grantees in excess of the amount warranted by said acts.

In Equity. Bill by the St. Paul & Northern Pacific Railway Company against the St. Paul, Minneapolis & Manitoba Railway Company and others to obtain possession of certain lands, and to quiet complainant's title thereto. Decree for complainant.

Pierce Barnes, for complainant.
M. D. Grover, for defendants.

WILLIAMS, District Judge. Under the voluminous statement of facts many questions of law are presented by the learned counsel in their arguments, but with the views I entertain of the case I deem the consideration of but two of them necessary to its proper determination.

The governing principle of all these various acts of congress and of the territorial and state legislature was to grant lands to the state of Minnesota to aid in the construction of railroads in the then territory and future state of Minnesota; and the proposi-

tion that the lands granted were to be exclusively applied in the construction of that road for and on account of which such lands were granted, and should be disposed of only as the work progressed, and be applied to no other purpose whatsoever, is prominently announced in all said acts of congress. The acts further state that the lands—especially the place lands—so awarded to any railroad or branch railroad shall be selected from a territory coterminous with said railroad or branch thereof. Applying this latter principle, it is difficult to see what real claim the defendants originally had or now have to any lands north of a point called Watab. It is not claimed that the defendant company constructed any road north of said place, or became in any manner entitled to the place lands north thereof; and, as a matter of fact, they were not entitled to any indemnity lands between Watab and Brainerd, because none of said lands were located within a territory coterminous with the road constructed by the defendant company. So it must follow that the deeds executed to the defendant company by the governor of the state of Minnesota containing lands north of Watab are either absolutely void, or voidable as to the quantity of land contained therein in excess of the amount to which the defendant company was entitled. The very learned counsel representing complainant insists strenuously, and cites numerous authorities to support his position, that the deeds were absolutely void; the governor being, as he contends, without authority to execute the same. Among the cases cited are Smelting Co. v. Kemp, 104 U. S. 644; Doolan v. Carr, 125 U. S. 626, 8 Sup. Ct. Rep. 1228; Sherman v. Buick, 93 U. S. 209, 216; Polk's Lessee v. Wendal, 9 Cranch, 87; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336; Wilcox v. Jackson, 13 Pet. 511; Iron Co. v. Cunningham, 44 Fed. Rep. 819; Anderson v. Roberts, 18 Johns. 527; Railroad Co. v. Davison, (Mich.) 32 N. W. Rep. 726. Without taking up or referring to these cases seriatim, it is sufficient to say that none of them are analogous to this case. That the governor of the state of Minnesota had authority to make deeds of land to any company constructing the roads, as fast as they were constructed, when any 20 miles, or, according to another act, when any 10 miles, of the road were constructed, is unquestioned; and, having that authority, it was necessary for him to determine how far the lands had been earned by the construction of the road; and if he erred as to the amount of lands to which any constructing company was entitled it was a mere error in judgment of the officer having authority to make the deeds; and the efforts of learned counsel on either side to demonstrate to the court the exact or approximate number of acres to which the respective companies are entitled are quite conclusive that if the executive, in making the deeds, did err, it was an error of judgment, and a misconception of the facts, into which any one was very liable to fall. So I am of the opinion that the most that can be said in relation to these deeds is that they contained lands in excess of the number of acres that should have been awarded by the executive to the defendant corporation,

and that the deeds were not void absolutely, but only voidable as to the number of acres in excess of what should have been conveyed by them.

This brings me to the consideration of the question of the right of the plaintiff to maintain this action, for if it be true that the deeds are not absolutely void, but voidable as to the excess, it would seem to follow that the defendant corporation holds the lands in trust for whomsoever was entitled to said excess, and, that being the case, this action cannot be maintained, because it is clearly barred by the statute of limitations of the state of Minnesota, and also by the bar of laches which should clearly prevail against the complainant in this case if it has no other right to maintain its action and to obtain the relief sought for in the bill of complaint. Upon this point it is unnecessary to cite authorities, it being conceded by counsel for complainant.

We now come to the consideration of the other important question in this case, and that is as to the force and effect of the act of the legislature of the state of Minnesota of March 1, 1877. The first section of that act is as follows:

"That the rights privileges, franchises, grants of land, and property heretofore held by the St. Paul & Pacific Railroad Company appertaining to the uncompleted portions of that line of railroad extending from Watab to Brainerd, are hereby declared forfeited to the state, without merger or extinguishment, but are hereby preserved, continued and conferred upon the terms and conditions as in this act provided."

Said act then goes on to provide that if a certain company called the "Bond Company" shall construct said railroad from Watab to Brainerd, and other certain branches which it is unnecessary to mention here, within a given time, it shall be entitled, under certain conditions, to said lands. It then further provides that:

"In case any forfeiture of any portion of the said line of road should occur under the provisions of this section, then and in that case, any company or corporation now organized, or that may hereafter organize, having authority from this state to build, maintain and operate a line of railroad within or through this state, may succeed to and acquire the right to complete, own, maintain and operate the uncompleted portions of said line of railroad mentioned in this section, by filing with the governor a written notice of its desire and intention, under and subject to the provisions of this act, to complete, equip, maintain and operate the then uncompleted portions of said line of railroad. Work shall be commenced thereon within thirty days after the filing of such notice, or as soon thereafter as the state of weather shall permit, and be prosecuted to completion at the rate of not less than sixty miles per year, until all the same has been completed. But, upon default to commence work or to prosecute the same to completion within the time aforesaid, such company shall forfeit all right to complete, maintain, or operate the portion of said line remaining uncompleted at the time of such default, without further act or ceremony, to be used and granted for the construction of such line of road."

Further still, the act provides that certain grants of land mentioned there "shall be reserved and retained by the state to be used by it for the payment of claims, incurred for work and material furnished in the construction of said lines of railroad; statements of

which claims were filed in the state auditor's office in pursuance of an act of the legislature approved February 21, 1874."

Under the provisions of this act the complainant corporation constructed a road from Watab to Brainerd. It also expended large sums of money in the payment of the claims mentioned in that act, for the payment of which the state had reserved lands not to exceed 40,000 acres in amount; and it now claims that it is entitled to have all clouds on its title to the lands so earned and conveyed to it removed that now exist by reason of the said lands being embraced in the deeds executed to the defendant corporation hereafter referred to, and that it be held to be entitled to receive from the state a conveyance of all such lands not heretofore conveyed to it by the state.

The questions arising under the first section of this act are: Did the legislature have the right to pass the act? And did it affect the lands mentioned in this suit after they had been conveyed by the governor to the defendant company by the deeds hereinbefore mentioned? It must be borne in mind that the state of Minnesota by the acts of congress held these lands in trust to carry out the sole purpose and intention of said acts, viz. to aid in the construction of railroads in the territory and future state of Minnesota; and the lands were to be applied to that, and to no other, purpose. And when it was found that a term of years had elapsed since the conveyance, and no portion of said road from Watab to Brainerd had been constructed, although the lands which were intended to aid in the construction of that road had been conveyed, it was not only within the power of, but was an imperative duty resting upon, the legislature to take such action as would best carry out the letter and spirit of the act of congress. The state represented the sovereignty that had granted the lands, and, so doing, it certainly had the right to declare all lands that had not been earned forfeited to the state, without merger or extinguishment, and apply them, as they were intended to be applied, to aid in the construction of this road. This the legislature did, and nothing more. It strictly preserved by the terms of the act the rights of all individuals who had settled upon the lands, or had acquired any rights therein. It preserved the rights of all parties who had expended any money in the building of any road in the construction of which these lands were intended to aid. It compelled any company that constructed the road, and became entitled to the lands, to pay out large sums of money for this purpose. The act was in all respects carefully drawn; all of its provisions were fair and equitable; and I think it secured to the complainant herein, when it complied with the act, the right to the lands, and therewith the right to maintain any action for their recovery, or to quiet any title that might exist adverse to it; and as it became entitled to receive a deed for the lands only as fast as it constructed the road, so its right of action began when it was entitled to receive the lands from the state. A sufficient length of time had not elapsed from the period at which it was entitled to the possession or to

receive the legal title to the lands prior to the commencement of this action to prevent the plaintiff from maintaining this action either upon the statute of limitations or the claim of laches.

I am not unmindful of the contention by defendants that these lands were embraced in the mortgage of June 2, 1862, made by the St. Paul & Pacific Company, the mortgage of October 1, 1865, made by the First Division of the St. Paul & Pacific Company, and the mortgage of April 1, 1871, made by the St. Paul & Pacific Company, and that upon the foreclosure of said mortgages all of the lands embraced therein were purchased by the defendant company, and that for that reason the defendants' right to them has been secured. Upon the view that I have of these mortgages as construed in the light of the various acts herein referred to, these lands were not embraced in the mortgages referred to. They were not put in the deeds by any description as to section, township, or range, and the only language that purports to convey them at all by the mortgages is the expression, "lands appertaining to the roads." So, if those lands from Watab to Brainerd did not appertain to the road constructed by the mortgagors, then it must be that they were not embraced in the mortgages, and did not pass to any one by foreclosure or sale thereunder. The act of congress granting these lands was both a grant and a law. Inasmuch as it was plainly stated in the act that these lands were only to inure to the company or party who actually constructed the road adjacent to them, if at that time such road had not been constructed, that grant, which was also a law, was a notice to all persons that the mortgagor had no right or title to those lands. So, in my judgment, that contention of the defendant must fail.

Entertaining these views, I am of the opinion that the complainant is entitled to recover as prayed for in the bill of complaint, and to have conveyed to it all lands mentioned in the complaint lying north of Watab that are coterminous with the line of said railroad extending north from Watab to Brainerd, and that its title be quieted to those lands, and all clouds removed that now may exist upon its title to the same.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. MILNER et al.

(Circuit Court, W. D. Michigan, N. D. July 29, 1893.)

1. CONSTITUTIONAL LAW — REGULATION OF COMMERCE — STATE QUARANTINE LAWS.

The detention and disinfection of immigrants by order of a state board of health, with the purpose of preventing infectious disease, is not a regulation of foreign commerce by a state, within the meaning of the prohibition in Const. U. S. art. 1, § 8. Brown v. Maryland, 12 Wheat. 419, followed.

2. SAME—TREATIES.

The right of the several states to establish and enforce quarantine regulations is not limited by any existing treaty between the United States and Norway and Sweden.

3. SAME—CRIMINAL PROSECUTION—INJUNCTION.
A federal court has no power to restrain by injunction a criminal prosecution by a state under an unconstitutional statute of such state.

4. SAME—QUARANTINE REGULATIONS.
In enforcing its quarantine regulations a state may detain immigrants from noninfected places who have traveled with others from infected localities.

5. SAME—DETAINING PERSONS PASSED BY FEDERAL OFFICERS.
The enforcement of the quarantine regulations of a state against immigrants cannot be restrained by injunction in a federal court, although the persons detained thereunder have been examined and passed by federal health officers.

6. SAME—COSTS OF INSPECTION.
The costs and charges of quarantine inspection under state laws may lawfully be imposed upon the carrier which brings the suspected passengers into the country, as being incident to the business in which it is engaged.

In Equity. Bill by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against Samuel G. Milner and others, constituting the Michigan state board of health, to restrain respondents from enforcing the state quarantine regulations. On motion for preliminary injunction. Denied.

E. C. Chapin and John D. Conley, for plaintiff.
A. A. Ellis, for defendants.

Before SEVERENS and SAGE, District Judges.

PER CURIAM. The bill sets forth that the complainant, a corporation of the state of Michigan, is, and has been for several years past, engaged, under a traffic arrangement with the Canadian Pacific Railway Company, in the transportation of passengers, on through tickets from Quebec, westward through Canada and over the line of the complainant's railway to and through the states of Michigan, Wisconsin, Minnesota, and North Dakota; also eastward from those states through Canada to Quebec; a large portion of the passengers westward being persons traveling from Norway and Sweden to points in said states.

The defendants, it is averred, constitute the state board of health of Michigan, assuming to exercise authority under an act passed by the legislature of said state, and approved June 20, 1885, entitled "An act to provide for the prevention of the introduction and spread of cholera and 'other dangerous communicable diseases,' as amended by 'An act approved April 26th, 1893.'" The bill has attached to it as exhibits a copy of each of said acts, and of certain rules adopted by the board, purported to be issued under and by virtue of the authority conferred by the amendatory act. It is further averred that the board, acting through its secretary and one of its inspectors, and in pursuance of said rules, is daily detaining and attempting to detain passengers on the Canadian Pacific Railway at the point opposite Sault Ste. Marie, Mich., and prohibiting their entering the state of Michigan until they have undergone the quarantine detention; and until the disinfection of their baggage as prescribed in said rules. It is averred that this deten-

tion, examination, and process of disinfection of baggage is applied to all emigrants, irrespective of whether they came from an infected or healthy locality abroad, and without regard to their point of destination. It is further averred that all said emigrants and travelers have been, before said detention, inspected by United States officials detailed for the purpose, and that complainant has not received nor permitted to be conveyed within the state of Michigan any passenger, traveler, or emigrant coming from any European port through the dominion of Canada, excepting such as have presented a certificate of inspection of the United States inspector. It is also averred that the board is threatening to arrest officials and employes of complainant unless complainant shall submit to and comply with the requirements of the board.

The claim is that the rules and action of the board of health are in direct violation of section 8, art. 1, of the constitution of the United States, in that they attempt to regulate and prohibit commerce with foreign nations; and that they are also in violation of the treaty made by and between the United States and Norway and Sweden, and now existing; also that they are over, above, and beyond the powers conferred upon the board by said act and amendatory act of the legislature of Michigan. The bill then sets forth averments of irreparable damages, and prays for an injunction.

The motion for a preliminary injunction will be overruled for the following reasons:

1. In Brown v. Maryland, 13 Wheat. 419--433, Chief Justice Marshall recognized that the removal or destruction of infectious or unsound articles was undoubtedly an exercise of the police power of the state, and an exception to the prohibition resulting from the exclusive power of congress to regulate the operations of foreign and interstate commerce; and that laws of the United States expressly sanction the health laws of the several states. In the License Cases, 5 How. 504, 576, Chief Justice Taney declared that "it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among the attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them." In Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851, Justice Bradley referred to these cases with approval, and stated with great clearness and force the distinction between the exercise of its police power by a state and an attempt to legislate upon matters of interstate or foreign commerce, which are exclusively within the power of the federal government. These authorities render it unnecessary to refer particularly to the cases cited for the complainant. It is sufficient to say that they all relate to state enactments concerning articles of commerce, and hence are not applicable here. Moreover, the quarantine act of congress, approved February 15, 1893, expressly recognizes the validity of state laws, and in section 3 requires the supervising surgeon general of the marine hospital service to co-operate with

and aid state and municipal boards of health in the execution and enforcement of their rules and regulations.

2. We find nothing in any existing treaty with Norway and Sweden in conflict with the institution or enforcement by any one or more of the states of this Union of quarantine regulations.

3. We do not deem it necessary to express an opinion whether the provision of the Michigan statute making it a misdemeanor to violate the rules of the state board of health, adopted in pursuance of the act, is in conflict with the constitution of Michigan, for we should not, even if we were of opinion that it is unconstitutional, undertake to issue an injunction against criminal prosecution by the state. That the legislature might authorize the board to adopt rules is, we think, beyond question. Such rules are essential to the proper enforcement of the law.

4. To the objection that passengers from noninfected countries and localities are detained, the answer is that such detentions are, in the nature of the case, to a certain extent unavoidable; and passengers from such countries and localities may have become properly subject to detention by reason of having mingled with others who could communicate pestilence or disease to which they themselves had been exposed or subjected. An opportunity for examination and inspection is indispensable also.

5. The objection that passengers who had certificates from United States inspectors were detained is not tenable. The states may exercise their police power according to their own discretion, and by means of their own officials and methods. The inconvenience resulting to emigrants and travelers from being halted and subjected to examination and detention at state lines is of trifling importance at a time when every effort is required and is being put forth to prevent the introduction and spread of pestilential and communicable diseases.

The costs and charges which are incurred in such quarantine inspection may lawfully be imposed on the railway company as being incident to the business in which it is engaged. The costs of the motion will be taxed to the complainant.

BANK OF NORTH AMERICA v. RINDGE.

(Circuit Court, S. D. California. August 7, 1893.)

1. CORPORATIONS—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS — ACTION TO ENFORCE—KANSAS STATUTE.
   Under Gen. St. Kan. 1889, p. 381, par. 1192, providing for the enforcement of the liability of stockholders of a corporation for the corporate debts, the creditor may either proceed summarily in the court where judgment has been given against the corporation and execution returned nulla bona, or he may proceed by an ordinary action at law wherever personal jurisdiction of such stockholder can be acquired. Howell v. Manglesdorf, 5 Pac. Rep. 759, 33 Kan. 194, followed.

2. SAME—LIMITATIONS—WHEN BEGINS TO RUN.
   The statute of limitations does not begin to run in bar of an action to enforce such liability until judgment has been given against the corporation, and execution thereon has been returned unsatisfied.

3. SAME—PLEADING—ALLEGATION OF DEFENDANT'S OWNERSHIP.
In such an action an allegation that plaintiff "is informed and believes" that defendant is a stockholder is insufficient. The fact of defendant's ownership of stock should be directly charged either upon information and belief or otherwise.

At Law. Action by the Bank of North America against Frederick K. Rindge to enforce the latter's liability as stockholder of the Haddam State Bank. Heard on demurrer to the complaint. Demurrer sustained.

Wells, Monroe & Lee, for plaintiff.
S. C. Hubbell, for defendant.

ROSS, District Judge. This is an action at law by a creditor of a Kansas banking corporation against the defendant, as a stockholder in that corporation, to enforce the liability which the statutes of Kansas impose upon stockholders in corporations, other than railway, religious, or charitable corporations, for the corporate debts.

The statute of Kansas, which is the foundation of the action, is as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Gen. St. 1889, p. 381, par. 1192.

The complaint, to which a demurrer is interposed, alleges that on the 2d day of January, 1889, the plaintiff recovered a judgment in the United States circuit court for the district of Kansas, in an action therein commenced on the 8th day of September, 1888, against George S. Elwood, John T. Elwood, and the Haddam State Bank, for the sum of $5,343, with interest thereon at the rate of 12 per cent. per annum from the date of judgment, together with the costs of the plaintiff therein expended, amounting to the sum of $34.25; that no part of the judgment, costs, or interest has been paid; that on the 21st of February, 1893, the plaintiff caused an execution to be issued out of the court in which the judgment was obtained to the United States marshal for the district of Kansas, which execution the marshal thereafter, in due time, returned nulla bona; that the Haddam State Bank was at the date of the rendition of the judgment, and had been for a long time prior thereto, and ever since has been, a corporation duly organized and existing under the laws of the state of Kansas; that plaintiff "is

informed and believes that the defendant herein was on the said 8th day of September, 1888, had been long prior to that time, has been ever since said date, and now is, the owner of the capital stock of said Haddam State Bank to the amount of $5,000 in the par value of said stock, and that the entire amount due upon said stock, except about the sum of $1,000, remains unpaid;" that the defendant has never paid any portion of his individual liability upon his stock to the plaintiff or to any other creditor of the bank; that the plaintiff has never enforced its judgment against the bank, against the defendant, or against any other of its stockholders, and has now no other action pending therefor.

The present action was commenced March 6, 1893.

The principal objections urged on the part of the defendant to the complaint are—First, that the remedy of the plaintiff, if any, is by suit in equity; and, second, that the action is barred by those provisions of the statute of limitations of California prescribing three years as the period for the commencement of an action upon a liability created by statute other than a penalty or forfeiture, and two years for the commencement of an action upon a contract, obligation, or liability not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state. Code Civil Proc. Cal. §§ 338, 339.

It is well settled that the individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute, and must be measured by the statute of the state which creates the corporation and imposes the liability; and, further, that, where the statutes of the state creating the corporation and imposing the liability provide a special remedy, the liability of a stockholder can be enforced in no other manner in a court of the United States. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. Rep. 757, and cases there cited.

The statute of Kansas in question was construed by the supreme court of that state in the case of Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. Rep. 759. After setting out the statute already quoted, the court said:

"It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the court where the judgment was rendered against the corporation; in the other, by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired. Before the summary proceeding by motion can be maintained, notice to the stockholder must be given, in order that he may appear and make such defense as can be made, and as is necessary to protect his interest. The statute does not define the form of the notice nor the time nor place of its service, but only prescribes that a 'reasonable notice in writing' shall be given to the person sought to be charged. Whether the notice given in this case is sufficient, and what constitutes a reasonable notice under this statute, must depend very largely upon the nature of the proceeding based upon the notice. While the proceeding is summary in its character, and its maintenance contingent upon the insolvency of the corporation, or upon the rendition of a judgment against the corporation, and the return of an execution thereon of nulla bona, yet we cannot regard it as an interlocutory or auxiliary proceeding in the action against the corporation. In the action against the corporation no notice

of its pendency is given to the stockholder. He is not directly interested in the action, as his liability is only secondary to the corporation, and exists alone by reason of this statutory provision, and of that provision of the constitution in pursuance of which the statute is enacted. Const. art. 12, § 2. His liability to the creditors of the corporation is in the nature of a guaranty. The action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied. We think that the proceeding against the stockholder, whatever remedy may be employed, is an independent one. It will readily be conceded, if the proceeding is distinct and independent, and the issues between the parties are personal, and if the consequence of the proceeding is in the nature of a judgment in personam, that the notice or process of the court upon which the jurisdiction depends cannot be served beyond the jurisdiction of the state. Before either of the remedies pointed out by the statute can be employed by the creditors, the stockholder must be brought into court, and have his day there. He is not concluded by the judgment against the corporation. That judgment is at most only prima facie evidence of his liability. Grund v. Tucker, 5 Kan. 70. When he is brought into court in this proceeding, he may interpose several defenses. Among other things, he may show that he is not a stockholder; or, if he had subscribed to the capital stock of the company, it had been forfeited or released, or it had been sold and transferred, and the liability sought to be enforced against him had been assumed and succeeded to by another; or he may show that the judgment is void. He may also set up as a defense that he is discharged by having already paid the amount of his individual liability to other creditors of the corporation. We think he may contest his liability in this proceeding to the same extent, and may interpose the same defenses, that he could have availed himself of if the creditor had chosen the second remedy prescribed by the statute, and proceeded in an ordinary action to obtain a judgment."

The construction of the Kansas statute by the highest court of that state is binding on this court. That is the general rule in respect to the construction of state statutes and constitutions. Any other rule in cases like the present might subject stockholders residing out of the state to a greater or less burden than domestic stockholders, depending upon the various interpretations that might be given the state statute by different courts.

As will have been observed, the Kansas statute upon which the suit is based, as construed by the supreme court of that state, provides two remedies for enforcing the individual liability of stockholders, one of which is by an ordinary action at law, to be instituted wherever personal jurisdiction of them can be acquired. That remedy is pursued in the present action, and is therefore a proper remedy.

It was further held in the case of Howell v. Manglesdorf, as will be seen from the quotation made, that the liability of the stockholders to the creditors of the corporation under the statute in question is in the nature of a guaranty, and that the action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied. The precise date when the execution upon the judgment obtained in Kansas was returned unsatisfied does not appear from the complaint, but it does appear therefrom that the execution was not issued until the 21st day of February, 1893, and that it was thereafter returned in due time nulla bona. The cause of action could not therefore be barred by either of the statutes of limitation of California relied on by the defendant.

The allegations of the complaint are, however, plainly insufficient to show that the defendant ever was the owner of any of the stock of the Haddam State Bank. The allegation is that plaintiff "is informed and believes" that defendant is, and was at the times mentioned, such owner. This is only an allegation in respect to the plaintiff's information and belief. The fact of the defendant's ownership of the stock is not charged, either upon information and belief or otherwise. This objection, however, is but technical, and can be easily remedied by amendment.

Demurrer sustained, with leave to the plaintiff to amend within the usual time.

MASE v. NORTHERN PAC. R. CO.

(Circuit Court, D. Minnesota, Third Division. August 21, 1893.)

MASTER AND SERVANT—WHO IS A VICE PRINCIPAL—RAILROAD CONDUCTOR.

Rules of a railroad company imposing upon its conductors the care and management of switches used by them, and charging them with the responsibility of their proper handling and position while in such use, are such a delegation by the company of the duty which it owes to its employes as will render a conductor, in that connection, a vice principal; so as to charge the company with liability for the death of an engineer killed by reason of his engine running into an occupied side track, through a switch negligently left open and unguarded by the conductor of another train.

At Law. Action by Clara Mase, as administratrix of Frank B. Mase, deceased, against the Northern Pacific Railroad Company, to recover for the death of her intestate. Judgment for plaintiff on a case submitted upon an agreed statement of facts.

Erwin & Wellington, for plaintiff.

John C. Bullitt, Jr., and T. R. Selmes, for defendant.

WILLIAMS, District Judge. This case is submitted upon the following agreed statement of facts:

"That the plaintiff is the duly-appointed and legally-qualified administratrix of the estate of Frank B. Mase, deceased, and is the widow of said deceased; that, at all times hereinafter mentioned, plaintiff's intestate, Frank B. Mase, was in the employ of the defendant as an engineer on one of its passenger trains, and was, on the 3d day of October, 1890, engaged as such engineer upon the engine of a certain train, mentioned and referred to in the testimony hereto annexed as passenger train No. 2; that on said 3d day of October, 1890, while so engaged in the performance of his duties as such engineer upon said train, said Frank B. Mase was killed in an accident occurring at or near Butler, in the state of Montana, caused by said train on which plaintiff's intestate was so employed running upon a certain side track or safety track, by reason of a misplaced switch, and thus colliding with certain cars and a certain engine, mentioned as engine No. 483, which stood upon said side track or safety track; that said switch was so misplaced or left open by one E. L. Short, the conductor of the train mentioned as No. 58, of which said engine No. 483 was a part; that the circumstances of said accident are as stated in the testimony of Marshall Nixon, given at the coroner's inquest on the body of said Frank B. Mase, a copy of which is hereto attached, and made a part of this stipulation; that the trains referred to herein or in said testimony were trains owned or controlled by defendant

in operating its lines of railway in said state of Montana and elsewhere, and that the persons engaged in and about said trains were in the employ of the defendant; that said accident was caused solely by the carelessness and negligence of said B. L. Short in permitting said switch to remain open and out of place, and said carelessness and negligence of said B. L. Short was the proximate cause of said accident and of the death of said Frank B. Mase; that said Frank B. Mase was free from all carelessness and negligence whatever in the premises.

"It is further agreed and stipulated that all the rules set forth in the complaint, and any and all of the rules contained in defendant's rule book, hereto attached, may be read and referred to by either party, in all proceedings that may be had in this case, with the same force and effect as though the same were fully set out herein, and the adoption and promulgation of said rules for the guidance of its employes is hereby admitted on behalf of the defendant; that the statutes of the state of Montana may be read and referred to by either party, in all proceedings that may be had in this case, from the printed copies thereof generally in use, without further proof of passage, and with full force and effect. It is further stipulated and agreed that, by reason of the matters herein set forth, the plaintiff, as the personal representative of said Frank B. Mase, deceased, has sustained damage in the sum of $4,000. Said B. L. Short had no control or direction whatever over said plaintiff's intestate, other than as given by the rules of the company. It is further stipulated and agreed that a jury is hereby waived in all proceedings that may be had herein in which either party would otherwise be entitled to a jury, and that the court may order judgment herein in accordance with the facts admitted by the pleadings, and herein stipulated, and the law of the land."

Marshall Nixon, being duly sworn, says:

"I live at Missoula. I am a railroad brakeman. At the time of the accident, on October 3d, I was at Butler. I was braking for Conductor Short, on train No. 58, bound for Helena from Missoula. Our train broke in two in the tunnel. We tried to back her up, and couple her together again, but the train was too heavy for the engine, and we could not get it together. Then we came down to Butler with the front part of the train, and put her in on the side track, on the left of the main line coming down. I cut the engine off, and took it out on the main line, and Mr. Short said to back it up, and put it on the safety switch, and I did so, and closed the switch after me, and put the lock in the keeper of the switch. Then I went to the telegraph office after Mr. Short. I was there about twenty minutes, then Mr. Short came out, and I followed after him, and he says to me, 'Go down, and tell that engineer [meaning our engineer] to back out, and come down on the head end of the train.' And he said, 'I will let him out.' Then he (Mr. Short) went right across the track, and opened the switch, and he says to me, 'Fly down, and turn all the retainers down back of the furniture cars;' and I did so, and as I went down I told the engineer that Short wanted him to back up, and he said there was not room to clear down there. Then I holloaed, and told Short they could not clear down there. Short gave me a rough answer, and said for me to go and see. I went and seen, and did not think there was room there myself. Then I went back, and went into the offce, and asked him what he was going to do. He said he was going to unload some stuff if we ever got out of there, and was kind of mad, and did not talk much after that. About that time he stepped out of the telegraph office, and the passenger train was coming down the hill, and Short said just as soon as I come on the platform, 'My God, that switch!' Just then No. 2 came past the platform, and ran into safety switch. There was Harry Cromwell's engine (engine No. 483) first and another engine and some cars on that track. I just threw down my brake club, and ran down to the wreck. I heard a man holloa, and I ran on to the fireman of No. 2. I pulled him out of the hot water, and he said, 'Where is Frank?' Then I heard another man holloa right below me. I went down to him, about 20 or 30 feet from his engine, where I found Engineer Frank Mase lying in a pool of water that had run out of the engine. From there I pulled him back, and ran to get some help.

His fireman, as I passed him, said, 'Get a board for me, quick.' I went right up, and told a lot of boys belonging to other trains that were in and passengers to come down and give me some help; that two men were dying. That crowd rushed down, and begun to take care of them. I went to look if somebody else was hurt. I went to see Mase three or four times. He died within half an hour. There was no light on the safety switch."

The rules of the corporation that relate to this case, and as admitted by the stipulation, are as follows:

"A switch must never be left open for another train or engine, upon the supposition that its conductor will close it, unless such conductor assumes its charge. Conductors, brakemen, or others handling switches must stand by them until relieved, or until switches are closed." "The conductor who uses a switch is responsible for its position, unless the switchman or another conductor or engineer personally assumes its charge." "Conductors have full authority over the employes of trains they are placed in charge of; and such conductors are held responsible by the company for the safe management of their trains, and for the strict performance of their duties on the part of the men engaged with them."

Section 697, div. 5, of the Compiled Statutes of Montana provides as follows:

"That in every case the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same as in case of injury sustained by the default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

Upon this state of facts, the only questions which arise are: First, whether the defendant corporation is relieved from liability to the plaintiff by reason of the claim by the defendant that Conductor Short was a fellow servant with the plaintiff's intestate at the time the injury occurred; and, second, whether the statutes of Montana relied upon by the plaintiff create any greater or different liability on the part of the defendant than the liability created or recognized by the general law.

Whether Conductor Short was at the time of the injury a fellow servant of Mase, the deceased, is the real question to be determined in this case; and in its determination I do not deem it necessary to endeavor to reconcile the conflicting opinions of the various courts upon this question. I am very much impressed with the language of Justice Miller in the case of Garrahy v. Railroad Co., 25 Fed. Rep. 258, in which that eminent jurist says:

"The question thus presented is one which has been much considered of late in the courts of last resort of all the states, and much discussed at the bar in those and in the inferior courts. There is no unanimity in the decisions of the courts, nor in the opinions of the profession."

It would seem that the decision in the Ross Case, 112 U. S. 377, 5 Sup. Ct. Rep. 184, settled that the conductor of a railway train was, by reason of the superiority of his position, a vice principal, and not a fellow servant, of the employes under him. But defendant claims that by the decision by the same court in the case of Railroad Co. v. Baugh, (June 5, 1893,) 13 Sup. Ct. Rep. 914, the doctrine of the superiority of one employe over another, constituting him a vice principal, and not a coservant, as laid down in the Ross Case, is eliminated, and that the latter case, as far as it

conflicts with the decision in the Baugh Case, is overruled. In the case of Railroad Co. v. Andrews, (6th Circuit,) 6 U. S. App. 636, 1 C. C. A. 636, 50 Fed. Rep. 728, Justice Sage, delivering the opinion of the court, holds that a brakeman on one train is a coservant with the conductor and engineer on another train, and, if killed in a collision caused entirely by the negligence of the latter, the company is not liable. In the case of Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. Rep. 322, the court holds that the fact that employes were working on different trains is entirely immaterial in the consideration of the question as to whether they were or were not fellow servants.

After due consideration of the various decisions which may be characterized, at least, as conflicting, I am of the opinion that this case must be decided upon the question as to what duties devolved upon Conductor Short at the time of the injury, under the facts and circumstances of this case. If such duties were assigned to him as made him the representative of the defendant, for the time being, then he was the vice principal, and not a fellow servant. The rules of the company make it imperative upon him that, when he opens a switch, he must stand by it until relieved, or until such switch is closed, and it holds him responsible for its position until another conductor assumes its charge; and, while this may not be considered as a part of the duty of the defendant to provide a safe roadbed, instrumentalities, and appliances, yet it was a delegation by the defendant to the conductor of a duty of the same kind and character that it owed to the employe. This duty might have been delegated by the defendant to a brakeman or a switchman; but I am of the opinion that, when the defendant selected any one person to discharge this duty, he must be considered in law as a vice principal, and not a coservant. It does not depend upon the question of superiority, but upon the question of the delegation of a duty that originally devolved upon the principal to that person; for the rules of the company are very strict in holding the conductor responsible for the position of the switch, and delegate that important duty to him.

It is true it may be said that the performance of the duty of properly setting the switch depends upon the care of an employe, and that, therefore, it is his negligence alone which prevents its proper performance. But this is equally true of any of the positive duties of the employer. Competent servants cannot always be obtained, and reckless and incompetent ones cannot be discovered and discharged, without the exercise of care on the part of those whose duty it is to hire and discharge the men. Proper and safe cars cannot be built without due care on the part of the master mechanic and men in charge of the car shops. Cars cannot be kept in proper repair except by the exercise of diligence on the part of the inspectors. The roadbed and all its appurtenances cannot be kept in repair and in safe condition except by the exercise of care on the part of the employes and servants upon whom that duty devolves. Yet, if an accident is caused by the

negligence of any one of those employes in the performance of their duties, the company is responsible, because it has not used due care to provide its servants with reasonably safe places in which to work, or with reasonably safe instruments with which to do the work. So, in like manner, the track cannot be kept in safe condition for those passing over it without due care on the part of persons to whom is delegated the duty of setting the switches, and for a failure to perform this duty I hold that the defendant is liable in this case. This duty was delegated to the conductor. He neglects that duty, and leaves the switch open, and the court cannot say that Frank Mase, the deceased, standing at his post of duty, rushing in the darkness to inevitable destruction, has been provided with a reasonably safe place in which to work, and that this negligence, under the circumstances, is the negligence of a coservant, and not of a vice principal.

Under the foregoing statement of facts, and in this view of the case, it is unnecessary to consider the effect of the statute of Montana upon this case. I might say, however, that the language is not very clear, but it seems to refer to a servant or employe acting under the order of his superior, and would seem to be an attempt to graft the principles laid down in the Ross Case upon the statutes of that state, and adds nothing to the general law as applicable to this case.

Let judgment be entered for the plaintiff in the stipulated sum of $4,000.

WINTERS et al. v. HUB MIN. CO. et al.

(Circuit Court, D. Idaho. May 15, 1893.)

1. CONTRACT.
   A contract made for a corporation to be thereafter organized does not bind it.
2. MORTGAGE—PROPERTY SOLD SUBJECT TO INCUMBRANCES.
   A mortgagee may maintain his action in equity, but not at law, for recovery of the debt, against the grantee of the mortgaged property, who takes it subject to the incumbrances, or who agrees to pay them.
3. SAME—EFFECT UNDER IDAHO STATUTES OF ACTION OF FORECLOSURE.
   When the mortgagee brings his action of foreclosure, he cannot maintain another and separate action for personal judgment on the mortgage debt.

At Law. Action by Winters and others against the Hub Mining Company and others to recover a balance due on a debt after foreclosure of a mortgage given as security therefor. Complaint dismissed.

S. B. Kingsbury and F. E. Ensign, for plaintiffs.
Texas Angel, for defendant Hub Min. Co.

BEATTY, District Judge. The action is at law, commenced in, and removed from, the state court. The plaintiffs having conveyed, by deed, the Hub mine to defendants Atkinson & Crocker, the latter, to secure the unpaid balance of purchase money, exe-

cuted their mortgage on the mine to plaintiffs. Thereafter, the defendant the Hub Mining Company purchased the mine of defendants Atkinson & Crocker, and agreed to assume and pay such mortgage debt. Subsequently, plaintiffs brought their action in the state court against all the defendants, for foreclosure of the mortgage, in which a decree and judgment of foreclosure was granted against defendant company alone, which took its appeal to the state supreme court. After defendant company had perfected its appeal by giving the statutory supersedeas bond, an order was procured from the state trial court for the sale of the mortgaged property under the decree; and after sale a deficiency of the judgment remained, for which a personal judgment is now asked in this action against defendant company, which, alone of defendants, was summoned or appeared in either action. Defendant company, by its answer, alleges the invalidity of the mortgage sale, because the order therefor was procured after appeal taken to the state appellate court, where the cause is now pending, thereby barring this action; that the original sale of the mine to Atkinson & Crocker by plaintiffs was accomplished by fraud; and that said Atkinson & Crocker, in purchasing the mine of plaintiffs, did so only as the agents for the defendant company to be thereafter organized. Plaintiffs' demurrer to the answer, and their motion to eliminate portions thereof, raise the questions to be determined.

1. In the purchase of the mine from plaintiffs by Atkinson & Crocker, the latter could not act as the agents of defendant company, and the purchase must be regarded as made by them for themselves, as it seems well settled that a contract made in the name of or for a corporation to be subsequently organized can in no way bind or affect it. Battelle v. Pavement Co., (Minn.) 33 N. W. Rep. 327; Match Co. v. Hapgood, 141 Mass. 149, 7 N. E. Rep. 22; and Abbott v. Hapgood, 150 Mass. 248, 22 N. E. Rep. 908.

2. That plaintiffs consummated the sale to Atkinson & Crocker by fraud, if an available defense to defendant company, is one that should have been determined by the former action, and cannot be urged here.

3. Can plaintiffs maintain any action for a personal judgment against defendant company upon the mortgage debt? It is clearly alleged in the pleadings of both parties that at the time the sale of the mine was made by Atkinson & Crocker to defendant company it assumed and agreed to pay the balance of the purchase money then remaining unpaid to plaintiffs. So far as observed, there is nothing in the voluminous pleadings to show to whom or how such promise was made, or that it was accepted by plaintiffs. The most that can be inferred is that it was such a promise as is implied when a grantee takes a conveyance with a recital therein that he shall pay the incumbrance on the property purchased. This is the most favorable view that can be taken for plaintiffs, in the absence of any showing that they accepted or relied upon such alleged promise. The liability of the grantee, with whom it exists, and in what forum it may be enforced, under such circumstances,

is a theme which has been most fruitful of discussion, and much difference of opinion, but which it is not deemed necessary to now review at length.

It has been mooted that such grantee is not liable to the mortgagee, either at law or in equity, because there is no privity between them; but it is held that the grantee's promise is made for the benefit of the mortgagor, who can enforce it, while the mortgagee cannot, until it appears that he accepted it; then the grantee becomes principal, the mortgagor his surety, and the mortgagee may maintain a personal action at law against the grantee for the debt,—but that the only way by which such relation and liability of the parties can be created and enforced at law is by the mutual agreement of the three parties. Shepherd v. May, 115 U. S. 511, 6 Sup. Ct. Rep. 119. No such agreement is shown in this case. But, whatever the rule may be at law, it seems now settled by the preponderance of authority in this country that the mortgagee may, without direct acceptance of the grantee's promise, maintain against him his equitable action. This upon the same principle that a creditor, in the collection of his debt, instead of proceeding against the surety, may avail himself of any equities or securities in the hands of, or contracts or promises made by, the principal, for the protection of his surety. So, here, when the defendant made its promises to assume the debt, it became the principal, A. & C. its sureties, and its promise an available asset or contract which plaintiffs, as creditors, can enforce by direct action against defendant. This promise, however, not being made to nor accepted by plaintiffs, so far as appears, no contract or privity exists between them and defendant company, and they can have no legal rights against it. Such is certainly the rule maintained by the supreme court. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494. Although this case was before referred to, in the ruling upon the first hearing of these questions, in support of the view then taken, plaintiffs' counsel still repeatedly insist in their briefs, and cite state authorities, as they say, ad nauseum, that a legal action may be pursued. In Keller v. Ashford the facts were that the grantee had accepted a deed containing a provision making it "subject, however, to certain incumbrances now resting thereon, payment of which is assumed, by said party of the second part;" and the court, upon page 620, 133 U. S., and page 496, 10 Sup. Ct. Rep., says:

"Upon the question whether the mortgagee could sue at law, there is no occasion to examine the conflicting decisions in the courts of the several states, because it is clearly settled in this court that he could not."

Counsel, in their last briefs, do not say this authority was before misconstrued, but simply claim the contrary, and cite state decisions in support of such claim. A clear understanding that this court aims to be governed by the authority of the supreme court and not by conflicting rulings of the state courts, may save much labor. Without further remark, it is held that plaintiffs cannot

maintain in this court their action in its present form, but, if it is not for other reasons barred, their pleadings must be reformed.

4. It only remains to determine the effect of the former action upon this, and let us not lose sight of the real question. It is not whether the mortgagee may not have a judgment against the grantee for the deficiency remaining after a foreclosure sale, the affirmative of which is so frequently asserted in general terms by counsel, but it is whether such judgment must be taken in the foreclosure proceedings, or may be in a subsequent, separate, distinct, action. These parties having all been in court, where plaintiffs had the right to take against defendant company what they now ask,—a deficiency judgment,—and having there waived, or at least neglected to demand, such right, ought they not to be now precluded? Upon general principles, this would be so. Their former action was in equity, which is a grave reason why all matters connected therewith should there have been determined, for it is the just rule of a court of chancery that, having charge of a cause, it will determine all issues, including legal rights and interests. That court does not tolerate a multiplicity of actions, where all pertinent issues can be disposed of in one. While aiming to mete out justice to all parties having any interest in the subject-matter, it also grants them rest from further litigation. Moreover, a judgment is a bar to another action between the same parties, not only as to those matters specifically determined by it, but also as to all those that might have been. It is clear that, in the former action, plaintiffs could, under the Idaho statute, to be hereinafter referred to, have had what they now ask. It was said by Mr. Justice Kent in La Guen v. Gouverneur, 1 Johns. Cas. 504, that:

"Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded."

So, here, if the plaintiffs did not avail themselves of the opportunity under their control, why should they not be forever precluded? But counsel repeatedly urge that this claim is not to be considered in connection with the former action; that it is a simple debt which defendant agreed to pay, and is entirely independent of that action, or what was involved in it; that such action is not to be considered at all, further than to learn what is left unpaid of the original debt; that the result of that action was simply to give defendant a credit on its debt, as you would indorse a credit upon any obligation, leaving open the right to sue for the balance. What was involved in and determined by that action? The court could not order the foreclosure of the mortgage without first finding the existence of a debt secured by it. The debt is the chief basis of the action. Without it, neither the mortgage can exist, nor suit on it be maintained. The debt must have been adjudicated, and upon proper evidence of its creation and existence, and

the debt now sued upon was a part of the same debt involved and considered before. No ipse dixit, that this is a separate claim, can divorce it from the original debt, as independent thereof, or from consideration, as not involved in the former action. Notwithstanding those general principles which generally prevent a multiplicity of actions, a different practice had, under the old rule, obtained in enforcing the collection of debts secured by mortgage. Under the common law the three separate actions of foreclosure, debt, and ejectment were allowed; and, independent of statute, a party could not unite with a foreclosure action a prayer for a deficiency judgment, but was compelled to pursue his remedy by two actions. This system has long been so abolished, in most jurisdictions, that a deficiency judgment may now be had in the foreclosure proceedings.

It would seem that under the rule, to prevent multiplicity of suits, a party should do in one action all the law permits; that under such statutes the deficiency judgment should be docketed in the foreclosure action; and while this seems almost the universal practice now, under those statutes, yet some of the states have held that separate actions may be maintained, but none that they must be. Counsel's query whether, in United States courts, they must not be separate, is answered in the negative by the ninety-second equity rule. Whether, under those state statutes which simply permit the entry of a deficiency judgment as a part of foreclosure proceedings, two separate actions may be maintained, or that litigants should be limited to one, is not, in my view, for determination here. Section 4520, Rev. St. Idaho, adopted from the Code of California, has moved a step beyond all others on this subject. It not only says that a judgment for a deficiency after sale under foreclosure may be docketed, but it also declares that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," which is followed by the direction that "in such action the court may" order the sale of the incumbered property, and if, upon return of the order, a deficiency exist, docket judgment therefor. This statute not only says there shall be but one action, but also that that one action shall be according to the provisions of the statute, and the steps to be taken in such action are there clearly defined. When it is borne in mind that all these remedial statutes were for the purpose of alleviating the expenses and annoyances of litigation, and that under some prior statutes of other states, permitting a full determination in one action, some of the courts still held that the prosecuting of two might continue, it would seem that it cannot be doubted that the legislature, through the provision that there can be but one action, designed to absolutely prevent conservative courts from permitting more. Such, I think, is the construction given this statute by the courts of California and Idaho, and their construction this court must follow. Bank v. Williams, (Idaho,) 23 Pac. Rep. 552; Ould v. Stoddard, 54 Cal. 614;

Bartlett v. Cottle, 63 Cal. 366; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. Rep. 609; Brown v. Willis, 67 Cal. 235, 7 Pac. Rep. 682; Hall v. Arnott, 80 Cal. 348, 22 Pac. Rep. 200; and Barbieri v. Ramelli, 84 Cal. 155, 23 Pac. Rep. 1086. Plaintiffs' counsel, in the citation of authorities, do so, apparently, regardless of the statutes under which they are made, and as they cite some of the above as supporting their view, a further notice of some of them seems demanded.

In 23 Pac. Rep. the defendant was the surety of the maker of a note, who, to secure him, gave to the payee a mortgage on realty. The payee then assigned the note and mortgage to the plaintiff, who brought an action against defendant for a personal judgment, The Idaho court dismissed the action, and, while the direct question here was not there involved, it was held the statute must be followed, and cited California decisions. In 54 Cal. it appears a personal judgment had been recovered in Ohio on a note secured by mortgage on realty in California, and execution returned nulla bona, whereupon the foreclosure action was commenced. The court clearly held that but one action could be permitted, and that the bringing of one is the waiver of the other; that the object of the statute is to avoid a multiplicity of suits, and thus to change the old rule allowing a suit of foreclosure, and a separate one on the debt. This case has not been overruled, but has since been referred to with approval by that court. In 64 Cal. 358, 30 Pac. Rep. 609, it is said that "under our Code an independent action at law cannot be maintained for a debt, whatever its form, secured by mortgage." But, without reviewing further the above-cited cases, it may be remarked that, while in none of them the facts are just as in this case, yet in all, whether it be a second action, or one for personal judgment, the same conclusion is reached,—that but one action can be had in such cases, which is that of foreclosure, with the right to docket therein any judgment for a deficiency after sale. Counsel cite Mauge v. Heringhi, 26 Cal. 577, but do not note the fact that it was an action upon a balance due after sale of pledged property pursuant to a common-law notice. Certainly, in such cases, action for deficiency could be had, for the simple reason that no action had been before had, and the court said that the action "is wholly unaffected" by the statute in question. Many citations are made by plaintiffs' counsel, including numerous Michigan cases; but, after careful examination, if any of them discussed or decided the question involved in this action, it is overlooked. Moreover, the Michigan statute under which all the decisions there were made only provides that "the court may decree payment of the balance of such debt remaining unsatisfied after the sale of the mortgaged premises," and has not the provision of our statute,—that there can be but one action. It is unnecessary to consider the effect of the pendency in the supreme court of the state of the foreclosure action, for it must be held the plaintiffs cannot maintain this action. It is therefore ordered that the complaint be dismissed.

In re O'NEAL et al.

(Circuit Court, N. D. Alabama, S. D. June 19, 1893.)

OFFICE AND OFFICERS—REMOVAL—POWER OF PRESIDENT—PRESUMPTIONS.

The removal of a district attorney and marshal was ordered by the president during a vacation of the senate, and before the expiration of the four-years term for which they were appointed, but they refused to surrender their offices. Subsequently, on the assembling of the district court, the new appointees to these positions presented commissions, signed by the president and attorney general, and demanded recognition. *Held*, that the court could not in this informal manner pass upon the question whether the president has power, in vacation of the senate, to remove officers whose terms have not expired, but, until the question was determined by a direct proceeding for that purpose, would presume that the executive had acted within his constitutional power, and would recognize the new appointees.

Recently, during the vacation of the senate, the president removed Levi E. Parsons, Jr., and A. R. Nininger, respectively district attorney and marshal for the northern district of Alabama, and issued commissions to Emmett O'Neal and J. V. Musgrove as their successors. The former declined to surrender their offices, and, the district court having convened pursuant to an adjournment of the March term, the question arose as to whom it would recognize as the proper incumbents.

J. A. W. Smith, for L. E. Parsons.
D. D. Shelby, for A. R. Nininger.
Thos. R. Roulhac, for Emmett O'Neal.
Loudon & Tillman, for J. V. Musgrove.

BRUCE, District Judge, (orally.) The conclusion seems to be a clear one. The question has been argued, to some extent at least, as if it were whether, in cases like these, the appointment being for four years, the president of the United States has power, in vacation of the senate, to remove an officer before his four years have expired. That question is not before the court now. It could be made only in some formal proceedings, recognized by law as a mode in which such questions could be raised and decided. This is not such a case. It is not even a motion; nothing like a quo warranto proceeding. This is the day to which the March term of this court was adjourned. Causes on the criminal docket are to be called for trial, and the judge of the court must recognize some one as entitled to speak for the United States, and some one to act as the executive officer of the court. Mr. O'Neal and Mr. Musgrove present commissions respectively as district attorney and marshal, signed by the president of the United States and the attorney general of the United States, and under the seal of the department of justice.

Is any effect to be given to these commissions? And are they now, in this hearing, to be held void, on the ground, as it is claimed, that the condition of the law on the subject is such that the president of the United States has no power to make these appointments?

Courts must proceed in an ordinary manner, and will not presume that the departments of the government will act otherwise than in accordance with their powers and duties. Acts of the lawmaking power of the government are presumed to be within the constitutional powers of the congress until the contrary is shown to the courts in some formal and proper mode recognized by the law of proceedings in the courts. It is not less so in regard to the executive department of the government, and on this hearing it must be presumed that the president acted, in making these appointments, in accordance with the constitutions and laws. The department of justice is a department of the government of the United States recognized by law, and the attorney general of the United States is at the head of the department, and district attorneys and the United States marshals are under his order and direction. How can it be maintained that the district attorney and marshal are in the actual possession of the offices they claim when they are acting in opposition to the orders and directions of the attorney general of the United States? The new appointees to the offices of district attorney and marshal whose names are in the commissions they bear and present here are recognized on this hearing as the persons entitled to represent the United States in their respective offices. Other questions have been argued, but it is not deemed necessary to discuss them.

AMERICAN STEAM BOILER INS. CO. v. CHICAGO SUGAR REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1892.)

No. 34.

1. INSURANCE AGAINST EXPLOSIONS—CONSTRUCTION OF POLICY.
   A steam boiler insurance company that had no power to insure against fire issued a policy insuring "against explosion and accident and against loss or damage resulting therefrom." On the back of the policy was a covenant that no claim should be made under the policy "for any loss or damage by fire resulting from any cause whatever." *Held*, that the company was not liable for loss caused by fire.
2. SAME—LOSS BY FIRE.
   A small fire broke out in the insured building, and continued for three days, though apparently extinguished each day. On the third day efforts to put out the fire resulted in bringing it in contact with a cloud of starch dust, which ignited and exploded, demolishing the building, which then burned up. *Held*, that the insurance company was not liable, since the explosion was merely an incident of the fire. 48 Fed. Rep. 198, reversed.

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

Action by the Chicago Sugar Refining Company against the American Steam Boiler Insurance Company upon a policy of insurance. Plaintiff obtained judgment. 48 Fed. Rep. 198. Defendant brings error. Reversed.

Statement by BUNN, District Judge.

This action is brought upon a policy of insurance issued by the plaintiff in error to the defendant in error on October 18, 1889. The loss for which indemnity was claimed under the policy involved a substantial destruction of the buildings and machinery constituting the sugar refinery of the defendant company in Chicago. On the day the policy in suit was issued the sugar refining company held two other policies in the American Steam Boiler Company, which were surrendered upon the issuing of the one in suit. The facts in the case appear mainly from a stipulation of the parties. Other evidence was taken, but the facts depend principally upon the stipulation, and are undisputed. A jury was waived, and the case tried by the court, which handed down its findings in favor of the defendant in error on November 23, 1891, assessing its damages at the sum of $44,241.09, for which sum judgment was entered.

Only the conclusions of law are reviewable in this court. The essential facts as they appear from the stipulation and from the findings of the court are as follows: The American Steam Boiler Insurance Company was incorporated November 5, 1883, under an act of the state of New York passed January 24, 1853, and certain other acts amendatory thereof. On the 18th day of October, 1889, it issued to the defendant in error, the Chicago Sugar Refining Company, a policy as follows:

"PERFECTED BLANKET CONTRACT POLICY.

"Policy No. A15,504.
"Expires October 17, 1890.
"Location, Chicago, Ill.

"American Steam Boiler Insurance Company,
of New York.

"Servimus Sevare.

"Principal Offices:

"Equitable Building, 120 Broadway, New York.

"Cash Capital, $500,000.00.

"Name of Assured, Chicago Sugar Refining Co.
"Amount Insured, $250,000.
"Premium, $1,250 payable upon delivery of policy, by check to order of the Company.

"Form 301.

"Agents.

"Thatcher & Voight,
"Mgrs. Western Dep't,
"Phoenix Building,
"Chicago.

"Cash Capital $500,000.00.

"No. A15,504. $250,000.

"American Steam Boiler Insurance Company,
of New York.

"In consideration of the application herefor, and the sum of surrender of Pols. 65,326 and 65,327 and four hundred and fifty dollars, The American Steam Boiler Insurance Company do insure Chicago Sugar Refining Co. and their legal representatives to the amount of Two Hundred and Fifty Thousand Dollars, as follows, viz:

"Perfected Blanket Contract No. 300.

"Approved by the Insurance Department of the State of New York, Sept. 16, 1889. Copyrighted, 1889, by The American Steam Boiler Insurance Company.

"Upon the 21 steam boilers and 34 filters, tanks, converters, etc., on the premises occupied by the assured as Sugar Refinery, situate in the City of Chicago, State of Illinois, and upon the steam pipes, the 9 engines, the shafting, belting, hangers, pulleys and the two elevators connected therewith and

operated thereby, against explosion and accident, and against loss or damage resulting therefrom, to the property, real and personal, of the assured, and to all property of other persons for which the assured may be liable.

"And against accidental personal injury and loss of human life, for which injury or loss of life the assured may be liable, to his employes or to any other persons whomsoever, and which shall be caused by said boilers or any machinery of whatever kind, connected therewith or operated thereby.

"But it is understood:

"That this company shall not be liable for any loss unless amounting to One Hundred Dollars or more, except for a loss resulting from injury to person; and

"That this company's entire liability for the injury or loss of life of any one person shall in no event exceed $5,000; and

"That this is a policy of Indemnity only.

"And this policy shall only cover losses sustained by the assured as above specified, between the seventeenth day of October, eighteen hundred and eighty-nine, to the seventeenth day of October, eighteen hundred and ninety, at 12 o'clock, noon, to be paid at their offices in the City of New York, within ten days after the receipt of proof of loss has been duly verified by the assured and accepted by the company, such indemnity payment being subject to the covenants and agreements herein; and this policy is issued and accepted upon the condition that all the provisions printed upon the back of this policy are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

"In Witness Whereof, The American Steam Boiler Insurance Company, of New York, have caused these presents to be signed by their President and attested by their Secretary, in [Seal] the City of New York, but shall not be valid nor will any indorsement or agreement be binding unless countersigned by the duly authorized and regularly commissioned managers for Western Department.

"Wm. K. Lothrop, President.
"V. R. Schenck, Secretary.

"Countersigned at Chicago, Illinois, this eighteenth day of October, 1889.
"Thatcher & Voight, Managers."

On the back of the policy, among other covenants and conditions, all made a part of the policy, were the following, which are the only ones material to this case:

"(2) That at all reasonable times the inspectors of this company shall have access to said boiler or boilers, and the said engines, elevators, and machinery connected therewith, on which safety depends; and ample facilities shall be afforded, whenever requested, to said inspectors, for a thorough examination of said boilers, and for the indicating of the said engines, and for the inspection of the said elevators and machinery."

"(3) That by the term 'explosion,' as used in this policy, is to be understood a sudden and substantial rupture of the shell or flues of the boiler or boilers, caused by the action of steam, and no claim shall be made under this policy for any explosion or loss caused by the burning of the building or steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever; nor for any loss or damage which may occur during any invasion, insurrection, riot, or civil or military commotion, or by theft or robbery, or by neglect of assured to use all possible means to save and preserve the property for further loss or damage after the explosion or accident has occurred."

The following facts were found by the court in regard to the origin of the disaster:

"That on the 27th day of March, 1890, an explosion, accident, or disaster, or whatever name may properly be applied, occurred upon the premises referred to in the policy, the result of which was a substantial destruction of a portion of the machinery, boilers, engines, filters, tanks, converters, etc., described in the policy, and of the buildings in which they were contained,

and in loss of life and injury to various persons working in and about the premises, who were employes of the plaintiff."

That the facts as to the origin of the disaster and its cause are as follows:

"The premises involved were used by the plaintiff in the manufacture of starch and dextrine, and consisted of two buildings, viz. the mill house, a one-story brick building, in dimensions about twenty-five feet wide by forty feet long, and the drying house, a two-story brick building, about two hundred feet long and fifty feet wide, the latter containing two dextrine kilns, in which prepared starch was exposed to steam heat in oven-like rooms about eight feet high, eight feet in depth, and eighteen feet wide, bricked in on the sides and top and closed in front by an iron door. In these rooms or kilns were steam pipes connecting with steam boilers, by means of which the steam heat was made available in the kilns or rooms in the process of manufacturing dextrine. High temperature is necessary to the success of the process."

"That on the 25th of March, 1890, a fire was observed by the employes of the plaintiff, confined to one of the kilns above mentioned. The fire was extinguished by the workmen, by directing upon it a stream of water through a two and one-half inch hose. The next day, March 26th, a small fire was again observed and extinguished. Afterwards, on this day, an endeavor was made to clean the kiln of the charred and wet mass or crust formed by the charred starch and the water which had been thrown into the kiln on the 25th, but it was not thoroughly removed, some of the crust having been left in the kiln under the steam pipes, and especially in the back part of the kiln, where, on account of its construction, it could not be reached by the boy who was sent in to clean it out. On the 27th it was again charged with fresh starch. Late in the afternoon of this day the foreman of the dextrine works reported to Dr. Behr, the superintendent of the plaintiff, that a blaze was observed in the same kiln where the flames had appeared on the 25th and 26th. Dr. Behr provided himself with a Babcock extinguisher, and, the door of the kiln being open, endeavored to put out the flames by directing upon it the contents of the extinguisher. He at first succeeded, but the flames immediately developed further back in the kiln, and in his endeavors to extinguish that the stream from the extinguisher came in contact with the starch, thereby producing a cloud of starch dust, similar to what is known as mill dust, which coming in contact with the flames, ignited, and produced an explosion. Through the open door of the kiln, in front of which Dr. Behr was standing, the blaze was communicated to the mill dust in the outer part of the buildings, which also ignited and exploded. Dr. Behr was thrown back by the force of the explosion, somewhat burned and injured, and for a time rendered unconscious. When he recovered consciousness he was able to free himself from the debris about him. The result of the accident or explosion or by whatever other name the fact may be designated was a substantial demolition of the two buildings above referred to, and the machinery, engines, and their connections contained in the two buildings. In addition to this, several persons in the employment of the plaintiff were killed, and others were injured in a greater or less degree."

"The blaze referred to in this finding was caused by the burning of the charred starch and crust referred to above. The blaze was a clear, bright flame, and was quite extensive, and burned strongly, being from six to eight inches high and extending under the pipes to the back of the kiln. There was no contact between the pipes and the charred starch or crust referred to. The steam pipes leading into the kiln were not defective or broken, nor was there a greater degree of heat caused by the pipes than was necessary and usual for the proper use of the kiln. The starch that was found to be blazing had been allowed to accumulate on the floor for some time, and had gradually become charred. Charred starch is combustible. The disaster was caused by the ignition of the inflammable gas or mill dust in the drying house."

Gregory, Booth & Harlan, for plaintiff in error.

John N. Jewett, for defendant in error.

Before HARLAN, Circuit Justice, and WOODS, Circuit Judge, and BUNN, District Judge.

BUNN, District Judge, after stating the facts as above reported, delivered the opinion of the court.

The circuit court found as a conclusion that the explosion was the cause of the damage, and gave judgment in favor of the plaintiff, now the defendant in error. Counsel for plaintiff in error contest this conclusion, and, in opposition to it, make two contentions:

First. That if the disaster was caused by an accident in the general sense of that term, it was not such an accident as was insured against by the policy; that the word "accident," as it occurs in the policy, is used subjectively, the same as the word "explosion," and only covers accidents in the machinery, due to its own imperfections; and that, if the damage can be said to have resulted from accident at all, it is not one resulting from any defect in the machinery, and is not therefore fairly within the purview of the policy.

Second. That the loss was properly a fire loss, and, as such, not insured against by the policy.

According to the view this court has taken of the last contention, it is not necessary to consider the first one. The insurance company issuing the policy in suit was a boiler insurance company. Their charter did not authorize them to insure against loss by fire. The law of New York under which the company was organized did not authorize nor contemplate insurance against loss by fire. The premium paid was not the premium which would have been demanded by a fire insurance company. The premium of one-half of 1 per cent. was no doubt a much smaller premium than would have been required for fire insurance, and was made commensurate with the risk taken, which, in the language of the policy, was that of "explosion and accident, and against loss or damage resulting therefrom." This being the case, the policy should not be construed as including an indemnity against loss by fire, unless such a construction becomes necessary. Certainly, a construction which would make the action of the company in issuing the policy ultra vires, should not be sought or adopted if any other reasonable construction lies close at hand, and is in accordance with the plain and obvious meaning of the language used, and the one which must have been contemplated by the parties themselves. When we look at the language of the policy, it is quite apparent that the parties not only did not contemplate or provide for such a risk, but, on the contrary, provided against it in language that is comprehensive and unmistakable. The third condition or covenant on the back of the policy contains this provision, which is a part of the contract of the parties:

"And no claim shall be made under this policy for any explosion or loss caused by the burning of the building or steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever."

It must be admitted that stronger or more comprehensive language could not have been chosen to show that there was no indemnity against loss by fire contemplated. The meaning and force of it is sought to be broken by counsel for defendant in error by saying that it is inconsistent with the main provision for insurance in the body of the policy, and therefore should not be given effect,—in analogy to a principle in the law of real estate that, when a condition in a deed is inconsistent with the grant itself, it is void. But it seems evident that this principle can have no application to this case. In this case, no doubt, the true principle of construction is that all parts of the policy should be considered and construed together in order to arrive at the true intent of the parties; but, aside from this, we can discover no inconsistency between the provisions in the body of the policy and this condition. The policy nowhere professes to insure against loss by fire. The company is a boiler insurance company, and it undertakes in the policy to insure against "explosion and accident," and there is a condition on the back of the policy which limits the term "'explosion' to mean only a sudden and substantial rupture" of the shell or flues of the boiler or boilers, caused by the action of steam. It is not contended that this condition is void, though, no doubt, it qualifies and limits materially the language of the provision in the body of the policy. Insurance against fire is perhaps the most common and important insurance indemnity known to business. It would be very unusual in a fire insurance policy if nothing were said in the indemnity clause of the policy directly and in terms about insurance against loss by fire. We suppose it might be possible to draw such a policy, but it would be, in a business way, very unusual. Now, it is manifest there is no provision in terms in this policy for insurance against fire. If it is there at all, it must rest upon inference and construction, which ought not to be in an insurance so common as that against fire. It was, no doubt, to guard against any such possible construction or inference that the express provision was put in against indemnity for "any loss or damage by fire resulting from any cause whatever." There is no inconsistency between this provision and the provision for insurance in the body of the policy, which, without this, should not be construed as an indemnity against fire. The putting in of this clause leaves little room for construction. Its import is too obvious and necessary. If the term "accident," as used in the policy, means accidents generally, those produced from outside causes as well as those resulting from defective machinery, still the accident of fire must be excepted by force of this condition of the policy. That the disaster which resulted in the destruction of the buildings and machinery was caused by fire is apparent from the evidence, and from the finding of facts by the court. The controlling, efficient cause was fire. The court finds that "the disaster was caused by the ignition of the inflammable gas or mill dust in the drying house." And the evidence fully supports this finding. The record shows that there was a fire in the kiln on

three separate days. On the first day it had extended to the top of the kiln. It was a dangerous fire, and caused the attendants much trouble. When they thought they had succeeded in putting it out, they would find it suddenly starting up again. The finding of the court shows that "the blaze was a clear, bright flame, and was quite extensive, and burned strongly, being from six to eight inches high, and extending under the pipes to the back of the kiln. * * *" Dr. Behr, a chemist, and the superintendent of the refinery, says:

"We were always afraid of fire. As it happened, the dust caught fire, and the explanation of that is that such fine powders, if you powder it up fine enough, have the property of catching fire."

And he further says:

"Hobbold came to me, and said, 'There is a fire in the dextrine kiln.' Now, generally, the first impulse when there is a fire is to put it out. I said, 'Let's go there and put it out before it catches any further.' * * * Before I had a chance to collect my mind or close the door [of the kiln] I got a kind of a flash, and that is all I know. * * * Such dust will catch fire, and burn like coal gas and air. * * * It takes very little to make this mixture of starch and air combustible. Just what happened as it caught fire I do not know. * * * After having had the experience, I can say now that I could have prevented the explosion if I hadn't opened the kiln. If the fire could have been confined to the kiln only, the damage would have been slight; there would not have been any explosion."

Again, he says:

"It [the blaze] was so long and big that it could not have been created by a piece of wood. A piece of wood would have no business there."

Witness Hobbold, one of the attendants, testifies:

"After we opened the door there was a flame. The fire reached to a flame between the time when I went up to the office and came down again on the bottom of the kiln. * * * The fire was in the rear; * * * in the rear of the steam pipes, and underneath; underneath the steam pipes on the floor; on the foundation. The crust that was packed tight from that 26th day that night was what was burning. The water got on there, and made a regular, you may say, pancake, and the heat dried it, and the crust got tight to the railing there, and laid underneath it there, and fire burned that crust. There was no dirt burning; only these crusts were burning,—the paste made out of the dextrine and the water. When I got out the first row, we moved up the second, and Dr. Behr took hold of the hose then, and got into the second, and probably, or so it seems to me, he must have got a little too high or too low, and some water got on top, and threw some of this dextrine off, and raised a dust, and that stuff struck the fire below, and that brought the explosion. * * * On the night of the 25th I was called at 11 o'clock. I was told the fire was there at 9 o'clock. I believe the engines and firemen put the fire out on the night of the 25th. On the morning of the 26th there was one crust that was burning. I saw that crust. I took a pail,—a tin pail,—and got water on that crust, and drowned it. * * * The pans were taken out on the morning of the 27th. They were not spoiled. It was cooked all right, but the fire had been all over the kiln until [as far as] the top; and on top we found trays that was burnt, and there was nothing left but a little bit of coals,—what you get after you burn paper,—on the top of the kiln."

Again, Dr. Behr testifies:

"When I opened the door there was not a sudden burst of flame. The flame was like a hard coal fire burning in a furnace: just a little flickering flame; not like charcoal. It was a clear flame. Two days before there was a fire there, and we certainly thought that the water would do away with all

tendency to further catching fire. It was just like a paste, and I got it all over my boots. That was cleaned out. The accumulation that was left was very little, but it was enough to catch fire. It must have come from the spilling out of the pans as they were shoved in there. The starch is put in there in a dry shape as powder. It does not become hard when heated. It can be changed into a dextrine at a high temperature, like they do it in Europe, and quickly changed; or by the use of low temperature, or by steam, like we do it, and take more time. After having had the experience, I can say now I could have prevented the explosion if I hadn't opened the kiln. If the fire could have been confined to the kiln only, the damage would have been slight. There would not have been any explosion. Hobbold notified me of the fire about six o'clock on the twenty-seventh of March, and I came down to the dextrine room, and had the kilns opened. There was a fire underneath, five or six or eight inches high, and underneath the coils of the pipes. Hobbold had played the stream from the extinguisher possibly about half a minute or so before I became unconscious. When I first noticed the fire under the pipes in the kiln, I directed Hobbold to put the water on the fire with the Babcock fire extinguisher. We had had an experience two days before in putting out a fire in that manner. I was not there. It was in the night, and they had put it out readily. I thought the easiest way to put it out was with the Babcock extinguisher. The explosion in the dextrine kiln originated from the fire. It was not sufficient to cause the destruction; but it was communicated then to the room above, and caused an explosion and destruction of the building. There must have been a second explosion in the rooms up stairs."

From the testimony and the findings it seems quite clear that the proximate and legal cause of the disaster was this persistent and dangerous fire, originating in the kilns, and progressing to a final destruction of the buildings, and that the explosion was a consequence of the fire, marking a stage in its progress. After the explosion the testimony shows that the fire continued, destroying the debris of the building; so that the entire result is traceable to the fire in the kilns as the efficient cause. There is nothing more common, when a fire is once in progress, than for explosions to take place as a result of the fire, and as a part of it. These explosions may add very materially to the destruction of property, but it would be to lose sight of a plain principle to attribute the loss in such cases to the explosion as the proximate cause. The explosion may be the proximate cause in the literal sense of its being the next, nearest, or immediate cause, but not in the legal sense of being the real and efficient cause, where there is a concatenation of causes and effects, each successive effect becoming in turn a cause. The rule applicable here is the one laid down by Mr. Justice Strong in Insurance Co. v. Boon, 95 U. S. 117. "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." Here the fire was the cause of the explosion, which played its full share in producing the wreck, the fire again getting in its work after the explosion took place. As was said by Mr. Justice Cushing in the leading case of Scripture v. Insurance Co., 10 Cush. 356:

"If, then, a combustible substance in the process of combustion produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff."

Nor is it any answer to say that the explosion would not have happened if the fire had been better managed, and the door of the kiln been kept closed. The attendants, perhaps, did not choose the best and safest method of extinguishing the flames, but they acted in good faith, and thought they were doing the best that could be done. Suppose a fire had caught in any other place inside the building, and in trying to extinguish it an attendant had, in the excitement of the moment, caught up a bucket of crude petroleum, supposing it to be water, and had cast the contents upon the flames, and an explosion had resulted, destroying the building, there could be no question in such a case but that a fire insurance company would be liable as for a loss by fire, although it might be reasoned that, but for such mismanagement, the fire might have been subdued. This case is not different in principle from the one supposed. In either the controlling cause of the loss is the fire. If the explosion was the immediate cause of the greater damage, the fire was the cause of the explosion, the cause of the cause. It will frequently happen in the case of a fire that the greater part of the damage is caused by water applied in efforts to extinguish the flames; yet it has always been held that the legal and efficient cause of such damage is the fire, and insurers against fire are held for it. The rule laid down by the court in Scripture v. Insurance Co. is the one that has been generally followed, and is applicable here, namely:

"That where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion or both combined. In either case the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire."

This principle has been frequently, and we think generally, acted upon since. It governed in the case of Washburn v. Insurance Co., 2 Fed. Rep. 304, decided by Judge Swing. To the same effect are Washburn v. Insurance Co., Id. 633, 2 Flip. 664, decided by Mr Justice Swayne of the supreme court; Washburn v. Artisans' Ins. Co., Same v. Pennsylvania Ins. Co., (Cir. Ct. W. D. Pa.) 9 Pittsb. Leg. J. (N. S.) 55. These decisions, though made in the circuit courts, have never been overruled, and are sound in principle. The same principle is recognized and adopted by the best text writers on the subject. Philips, in his work on Insurance, (section 1097,) says "the maxim 'causa proxima spectatur,'" affords no help in these cases, but in fact is fallacious; for, if two causes conspire, and one

must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearest in place or time to the consummation of the catastrophe. And at section 1132, he says: "In case of the occurrence of different causes to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." The rule is well stated by the supreme court of Michigan in Brady v. Insurance Co., 11 Mich. 425. They say:

"This contract of insurance is one of indemnity against loss by fire, and the whole loss of which the fire is the actual cause is within its terms to the extent of the indemnity promised. Much is said by judges of the proximate and remote cause of the loss, and the distinction was very elaborately discussed by counsel in the present case; but, after careful consideration, I must confess that to my mind the word 'proximate' is unfortunately used, and serves often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the actual cause of the loss, whether operating directly or by putting intervening agencies—the operation of which could not be reasonably avoided—in motion, by which the loss is produced, is the cause to which such loss should be attributed. If, in the effort to extinguish fire, property is damaged or destroyed by water, the water may be said to be the proximate cause of the injury or destruction; yet in no just sense can it be said to be the actual cause. That was the fire. The fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided."

In Insurance Co. v. Foote, 22 Ohio St. 340, the same principle is carried out. There the action was upon a fire insurance policy which provided that the company should not be liable for any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal oil, etc. It appeared that an explosive mixture of whisky vapor and atmosphere had come in contact with the flame of a gas jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the property. It was justly held that the explosion was the cause of the loss, and that the company was not liable. The court say on page 349 that:

"It is true that the explosion was caused by a burning gas jet, but that was not such a fire, as contemplated by the parties, as the peril insured against. The gas jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection, although it was a possible means of putting such destructive force in motion; it was no more the peril insured against than a friction match in the pocket of an incendiary."

This was but carrying out the principle adopted in all the cases that we must look to the efficient or proximate cause to determine the responsibility for the disaster. And on page 351 the court say:

"That a loss other than by combustion, resulting from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only, is a doctrine not only reasonable in itself, but is sustained by authority."

See, also, Waters v. Insurance Co., 11 Pet. 225, opinion by Judge Story; Scripture v. Insurance Co., 10 Cush. 357; Millaudon v. Insurance Co., 4 La. Ann. 15; Insurance Co. v. Corlies, 21 Wend. 367.

The conclusion we have reached is that the policy sued upon contains no indemnity against loss by fire, and that the damage to the premises of the defendant in error was caused by fire, and that the loss was properly a fire loss. Judgment reversed, and the cause remanded, with directions to the circuit court to enter judgment of no cause of action, and for costs in favor of the plaintiff in error.

Mr. Justice HARLAN is not present, but he participated in the hearing and the decision of this case, and concurs in this opinion.

DALBEATTIE STEAMSHIP CO., Limited, v. CARD.

(District Court, E. D. South Carolina. July 14, 1893.)

SHIPPING—CHARTER PARTY—CANCELLATION.

A charter party provided for cancellation by the charterer, "should the steamer not arrive at her loading port and be ready in all respects for this charter to commence on or before February 15th, 1892." It was further provided that the charter should not commence until the morning after the steamer was ready to receive cargo at the place of loading, and customary written notice thereof had been given before noon on the day the steamer was ready. On February 13, 1892, the steamer entered the port of Charleston, and went to quarantine. On the forenoon of that day her master reported her arrival to the charterer, who answered that the master had reported too late, and the charter was canceled. On the afternoon of the 13th the steamer came up to the city, and was assigned a berth by a subcharterer, with the knowledge of the charterer. There she remained on the 14th (Sunday) and 15th. On the forenoon of the 15th her master again notified the charterer that he was ready. *Held*, that the charterer had no right to cancel the charter.

In Admiralty. Libel by the Dalbeattie Steamship Company, Limited, against H. St. Julian Card, doing business under name and style of Henry Card & Son, for breach of charter party. Decree for libelant.

Bryan & Bryan, for libelant.
J. N. Nathans, for respondent.

SIMONTON, District Judge. The steamship Dalbeattie, under charter to Henry Card & Son, entered the port of Charleston 13th February, 1892, in the forenoon. She went to the quarantine station, about two miles from the city. On the morning of 13th February, 1892, in the forenoon, her master, in person, reported her arrival to Henry Card & Son, charterers, and to the East Shore Terminal Company. He had been informed by letter that his vessel had been subchartered to that company. The agent of the company referred him to Henry Card & Son for an answer to his notice. The answer, in effect, was that he had reported too late, and that the charter was canceled. On the afternoon of 13th February, at about 4 o'clock, the Dalbeattie came up to the city

of Charleston, and her master asked for his berth, which, under the charter party, was to be selected by the charterer. He was assigned a berth abreast of the wharves of the East Shore Terminal Company. This was done by this company, with the knowledge and assent of the charterer. She remained in this berth thenceforward, through that afternoon and the next day, (14th,) which was Sunday, and on Monday. On Monday, (15th,) before noon, the master of the Dalbeattie again notified the charterer that he was ready. His notification was disregarded. The charterer insisted that the charter was canceled. Freights having fallen, the master of the Dalbeattie was compelled to content himself with much lower freight engagement with another shipping merchant, and brings this action against Henry Card & Son for his loss.

This case is one in which the respondent stands on his strict legal right. There is no room for sentiment. If he is correct, his right must be accorded to him. His charter party is dated 13th January, 1892. Such is the ingenuity of the human mind that questions of a variety almost infinite can arise in construing the same words under varying circumstances. The question for us to decide is, did this steamer arrive at this port, and report herself, within the time prescribed by the charter party? and thus did the condition of things arise which authorized the charterer to cancel the charter party? The words are:

"Should the steamer not arrive at her loading port and be ready in all respects for this charter to commence on or before February 15th, 1892, the charterer may cancel the charter."

We are to construe these words, "for this charter to commence," and the controlling authority in construing them is the instrument itself. The use of the same words in other charters, and the construction courts have given them, aid us. The instrument itself, if it speaks, controls us. The clause of this charter party immediately preceding the clause just quoted says:

"It is agreed that this charter shall not commence until the morning after the steamer is ready to receive cargo at the place of loading, all of her holds being cleared and clean swept, and customary written notice thereof is given to the charterers or their agent, and such notice must be given before noon on the day the steamer is ready."

So the charter does not commence until her arrival at the place of loading,—that is to say, "Charleston, S. C., or as near thereto as she can safely get,"—and until 24 hours after she has given written notice of such arrival, and of her readiness to receive cargo, by reason of all of her holds being cleared and clean swept, and the charter must commence on or before 15th February, 1892. If we accept the construction that the words, "the charter will commence," apply to the charter itself, and were not simply intended to fix the beginning of the lay days, as was the construction in Fearing v. Cheeseman, 3 Cliff. 96, then the receipt of the notice did not give to the charterer the right at once and thereupon to begin loading. That right did not begin until 24 hours afterwards, and consequently this last was the period fixed for the readiness of the steamer to receive cargo. In other words, the charter did not

contemplate that she must be ready to receive cargo at the date of the notice, but 24 hours afterwards. This appears from another part of the charter party. The ship had to report on her arrival, but she must load at such wharf or dock as the charterers should select. So, necessarily, at the time of reporting, she could not be in the place at which she was to load, and so be ready to receive cargo, but was compelled to remain in the stream, or select a dock at her peril. This notice of 24 hours was intended to prevent the charterer from being taken by surprise. He had to select his dock, and prepare his cargo. The time was given him so that he should not incur demurrage. Now, it is true that, when he reported, the master mentioned that his ship was at quarantine. But in the same breath he stated that she was being fumigated, and would be up after noon. She did in fact come up, with the knowledge of Card & Son and the East Shore Terminal Company, was at a berth selected by them that afternoon, spent Sunday there, and at daylight on the morning of 15th was ready, in all respects, for a cargo. To hold that this charter was open for cancellation, under these circumstances, would be contrary to the broad principles of the civil and maritime law.

Let the amount of damage be computed by the clerk, and a decree entered for this sum and costs to libelant.

BOOYE v. L'ENGLE.

(District Court, D. New Jersey. June 20, 1893.)

1. TOWAGE—NEGLIGENCE OF TUG—PASSING DRAWBRIDGES AT NIGHT.
   A schooner towed by a tug down the St. Johns river, Fla., collided with the piers of a railroad bridge, through the draw of which the tug was taking her, on a dark night. On the previous day the master of the tug, in a conversation with the master of the schooner, had agreed that it was dangerous to tow through a draw at night, and for that reason had waited over night before starting on the voyage, in order to avoid passing after dark another bridge, which lay near the beginning of the voyage. Many experts also testified that towing through a drawbridge at night was not warranted by usage. *Held*, that the tug was guilty of negligence, and liable for the damages.
2. SAME—LONG HAWSER.
   It is negligence for a tug to tow a vessel through the draw of a river bridge with a hawser of 35 fathoms or more.
3. SAME.
   It is negligence for a tug towing a vessel on a long hawser to attempt to take her through the draw of a river bridge on a course diagonal to the draw.

In Admiralty. Libel by Japhet T. Booye, master of the schooner Ida C. Schoolcraft, against John C. L'Engle, owner of the tug R. L. Maybe, to recover for negligent towage. Decree for libelant.

Curtis Tilton and Henry R. Edmunds, for libelant.
Call & Adams and Goodrich, Deady & Goodrich, for respondent.

GREEN, District Judge. The libel in this cause was filed to recover from the respondent the amount of damages sustained by the schooner Ida C. Schoolcraft by coming into collision with the draw pier of the railroad bridge crossing the river St. Johns, at Jacksonville, Fla., while being towed by the respondent's tug. It appears that on the 19th of February, 1890, the Schoolcraft was lying at Palatka, Fla., having on board about 250,000 feet of lumber. She was destined to Boston, Mass. It was necessary that she should be towed down the St. Johns river, to the open sea, from Palatka; and for that purpose her master made a contract with respondent in this case, John C. L'Engle, for such towage. Upon the river St. Johns, between Palatka and the sea, there are two drawbridges,—one at Palatka, and the other at Jacksonville. It appears from the evidence in this case that the respondent dispatched the tug R. L. Maybe to Palatka for the purpose of towing the Schoolcraft down the river. The tug arrived at Palatka between 8 and 9 o'clock at night, and her master was desirous to commence the towing immediately, but after a conversation with the master of the Schoolcraft about the safety and prudence of towing through the drawbridges at night, it was agreed between them that the tug should not start with the schooner in tow until daylight the next morning. Passing the drawbridge at Palatka safely the next morning, they arrived near the railroad bridge at Jacksonville about 8 or 9 o'clock in the evening of the same day. The night was very dark, and the tide was ebb. In passing through the draw of this railroad bridge the schooner struck the draw pier, and was damaged to the extent of about $4,000, as it is alleged. It is to recover this sum, with interest, that this libel is filed.

The libelant claims that the injury sustained was solely the result of the negligence of the tug, and insists, in the first place, that the attempt to tow the schooner through the draw of the railroad bridge at Jacksonville, after night had fallen, was a direct and positive breach of the towage contract. But I am unable to find, after a close examination of the testimony, evidence to justify this contention of the libelant. As has already been stated, there was a conversation on board the Schoolcraft, between the captain of the tug Maybe and the master of the schooner, about the prudence of towing through the bridges in question after night, but I think it quite clear that such conversation had no relation to a towage contract. That contract, I think the facts show, must have been made previously to the arrival of the Maybe at Palatka, for it appears that the captain of the Schoolcraft was surprised when he found that his vessel was to be towed by the Maybe, having expected to be taken down the river by another boat, and was annoyed somewhat that the tug which was to tow him should have been so late in arriving at Palatka; her arrival being so late, in fact, that he had given her up. If he was expecting a tug to tow him down the river, and especially if he was expecting a different tug than the Maybe to do the towing, it is quite evi-

dent that the arrangement for the towing must have been made previously to the arrival of the Maybe at Palatka. If the contract for towing had already been made, the conversation between the captain of the Maybe and the captain of the Schoolcraft could not in any wise change or alter or add to that contract. I cannot find, anywhere in the cause, testimony which satisfies me that the conversation on board the Schoolcraft, between these two masters, amounted to the making of a new contract, or was intended to be an alteration of one already made before. I cannot, therefore, assent to this insistment that there was a deviation from the towage contract. But the conversation referred to becomes very important in view of another charge made against the tug Maybe, and which concerns itself with the prudence with which that tug was managed. That conversation, as given in the testimony, was as follows:

"Question. Did you have any conversation that evening with the captain of the tug Maybe about towing your vessel down through the bridges? Answer. Yes, sir; we had a conversation. Q. Where was the conversation held? A. In the cabin. Q. Of your vessel? A. Yes, sir. Q. What was the conversation? A. I said to him that I did not think it was prudent to tow the vessel down through the bridges after night. He agreed with me,—sanctioned it,—and called some one from aboard the boat,—I suppose, the fireman or engineer,—and told him we would not start until daylight, and to let the steam go down. Q. In pursuance of that arrangement, did the tug Maybe, or not, lay alongside of you all night, before starting? A. Yes, sir; she laid alongside of us until daylight, and we started at daylight the next morning."

If it be true that it was imprudent for the tug Maybe to attempt to tow the schooner Schoolcraft through the draw at Palatka at night, such imprudence must necessarily attach itself to the conduct of the tugboat in attempting to tow the schooner through the draw of the railroad bridge at Jacksonville at night. The captain of the tug admits the imprudence of such conduct, and, rather than be guilty of such imprudence at Palatka, he deliberately wasted several hours, although he knew he would thereby lay himself liable to the angry criticism of his owner. Now, it was the implied duty of the Maybe to tow in a careful, prudent, and proper manner. Any conduct on the part of the tug which violated either of these requirements must be held to be negligence. Therefore, in towing the schooner through the draw at Jacksonville at night,—admittedly an imprudence,—a negligent act was committed. The result of that act was a collision between the schooner and the draw pier of that railroad bridge. No evidence of negligence on the part of the schooner is shown. Clearly, the fault which caused the collision must be placed, in this view of the case, upon the tug alone. It is well to remark that not only does the master of the Maybe admit the imprudence of attempting to tow through a drawbridge at night, but, as well, 16 disinterested expert witnesses, with experience embracing nearly all the waters on the Atlantic seaboard crossed by bridges, declare that towing through drawbridges at night is not only not warranted by the usages of towing, but that it is a dangerous practice. One of them says that "it is always considered a dangerous thing, [that

is, to tow through a drawbridge at night,] and we have always made it a rule to anchor, and wait until daylight to go through a bridge." So far as this bridge at Jacksonville itself is concerned, there seems to be no special or different usage there than is in vogue at any other drawbridge named by the witnesses. It is clearly shown that it is not a custom to tow through the Jacksonville bridge at night. I do not say, as a matter of law, that such drawbridge could not be passed through at night without negligence, but, if attempted to be passed, the towing vessel is bound to see that no damage results to the tow of which she is in charge.

But there is another act of imprudence, which I think amounts to negligence, of which the tug was guilty. Not only did the tug attempt to tow the schooner through this draw at night,—thereby doing a very dangerous thing,—but she towed the schooner with a hawser said to be at least 50 fathoms in length. This is contrary to the usages and customs of good and safe towage. The witnesses produced by the libelant upon this part of the case unanimously hold that it is an improper thing to tow through a draw with so long a hawser. It is exceedingly difficult to control a tow at so great a distance. Even if the hawser was but 35 fathoms in length, as is claimed by the respondent, such length of hawser is clearly, under the evidence in this case, a violation of the usages of good towage, and made the tug, in this respect, negligent. Most of the witnesses insist that it was the duty of the tug to take the schooner alongside in running the draw,—at least, that such was the proper and prudent course to pursue,—or, if not, certainly to shorten the towing hawser to 10, or, at the very utmost, 20, fathoms. I think the fair deduction from the testimony in the case is that common prudence required the tug attempting to pass the draw at night to take the schooner alongside. Then she would have had absolute control of her, and could have regulated her movements in such way that all danger of collision with the pier or the sides of the draw would have been avoided. The omission to do this, under the circumstances, is a negligent act on the part of the tug.

Another insistment of the libelant that the tug was negligent, perhaps is the weightier one in the case. To understand exactly what the negligence charged is, it will be necessary to explain that the channel of the St. Johns river, about a mile above the Jacksonville bridge, is on the southeast side of the river, while the draw of the bridge itself is on the northwest side. In going down the river, after coming past a beacon known as "Beacon No. 27," which is about a mile above the bridge, it is necessary to turn sharply across the river in order to make the draw, and, when well over to the northwest side, turn again to the right, down the river, and then head straight through the draw. It is evident that this last turn down the river must be made by the towing boat some distance above the draw, for before that turn is made both the tug and the vessel being towed are on a course

diagonal to the course of the river and to the draw, and, in order that they may pass through the draw safely, must be "straightened up," as it is called, before entering the draw, so that when the tug enters the draw the vessel being towed may be directly astern. Now, what seems to have occurred in this case is this: The tug Maybe towed the schooner down the river safely to beacon No. 27. From beacon No. 27 the tug made a diagonal course across the river, directly heading for the light shining upon the draw pier of the draw. It was the duty of the tug "to straighten up" the tow before entering the draw. This I think the evidence clearly shows she failed to do, for all the witnesses that were upon the schooner testify that the schooner, following the lights on the tug, approached the draw diagonally to its opening. And that the schooner did so enter the draw on a diagonal course, I think, is clearly shown by the fact that she struck first on the southeast pier, then was thrown by the force of that blow, and by the continual operation of the tug in towing her, to the opposite side of the draw, where she struck against the swinging part of the draw, and, as well, by the fact that the schooner struck the pier with her starboard bow, scraping her whole starboard side against the pier to a point amidship, and then went across the draw, and struck the opposite side with her jibboom. These points of collision are not disputed, and they seem to fix with certainty that the schooner entered the draw, not on a straight line, but heading diagonally across it. The negligence of the tug seems to have been her failure to turn down the river far enough above the draw to straighten up the schooner so as to bring her directly astern. Being up the river at an obtuse angle from the tug, the power transmitted from the tug to the schooner by the hawser would naturally tend to force her over against the pier, where she struck. As an aggravation, perhaps, of her negligence in this respect, it is not denied that the master of the tug, who was acting as master, lookout, and wheelman at the same time, after the tug entered the draw, did not notice whether the schooner was following directly or not. In fact, the master and the mate both say that they did not see the schooner at all after the tug began to turn; and the engineer of the tug, who claims to have been able to see clearly astern, says that after the tug turned into the draw he did not see the schooner. The night, as has been stated, was very dark,—so dark, in fact, that no wake from the tug was visible,—and the only guide which the schooner had for towing were the lights upon the tug itself. It is in evidence that the schooner followed these lights closely, and as directly as possible. In fact, the master of the tug admits this in his testimony.

I think no act of negligence in the management of the schooner has been proved, and upon the whole case, as made, I am constrained to sustain the libel, for the causes assigned.

Let there be the usual decree.

THE INIZIATIVA.

JARVIS et al. v. THE INIZIATIVA.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. NEGLIGENCE — EVIDENCE — LEAVING HEAVILY-LADEN LIGHTER WITHOUT WATCHMAN.
   Libelants were owners of a lighter which was being loaded with sulphur alongside claimant's ship, under order from the consignees to take 100 tons. In answer to an inquiry the master of the lighter was informed that there was to be no night work that night, and about 6 P. M. the lightermen made the lighter fast alongside for the night, and went home, with the understanding that there was to be no night work. In their absence the ship's crew loaded the lighter to her full capacity, and at half past 9 they made her fast to the ship, and left her, without a watchman, exposed to the swells of passing boats, where she was found overturned the next morning. It was usual to have a night watchman on board this lighter, when heavily laden. By the bill of lading the sulphur was to be discharged into lighters furnished by the consignees, and was to be taken day and night as delivered by the ship. *Held*, that the ship was negligent in leaving the heavily-loaded lighter without a watchman during the night,
2. NEGLIGENCE—PROXIMATE CAUSE.
   A heavily-laden lighter was left for the night, by a ship's crew, securely fastened to the ship, but without a watchman, and was found the next morning, overturned, with all the lines fastening her to the ship broken. *Held*, that the very strong probability of the accident being caused by the absence of a watchman was sufficient to justify a decree against the ship.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Emeline P. Jarvis, James W. Gallison, and Forrest W. Gallison, owners of the lighter Overton, against the steamship Iniziativa, her engines, etc., for negligence. The district court rendered a decree for libelants. Respondent appeals. Affirmed.

J. W. Hyland, for libelants.
Lorenzo Ullo, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a final decree of the district court for the southern district of New York in favor of the libelants, upon a libel in rem, to recover damages for negligence. The following outline of the undisputed facts was found by the district judge:

"At about half past 5 o'clock in the morning of October 5, 1891, the libelants' lighter Overton, fully loaded with about 98 tons of sulphur, and made fast alongside the steamship Iniziativa at the Mediterranean pier, Brooklyn, broke her lines, capsized, and sank. The libel was filed to recover damages for the loss of boat and cargo, on the ground that they were upset by the negligence of the Iniziativa. The libelants were engaged in the lighterage business in the harbor of New York. The consignees of the sulphur gave them an order on the steamship for 100 tons, the capacity of the lighter Overton, to be taken to Gowanus creek. The lighter arrived alongside the Iniziativa in the afternoon of October 7th, and up to a little before 6 P. M.

had taken on board 35 tons; namely, 20 tons, which filled the hold, and 15 tons on deck. The loading was done by hoisting the sulphur out of the ship upon a platform erected upon her rail, where the sulphur was weighed by a weigher employed by the consignee, and, after being weighed upon the platform, was shot down upon the lighter below. The bill of lading provided that the sulphur was 'to be discharged into lighters, which consignee is to furnish as requested by ship, and delivery to be taken day and night as ship delivers.' One of the printed clauses of the bill of lading also provided that the consignee was bound to be 'ready to receive the goods from the ship's side simultaneously with the ship being ready to unload, either on the wharf, or into lighter provided with a sufficient number of men to receive and stow the goods;' and in default thereof the master was authorized 'to enter the goods at the customhouse, and to land, warehouse, or place them in lighter, without notice to, and at the risk and expense of, the said consignee of the goods, after they leave the deck of the ship.' At about half past 5 P. M. the master of the lighter hailed the ship to know whether there was to be work at night; and the weigher replied, 'No;' that they were to knock off at 6 o'clock. Soon afterwards, the discharge being stopped, the three men on board the lighter made her fast, properly, alongside, for the night, and went home. Work was resumed at 7 P. M., but, the lightermen not being present, the foreman on the ship sent down a couple of men to trim the sulphur as it was dumped aboard, and the loading, up to ninety-eight tons, was completed at half past 9, when the men were discharged. The lighter was moved several times while loading in the evening. At half past 5 the next morning the noise of the upsetting of the lighter was heard. No one saw it upset, or testifies to the immediate cause. All the lines that fastened it to the ship were broken."

The theory of the libel is that the steamship was in fault in discharging more sulphur on the deck of the lighter in the absence of her master and crew, when notice had been given that work had ceased until the next day; in not trimming the cargo properly; and in not having a watchman to look after the safety of the lighter at night, after she had been heavily loaded. A majority of the court are of the opinion that there is no adequate evidence that the lighter was not properly trimmed.

The contested question of fact in the case was whether the lightermen knew, or ought to have known, that work was to proceed in the evening, and were consequently improperly absent. It is evident that at about half past 5 o'clock they were informed by the weigher that work would not be resumed in the evening; that subsequently the ship's men were informed that the work would go on; that the latter returned after supper to the vessel, and completed the discharge of the sulphur. The claimant insists that the lightermen were also notified at the interview with the ship's crew that work would be resumed, and either knew, or ought to have known, of this decision. The lightermen deny that they heard of any change in the plans for the night work, and they are corroborated by the weigher. It is also manifest that they had no objection to a continuance of the work, and that if they had supposed that the original plan had been changed they would have returned after supper, and received the 100 tons. We therefore concur with the district judge "that the lightermen left the lighter at about 6 o'clock with no notice that the ship was to work at night, but on the distinct understanding to the contrary." In their absence the lighter was loaded by the ship's crew to her full capacity, was probably very

deeply loaded at the stern, and was left without watchman or oversight at a place where she was exposed to the swells of passing boats. She was securely fastened to the steamship, but she was found capsized, with her keel against the ship's side, and her mast broken away, and hanging from the steamer. The accident was not caused by leakage. It was usual to have some one on board the lighter at night, when she was heavily laden. It is insisted by the claimant that, inasmuch as, under the bill of lading, the sulphur was to be discharged into lighters furnished by the consignees, and was to be taken day and night as delivered by the ship, and as the consignees were bound to be ready with an adequate number of men to receive and stow the goods, the steamship was rightfully delivering the cargo at night on board the lighter, and was not bound to look for the care and preservation of the sulphur after it left the ship's rails, or to have oversight of the lighter. In the view which we take of the case, it is not important to determine whether the delivery on board the lighter was to be considered as a delivery to the consignees, through their agents, or a delivery to purchasers from the consignees, who were thus receiving the sulphur under an independent contract, and we assume that, as claimed by the appellants, the delivery was to persons acting in the stead and capacity of consignees. If the consignees had refused to receive goods at night, or had refused to furnish men at night, and had been in default, a different question would have arisen; but the lighter was furnished with a competent number of men, whose absence in the evening was excusable upon the distinct understanding on their part that they should not return. The ship must have known that their absence was not willful or voluntary, but that, on the contrary, the consignees were ready to furnish men, and were not in default. In this state of facts, it was not improper for the ship, in her earnestness to complete the unloading, to load the lighter to her capacity, but, in the excusable absence of her caretakers, it was the duty of the ship to take such reasonable precautions and care of her as were necessary in order to protect her from damage during the night. If the consignees were not in default, and the ship used their property, it must be used with reasonable care. The ship was guilty of want of ordinary care in leaving the heavily-loaded lighter without attendance during the night, where she was exposed to danger.

But the claimant insists that, in order to find the ship guilty of a tort, it is not sufficient merely to prove that she was negligent, and that an accident occurred, but it must be shown that the negligence caused, or materially contributed to, the accident, and it is conceded that the immediate force or cause which produced the injury is unknown. The general principle which is invoked by the claimant is true, but the principle is satisfied when the plaintiff establishes by his "evidence circumstances from which it may fairly be inferred" that the accident was attributable to a want of precaution which the defendant was under obligation to have taken.

We do not know the particular agent which struck the blow that overturned the lighter. We do know that the injurious force was naturally to have been expected, was ordinarily provided against, and would probably have been averted had the claimant taken the precautions which he ought to have resorted to. Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. Rep. 369; Daniel v. Railway Co., L. R. 5 H. L. 45. It is manifest that violence of some sort wrenched the lighter from the ship, and threw her over. The district judge thought it was probable that "she took in water from the swells of passing boats in the early morning, through her exposed situation, in the absence of any watch to guard against such dangers;" but, whatever created the violence, it is scarcely possible that the presence of a competent and attentive watchman would not have been able to deliver the boat from its effect. The probability that the calamity resulted from the absence of a watchman is very strong.

The decree of the district court is affirmed, with costs.

THE CONNEMARA.

MORRIS v. THE CONNEMARA.

(District Court, S. D. New York. June 29, 1893.)

SHIPPING—CATTLE—FAILURE TO TAKE SUFFICIENT FODDER.

A steamship carrying cattle sailed without taking on board all of the fodder furnished alongside for use of the cattle on the voyage. It appeared that after the ship had left her dock, to take advantage of the tide, she remained in the stream seven hours,—long enough to have taken aboard the fodder left behind; also that the representative of the owner of the cattle made repeated demands on the agents of the ship before she sailed that the remaining bales be taken aboard, which were neglected. The bill of lading required the ship to supply "conveyance for necessary fodder." The master maintained that he relied on the representations of the drover in charge that there was fodder enough, which representations the drover denied. The drover had no authority to determine the amount to be taken, or to leave behind any that was supplied by the owners of the cattle. The cattle were without food for nearly 48 hours before arrival at Havre, when a very slight amount was furnished them; and when they arrived at Paris, one or two days later, they had sustained a serious loss in weight and condition, for which damage this libel was filed. *Held*, that the ship was liable for the damage arising from insufficiency of food during the voyage and up to the landing of the cattle at Havre, but not for the loss through lack of food thereafter.

In Admiralty. Libel for damage to cattle in transportation. Decree for libelant.

Bristow, Peet & Opdyke and David Willcox, for libelant.
Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was filed to recover for the damage to a cargo of cattle carried in November, 1890, by

the steamship Connemara from New York to Havre, in consequence of alleged lack of necessary food, a portion of the hay designed for them having been left behind by the steamer.

The bill of lading provided that the steamer should supply "conveyance for the necessary fodder." The steamer was at the Atlantic basin, and there took on board the fodder provided by the shippers, except about 79 bales of hay, which were left on the barge alongside of her, at the time when the steamer, to take advantage of the tide, was hauled out into the stream at about 7 o'clock on the morning of November 11th. At about 8 A. M. she arrived off Liberty island, and was there anchored till about 3:30 P. M., when she proceeded to sea. The cattle, numbering 519 head, were shipped on board during the forenoon. The master knew when he hauled out, that a part of the hay provided was not on board, but was left on the barge. A portion of the corn provided was also unaccounted for. The voyage was rough; some cattle were lost through suffocation in rough weather; and for nearly 48 hours before arrival at Havre, the cattle were without food. At Havre only a very slight quantity was supplied to them; so that for a period of from one to two days more, during which they were sent to Paris by rail in three different trains, they were almost wholly without food, in consequence of which they became much emaciated, and the owners sustained thereby considerable loss, for which the above libel was filed.

The claimants contend that when the steamer sailed without the remaining bales of hay, it was upon the assurance of Connors, the drover who was in charge of the cattle on board the steamer, that there was fodder enough; and that the steamer should go on without waiting to take aboard what had been left behind. Several witnesses corroborate the captain's testimony as to this conversation. Connors most strenuously denies it; and he and the assistant drover assert that they made frequent protests to the captain during the day that the additional fodder was necessary, and must be taken on board. The testimony of McCauley, one of the libelant's witnesses, indicates that something of the nature stated by the captain was said by Connors just before the ship sailed, viz. that if the ship lost that tide, she would lose another day; while the 40 bales of fodder left behind would be only about a day's supply, so that nothing would be gained by waiting. The testimony shows that Connors understood that there were only about 40 or 50 bales left behind, as the master told him about 11 A. M. Connors had nothing to do with the supply or the shipment of the fodder, and no responsibility in connection with it till it was shipped. His duties were only to take charge of the cattle after they were shipped on board.

The other circumstances in the case show that the conversations with Connors, whatever they were, are altogether insufficient to justify the master in sailing without taking on board the fodder that had been supplied for the cattle. Connors did not have the

least authority, real or apparent, to bind the owners of the cattle on this subject; or to release the ship from her obligation to take on board the necessary fodder which the owners of the cattle had provided and sent alongside. After the vessel hauled out into the stream, two hours' time would have been ample to bring the lighter alongside and take the remaining bales on board. The steamer had a tug at hand to assist her as desired; and she did not sail till at least 7½ hours after she had anchored near Liberty island. Not the least excuse is offered by the master for not taking steps at once to bring the lighter alongside and take the rest of the fodder aboard, long before the alleged conversation with Connors above referred to.

But besides all this, between 9 and 10 A. M. Mr. Berrie, the representative of the owners of the cattle, learning that some of the bales had not been taken, sent a complaint to Barber & Co., the agents of the steamer, and a demand that the remaining bales be taken aboard. This was urgently pressed upon the agents of the ship, who made the indifferent reply that there was enough fodder on board, and if Mr. Berrie wanted the rest taken, he must see to it himself. Mr. Berrie then endeavored to stop the shipment of the cattle; but it was too late, and at length Barber & Co. agreed to telephone for a tug to take the lighter to the ship if Mr. Berrie would pay the towage, which was agreed to. The lighter, however, was not sent, and the ship sailed, as before stated, without the remaining bales.

The behavior both of the captain and of the ship's agents in regard to this fodder, was extremely arbitrary and culpable. The captain's own account of his conversation with Connors at the last moment shows his knowledge of his remissness, and of his duty to take that fodder on board. He states that he asked of Connors an authority in writing for sailing without the remaining bales, which Connors refused, saying that his word was as good as his bond. But not only had the captain misled Connors by his erroneous statement of the amount of hay left behind, but he had not the least reason for supposing that Connors had anything to do with the supply of fodder, or with determining how much should be taken, or that Connors had any authority to leave behind any fodder that the owners had supplied. It would be monstrous if shipping contracts could be violated and the property rights of the shippers of cargo could be sacrificed through excuses founded on conversations like this with subordinates whom the master had misled, even if the conversation occurred as alleged. Both the agents and the master disregarded their plain duty, and they necessarily took the risk of the result. I doubt whether anything was said substantially different from what McCauley says; and that is plainly no defense.

I do not think the computation of 15 pounds of hay per head a day can be accepted as showing that there was waste of the hay taken; or that there was actually taken on board enough for

the voyage. Including the inevitable loss from waste, the evidence shows that 16 pounds a day is none too much; and this, on the closest computation, involves a large deficiency.

The steamer must be held answerable, therefore, for the damage arising from the insufficiency of food during the voyage and up to the landing of the cattle at Havre. I do not think she is answerable for any further damage through the absence of a proper supply of food after arrival at Havre. The indifference and brutality of the treatment of the cattle on arrival at Havre and between there and Paris, form a fair counterpart to the indifference of the ship's representatives here.

Unless some better mode of ascertaining and apportioning the ultimate loss from depreciation of the cattle through these two causes can be discovered upon a reference, should the parties choose to take one, the entire loss up to the time of the arrival of the cattle at Paris will be divided, and one-half charged to the ship. A decree may be entered accordingly, with costs.

THE WELLS CITY.

MORRIS BEEF CO. v. THE WELLS CITY.[1]

(District Court, S. D. New York. June 28, 1893.)

1. SHIPPING—BILL OF LADING—STIPULATIONS—PRIVILEGE TO TOW AND ASSIST VESSELS—CONSTRUCTION—PERISHABLE CARGO.
   The implied and paramount obligation of the ship as respects perishable cargo under the usual bill of lading is to deliver it seasonably, and all minor stipulations are to be construed as subordinate to and consistent with that duty; hence the clause permitting the ship to "tow and assist vessels in all situations" cannot be held to authorize a subversion of the voyage, and a ship which, in view of such a clause, should undertake a salvage service, knowing that her cargo must necessarily suffer from the consequent delay, would be bound to make compensation for the loss inflicted on the cargo.

2. SAME—NECESSITY FOR KNOWLEDGE OF LIABILITY TO LOSS.
   A vessel carrying a cargo of chilled beef, and whose bills of lading authorized her to tow and assist vessels in all situations, rendered a salvage service to another vessel, by reason of which her own voyage was delayed three to four days, causing damage to her cargo. The evidence indicated that the master could not properly be charged with knowledge that the delay would so injure his cargo. *Held* that, as the salvage service was apparently authorized by the privilege clause in the bill of lading, the master's knowledge of the likelihood of damage to his cargo on undertaking the service must be made to appear, and, for lack of that, the libel should be dismissed.

In Admiralty. Libel for damage to cargo. Dismissed.

McFarland & Parkin, for libelant.
Convers & Kirlin, for claimant.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

BROWN, District Judge. The above libel was filed to recover for damage to cargo during a salvage service rendered by the steamship "Wells City" to the steamer "Catalan," which was found disabled by the Wells City on her voyage in October last, from this port to Bristol, and was towed about 900 miles to the port of Valencia on the Irish coast. On a suit for salvage in the admiralty division of the high court of justice in England, an award of £2650 salvage was made on the 21st of November, 1892, upon an agreement between the parties to the suit, in which the libelant was not represented. The libelant claims that it sustained special damages through the delay consequent on the rendering of the salvage service, which entitled it to compensation for its loss.

The libelant had shipped to Bristol a quantity of chilled beef in refrigerators. The contract of shipment authorized the ship to "tow and assist vessels in all situations." The usual time of the passage of the steamers of the Wells City Line from New York to Bristol is 16 days. The vessel sailed from New York on the 16th of October, fell in with the Catalan on the 28th of October, left her moored in the harbor of Valencia on the 4th of November, and after coaling, reached Bristol on the 7th,—a passage of 21 days.

I find upon the evidence that the detention occasioned by the salvage service amounted to from three to four days. During the first part of the voyage the ship had experienced rough weather, and when she fell in with the Catalan on the 28th, she was already at least one day behind her usual progress. Any extension of the voyage beyond 19 days, according to the libelant's evidence, was certain to be attended with injury to the chilled beef before it could be marketed.

For the libelant it is contended, that this injury was so certain and inevitable, and that the liability to damage was so well known to all engaged in the business, that it must be deemed to have been known to the master also; and that therefore his undertaking to tow the Catalan into port, which he knew would prolong the voyage considerably beyond 19 days, was equivalent to a voluntary and deliberate choice to sacrifice the libelant's beef to the earning of a salvage award; and that the stipulation in the bill of lading giving the privilege "to tow and assist vessels in all situations" cannot properly be construed to authorize such a deliberate sacrifice of cargo without compensation.

Contracts, like statutes, are to receive a reasonable construction. This maxim is liberally and especially applied to the general, printed forms of mercantile and shipping instruments, in furtherance of the presumed intent of the parties. Abb. Shipp. 250–260; Raymond v. Tyson, 17 How. 59–62; Potter's Dwar. St. 130, 136, 145. General stipulations, having a reasonable scope of application consistent with the purpose of the voyage, are not to be construed as authorizing what is incompatible with its purpose, or what would inflict extraordinary loss, for it is not credible that either party could have so intended. Thus, the stipulation authorizing vessels to

touch and stay, or to call, at any port or ports, and in any order, is limited to such as are upon the course of the voyage specified. Gairdner v. Senhouse, 3 Taunt. 16, 22; Solly v. Whitmore, 5 Barn. & Ald. 45; Leduc v. Ward, 20 Q. B. Div. 475; Steam-Ship Co. v. Theband, 35 Fed. Rep. 620, affirmed on appeal. In the case last cited, the same construction was applied to the clause in question, viz.: "To tow and assist vessels in all situations;" and that clause was held not to authorize a vessel to go 40 miles directly out of her course for the purpose of taking another vessel in tow in the ordinary course of towage.

A similar construction here must exclude any general departure from the purpose of the voyage; or any such procedure as must plainly subvert its purpose as respects the cargo. This clause was inserted to enable the ship to do a salvage service without thereby becoming an insurer of the cargo against all subsequent perils. But this privilege does not override all the other express and implied agreements and duties imposed by the bill of lading, or permit the subversion of the voyage. All the provisions of the bill of lading are to be construed together, and consistently with the general purpose of making the voyage effective and beneficial to both vessel and cargo. This clause would not authorize an abandonment of the voyage in mid ocean, or the throwing over of the cargo, in order to render a salvage service; for both would be incompatible with the purpose of the voyage. See The Colon, 10 Ben. 60, 76. But it is the same thing to the cargo owner whether his cargo is thrown overboard, or voluntarily delayed till it is decayed and worthless. The implied and paramount obligation of the ship as respects perishable cargo is to deliver it seasonably; and all minor stipulations are to be construed as subordinate to that, and limited to consistency with this main purpose, "ut res magis valeat quam pereat." Consulado, c. 214; 3 Black Book Adm. 465.

I have no doubt, therefore, that if the master, when he undertook this service for the Catalan, knew, or had reason to know, that the chilled beef in this case must necessarily suffer certain decay or deterioration from the delay caused by the salvage operations, he could not justify the delay by the clause giving him liberty to tow and assist vessels in all situations; and that the ship must, therefore, make compensation for the loss inflicted on the cargo by the salvage undertaking.

I am not satisfied, however, upon the evidence, that the master is fairly chargeable with this knowledge. He testifies unequivocally that he had no such knowledge, but supposed that the chilled beef would keep an indefinite time without injury, if the temperature were kept at 32°. No doubt suspicion reasonably attaches to testimony as to one's own knowledge, given to prevent being held for a large loss. But I do not find any facts or circumstances connected with this feature of the chilled beef business, brought home to the master, in a manner to warrant a disregard of his testimony. He made no inquiry at the time of the custodian in charge of the beef,

as he did not suspect any liability to loss; nor did the custodian make any objection to the salvage, though he, if any one, ought to have suspected a liability to special damage to his beef through the probable delay. And on the arrival and discharge of the cargo, no damage was reported, nor at that time perceived, or apparently expected by any one; and none was known to the libelant in the salvage suit at the time when the award therefor was made. The liability to damage was a matter of expert knowledge; but not, I think, of common knowledge. The salvage service being apparently authorized by the privilege clause in the bill of lading, and to be taken out of that clause by construction only, and in consequence of the special facts and the certainty of damage to the beef, as forming an exception to the general scope of the privilege, the master's knowledge of those facts must appear in order to sustain the exception. For lack of this, I must dismiss the libel, but without costs.

This libel not having been filed to recover salvage as such, I have not discussed that feature of the subject. The general circumstances of the case are stronger even than those in The Colon, 10 Ben. 60, in which Judge Choate allowed compensation as salvage to the cargo owner for his necessary loss. That decision upon its special facts seems to me sound and just, and the necessary result of the decisions in the prior cases. It is not inconsistent with the adjudications in The Persian Monarch, 23 Fed. Rep. 820; The Brixham, 54 Fed. Rep. 539, (Hughes, J., March 1, 1893;) and The Dupuy de Lome, 55 Fed. Rep. 93,—in which no special loss or special liability to loss existed, and which, therefore, were within the implied waiver of the salvage clause of the bill of lading; though I dissent from some of the general expressions used in the latter decisions.

HAIRE v. ROME R. CO. et al.

(Circuit Court, N. D. Georgia. March 14, 1891.)

No. 953.

1. REMOVAL OF CAUSES—LOCAL PREJUDICE — SEPARABLE CONTROVERSY — REMAND.
Under Act March 3, 1887, § 2, (24 Stat. 553,) one of several defendants may remove a cause to a federal court on the ground of local prejudice, whether there is a separable controversy as to such defendant or not, and, where there is no separable controversy, the cause will not be remanded as to the other defendants.

2. SAME—ACT MARCH 3, 1887—CONSTITUTIONALITY.
Thus construed, the act is within the constitutional power of congress, although it gives the right of removal in causes where citizens of the same state are opposing parties.

3. SAME—REMAND—SEPARABLE CONTROVERSY.
An action against a construction company, whose employes negligently managed the train which caused plaintiff's injury, wherein the owner of the engine and cars composing said train and the owner of the tracks where the injury was done are joined as defendants, does not contain any separable controversy as to the parties so joined, giving them the right to a remand under Act March 3, 1887, § 2, (24 Stat. 553,) after removal to a federal court by the construction company on the ground of local prejudice.

At Law. Action for personal injuries in the superior court of Floyd county, Ga., by Robert L. Haire against the Rome Railroad Company, the Chattanooga, Rome & Columbus Railroad Company, and the Rome & Carrollton Construction Company. The last-named defendant removed the cause to this court. Heard on motion to remand. Denied.

Alexander & Wright and J. H. Hoskinson, for plaintiffs.
W. W. Brooks and W. T. Turnbull, for defendants.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

NEWMAN, District Judge. This is a motion to remand. The case was removed to this court from the superior court of Floyd county, on the ground of prejudice and local influence, on the petition of the Rome & Carrollton Construction Company, a foreign corporation, averring itself to be by law a citizen of Connecticut. The other two defendants are Georgia corporations, and citizens, under the law, of this state and district. The plaintiff is a citizen and resident of this state and district.

The principal ground upon which the the motion to remand is based is stated in the motion to remand as follows:

"Plaintiff being a resident and citizen of Georgia when the action was brought, and two of the defendants being residents and citizens of the same state, and real parties to the cause, the circuit court has no authority to remove the case from a state court to the federal court, or to try the same, at the instance of a nonresident defendant. To authorize the removal of this cause all of the defendants must have been nonresident citizens."

The proper determination of this question depends upon the construction to be given clause 4, § 2, of the act of March 3, 1887, the

enrollment of which was corrected by act approved August 13, 1888 This is the language of the clause:

"And where a suit is now pending or may be hereafter brought in any state court in which there is a controversy between the citizens of the state in which the suit is brought and the citizens of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in said state court or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of prejudice or local influence, to remove said cause: provided that, if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice and local influence, and that no party of the suit will be prejudiced by the separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

In the first clause of this same section, providing for the removal of suits "arising under the constitution or laws of the United States or treaties," the right to remove is given to "the defendant or defendants therein." In the second clause, providing for removal on the ground of citizenship generally, the right is given "the defendant or defendants therein." The third clause relates to separable controversies, and then, coming to the fourth clause, the one now under consideration, the language is: "Any defendant, being such citizen of another state, may remove," etc. The difference in the language used in these clauses must have been understood by congress, and the significance that would be attached to this difference well known. No other conclusion can be reached than that congress intended, in cases where it appeared that from prejudice or local influence a nonresident defendant would not be able to obtain justice in the state courts, such defendant, notwithstanding the fact that other defendants were joined with him in the suit, should have the right to remove "such suit" into the circuit court of the United States. The proviso, as quoted above, to the clause under consideration supports this construction.

But it is said that it could not have been the purpose of congress to allow the removal of a suit between resident plaintiff and nonresident defendant where one or more resident defendants may be joined in the action. There is no exception in the statute as to this class of cases, and its terms are certainly broad enough to include them. Indeed, following the construction now generally given this statute by the circuit courts,—that it was intended to cover the whole subject-matter of removal, and consequently repeals all former legislation on the subject,—construing it within itself, and only viewing former legislation as far as it throws light on this, no room is left for doubt that cases like the one under consideration are removable.

It is said, however, that if this be the proper construction of the act, it is unconstitutional, in that it provides for the removal of suits between citizens of the same state. There is a controversy in this case between citizens of different states, and it can hardly be true that, where there is a controversy between citizens of

different states, the fact that there are citizens of the same state on the opposite side of the case would deprive the federal court of jurisdiction. My own opinion of clause 4, § 2, of the act of 1887, when it first came up for construction, was that it did not repeal former legislation except where there was a necessary conflict. I understand now, however, the general opinion of the circuit courts throughout the country to be to the contrary, and probably this latter is the correct view.

This question was before the circuit court of Oregon in the case of Fisk v. Henarie, 32 Fed. Rep. 417. The conclusion there, quoting from the syllabus of the opinion, which is by Judge Deady, is:

"Subsection 3 of section 639 of the Revised Statutes, as amended by section 2 of the act of 1887, gives the right to remove a suit 'in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state' to 'any' defendant, being such citizen of another state, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto. The judicial power of the United States extends to controversies between citizens of different states, which includes a 'case' in which controversy exists without reference to the citizenship of the other parties therein; and congress may confer jurisdiction on such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise."

In the case of Whelan v. Railroad Co., 35 Fed. Rep. 849, Judges Jackson and Welker presiding, in a full and well-reasoned opinion by Judge Jackson the same view was taken, and the same construction given to clause 4 of section 2 of the act of 1887.

In the recent case of Anderson v. Bowers, in the circuit court for the northern district of Iowa, (43 Fed. Rep. 321,) Judge Shiras expresses a different view as to this statute, and holds that, under the clause now for consideration, "the right of removal does not exist where the controversy is between a citizen of the state wherein the suit is pending, on the one side, and a citizen of the same state and a citizen of another state, on the other side."

My conclusion as to the proper construction of this statute, however, is that expressed above, and I must hold that the right of removal exists.

Plaintiff asks in his petition that, if the motion to remand the entire suit is denied, it may be remanded as to the two resident defendants. To justify remanding the case as to the other defendants, it must "appear that said suit can be fully and justly determined" as to them, "without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties." The suit is by the plaintiff for personal injury received by him by the negligent running of a locomotive and cars by the employes of the Rome & Carrollton Construction Company, who were engaged in operating engines and cars belonging to the Chattanooga, Rome & Columbus Railroad Company over the tracks of the Rome Railroad Company. The declaration, which is contained in the transcript of the record, shows this fact, and that the Rome & Carrollton Construction Company, according to the plaintiff's view of this case, would be primarily liable for his injury; the contention being, as I understand it, that the other defendants

are liable,—the Chattanooga, Rome & Columbus Railroad Company, because its engines and cars were being used by the persons whose negligence caused the injury, and the Rome Railroad Company, because it was upon its tracks that the accident happened and the injury was done. I do not see how the case could be tried as to the two other defendants without the result being affected by the prejudice and local influence (presuming it to exist) against the construction company. Its employes did the wrong complained of, and the other defendants are liable only because the one allowed it to use its cars, and the other its track. The case could not be tried without thorough consideration of the action of the employes of the nonresident corporation, and I do not think it is a case where the remand would be justified as to the other defendants.

It is therefore ordered that the motion to remand the entire case, and as to the separate defendants, be overruled.

PROVISIONAL MUNICIPALITY OF PENSACOLA v. LEHMAN et al.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

No. 112.

1. EQUITY—PLEADING—DEFECTIVE DESCRIPTION IN BILL—CURED BY ANSWER.
A bill in equity to enforce the conveyance of realty, and resting upon a law (Act Fla. June 2, 1887; St. c. 3774) empowering a city to convey public property, although demurrable because it fails to clearly state whether the property in dispute was proprietary, or held in trust for public use, is cured of its defect by respondent's answering over, instead of standing by his demurrer.

2. SAME—SPECIFIC PERFORMANCE—CONTRACT TO CONVEY PUBLIC PROPERTY.
The city of Pensacola, becoming insolvent, sold and attempted to convey its public parks to private persons, having no legal authority to do so. It received the purchase price, and recognized the ownership and possession of certain purchasers, but subsequently resumed possession of the property. Thereafter, the legislature passed an act authorizing the city to convey to the holders the public property theretofore sold for valuable consideration, "whenever it shall be shown to the satisfaction of the * * * commissioners that the city sold * * * and received value therefor * * * and it shall appear equitable" to them to make such conveyance. Act June 2, 1887; St. c. 3774. *Held*, that purchasers to whom the board refused to make conveyances were entitled to equitable relief.

3. MANDAMUS TO COMPEL CONVEYANCE — PUBLIC PROPERTY — CLEAR LEGAL RIGHT.
Under the act the purchaser could not assert a clear legal right to have the disputed property conveyed, and could not, therefore, have relief in the Florida courts by mandamus.

4. FEDERAL COURTS—JURISDICTION—MANDAMUS TO COMPEL CONVEYANCE.
Mandamus cannot be invoked as an original proceeding in a federal court; and the conveyance of real property to parties asserting a clear legal right cannot, in a United States court, be enforced thereby.

5. SAME—MANDAMUS IN STATE COURT—ADEQUATE REMEDY AT LAW.
Mandamus in a state court to enforce the conveyance of real property, as to which a clear legal right is asserted, is not such an adequate remedy at law as to bar the equitable jurisdiction of a federal court. Smith v. Bourbon Co., 8 Sup. Ct. Rep. 1043, 127 U. S. 105, distinguished.

6. SPECIFIC PERFORMANCE—BILL TO ENFORCE CONVEYANCE—PUBLIC PROPERTY.
Act Fla. June 2, 1887, (St. c. 3774,) empowered the city of Pensacola to convey certain public property theretofore sold, and attempted to be conveyed, "whenever it shall be shown to the satisfaction of the * * * commissioners that the city sold * * * and received value therefor * * * and it shall appear equitable" to the commissioners to make such conveyance. *Held* that, even if the act were only permissive, equity would require the city to return the purchase money, or convey the premises, to purchasers for a valuable consideration.

7. SAME—CONSTRUCTION OF STATUTES—EQUITY.
The words, "and it shall appear equitable to said board," refer only to existing, well-defined equities, and do not vest an arbitrary discretion in the municipality. Unless there should, in fact, be equitable reasons against making such conveyance, the statute is mandatory. Supervisors v. U. S., 4 Wall. 435, followed.

8. SAME—CONTRACT TO CONVEY—FAILURE TO IMPROVE PROPERTY.
The failure of the purchasers to build upon and improve the lots in question raises no equity in favor of the municipality.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill by Emanuel Lehman and Meyer Lehman against the Provisional Municipality of Pensacola to enforce the conveyance of certain real property to complainants. Decree for complainants. Respondent appeals. Affirmed.

W. A. Blount, for appellant.

R. C. Brickell, H. C. Semple, W. A. Gunter, and Richard L. Campbell, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. Emanuel Lehman and Meyer Lehman, who were citizens of the state of New York, brought their bill in the circuit court against the Provisional Municipality of Pensacola, in the state of Florida, and therein, among other things, alleged:

"That the city of Pensacola, a corporation formerly existing under the laws of the state of Florida, (of which the respondent is the legal successor, being invested by said laws with all the rights, and subject to all the liabilities, of said city of Pensacola,) claiming to be the absolute owner of all the lots in blocks O and P, (according to 'the plan drawn by Theodore Moreno, and adopted by the city of Pensacola on 24th of July A. D. 1866,') situated within the limits of said city of Pensacola and said provisional municipality, did on the 8th of January, A. D. 1868, bargain, sell, and convey, by deed with warranty of title, to your orators and Benjamin Newgass, lot six, (6,) in said block O, for the consideration of twelve hundred dollars; lot number one, in block P, for the sum of twelve hundred and fifty dollars; and two, (2,) in said last-mentioned block, for the sum of nine hundred and fifty dollars; said deed of conveyance being executed to effectuate a sale of said lots made to your orators and said Newgass on the 1st of January, A. D. 1867, at public outcry in the city of Pensacola, under the authority of a resolution of the board of aldermen of said city of Pensacola, adopted 24th July and November, 1866, at which sale your orators and said Newgass were the highest and best bidders for said lots at the sums above mentioned, payable half in cash, and the other half in one year, with interest, which payments were fully made, and said deed of conveyance duly recorded in the record of deeds of Escambia county, state of Florida, on the 17th January,

1868. And orators further allege that on the 9th July, 1872, the said Benjamin Newgass conveyed all his right and interest in said lots to your orators, who have ever since been the sole owners thereof. And orators further show that said block O was divided by said survey of Theodore Moreno into six lots, numbered from 1 to 6 inclusive, and said block P was by the same survey divided into two lots, 1 and 2, and that the area out of which said blocks were formed was claimed by the city of Pensacola under one right and title. And orators further show that in December, A. D. 1866, said city of Pensacola sold and conveyed to Henry Pfeiffer lot one, (1,) in block O, for the sum of two thousand and sixty dollars, being the most valuable of all the lots in the block, because fronting on Palafox street, which is the main business street of the city of Pensacola. On 27th December, A. D. 1866, the said city of Pensacola sold and conveyed to Patrick Maloney lot two, (2,) in block O, fronting on Palafox street, for the consideration of two thousand and five dollars; said sale having taken place under authority of the resolution of the board of aldermen of the city of Pensacola, of 24th July, A. D. 1866. On 1st of January, A. D. 1867, the said city of Pensacola conveyed to George Pfeiffer lot five, (5,) in block O, for the sum of twelve hundred and fifty dollars, half cash and half on credit of twelve months, with interest, said conveyance having been made to effectuate a sale under the aforementioned resolution of the board of aldermen of the city of Pensacola, of November, A. D. 1866. On 16th March, A. D. 1867, the said city of Pensacola conveyed to Mary Petersen lot three, (3,) in block O, for the consideration of one thousand and ten dollars; said conveyance having been made to effectuate a sale authorized by the said resolution of said board of aldermen of 24th July, A. D. 1866. And orators further show that, doubts (as they are informed, but of which they had no knowledge until within a year before the filing of this bill) having arisen as to the right of the said city of Pensacola to make the sales and conveyances as aforesaid, as well as to the validity of sales and conveyances of other property made under its authority, the legislature of the state of Florida, by an act approved 2d of June, 1887, which is chapter 3774 of the Statutes of said state, empowered the said Provisional Municipality of Pensacola to make deeds to the grantees of such property, which should vest the title in such grantees, their heirs and assigns, forever, 'wherever it shall be shown to the board of commissioners [of such municipality] that the city of Pensacola sold said property and received value therefor from some holder or his grantee, and it should appear equitable to said board that such conveyance should be made.'

"And your orators further allege that, in execution of the trust imposed upon respondent by said act of the legislature, respondent did, on the 29th of February, A. D. 1888, convey to the heirs of said Henry Pfeiffer, then deceased, said lots one (1) and five, (5,) in block O; said Henry Pfeiffer, in his lifetime, having acquired title to said lot five (5) from said George Pfeiffer. On the 13th of April, 1888, a like deed was executed to the said Patrick Maloney by respondent for said lot two, (2,) in block O, and on the 26th May, 1888, a like deed was executed by respondent to said Mary Petersen for said lot three, (3,) in block O; the sole inducement to the execution of the said deeds of conveyance by respondent being the legal duty imposed upon respondent by said act of the legislature, and the fair and adequate price paid for said lots by the purchasers thereof. And orators further show that the price paid by them and said Newgass for said lots in block O and P were fair and adequate in themselves, and more apparently so when compared with the prices paid for more eligible lots by the said George and Henry Pfeiffer, Maloney, and Petersen, as above stated.

"And orators further allege that, some time in years A. D. 1888 and 1889, respondent, disregarding your orators' rights as above set forth, of which respondent had notice, took possession of said lots 1 and 2, in block P, and lot 6, in block O, and appropriated the same to its own use, erecting thereon various structures, in palpable violation of respondent's trust duty to your orators under said act of the legislature. And orators further allege that from the time your orators and said Newgass purchased said lots 1 and 2, in block P, and 6, in block O, up to the year 1890, state, county, and city, as

well as municipality, taxes were assessed thereon, as the property of your orators or of your orators and said Newgass, and paid by your orators, and that during all that period they never knew or heard that any doubt existed as to the right of the city of Pensacola to sell and convey said lots to your orators and said Newgass, or of the existence of said act of the legislature intended to perfect titles like theirs, and that it was in fact in the fall of the year 1890 that your orators first acquired such information. And your orators further aver that immediately after being so informed they employed H. C. Semple, attorney at law of Montgomery, Ala., to proceed to Pensacola for the purpose of asserting their right to said lots, which he having done, found the said lots had been appropriated by respondent to its own use, in violation of the trust duty imposed upon respondent by said act of the legislature, and which trust duty it refused to execute in behalf of your orators, as it had done in the case of other beneficiaries under said legislative acts."

The prayer of the bill was for a decree that respondent shall, by its proper officer, and under its corporate seal, execute unto orators a deed of conveyance of said lots 1 and 2, in block P, and lot 6, in block O, according to the said plan of Theodore Moreno, adopted by the city of Pensacola on 24th of July, A. D. 1866; that said respondent shall surrender the possession of said premises unto orators upon their demand, or that of their duly-authorized agent; and also that respondent shall be decreed to pay to orators a reasonable ground rent for the use of said premises, from the time respondent took possession of the same up to such time as respondent shall surrender the same to orators; and for such other and further relief as may seem meet and agreeable to equity.

The defendant filed a general demurrer. The demurrer was overruled, and the defendant filed an answer. The answer repeats the demurrer, and alleges, substantially, that the property in controversy had been a part of a public square dedicated to the public ever since prior to A. D. 1763; that, at the close of the late war, it, with other public places, including streets, passageways, alleys, parks, and lots dedicated for public uses, such as courthouses, jails, academies, and schools, were sold by the said city, or under execution and decrees against it; that upon many of these lots large buildings were erected by the purchasers, and, as some of the lots were no longer useful for public purposes, the defendant procured the passage of the act of the legislature mentioned, so that, in the discretion of its commissioners, such persons as should have paid full value should have conveyances made to them, wherever, in the opinion of the board, it should seem equitable. The answer further alleged as follows:

"That after the passage of the act this defendant sold two pieces of its public property, in many cases confirmed the title to persons in possession of other pieces purchased as aforesaid, upon their paying to this defendant such sums as its commissioners considered to be sufficient to justify the defendant in relinquishing its title to said pieces; in some instances refused to confirm to the applicants therefor, and in a few instances, when the applicants for confirmation had erected large and valuable buildings upon the property purchased, and the defendant was convinced that the prices originally paid were adequate at the time of payment, this defendant confirmed the titles, upon the grounds of occupancy of the purchaser, of the adequacy of the purchase price, and of the making of valuable improvements by the

applicant, and of the want of absolute need of the locality by this defendant for public purposes. Among this latter class were embraced the persons mentioned in the bill as the persons who purchased lots in O and P, as set forth in the bill, and to whom has been confirmed the title acquired by them, each of the said persons having, immediately upon the purchase, taken possession of said property, and erected large and valuable buildings thereon.

"That it is not true, as alleged in said bill, that the defendant has confirmed all the title to lands sold as aforesaid, except that of complainants, for, as hereinbefore set forth, some applications have been rejected; some have been granted only upon the payment of amounts, in many instances, many times greater than the original purchase price. In some cases, no applications have ever been made for confirmation, and, in one case, consideration upon the application is now pending. That no confirmation has ever been granted, and no right to confirmation considered, by the defendant, except upon a petition setting forth the circumstances and the equity relied upon, and that no application was ever made by the complainants, or those from whom they purchased, until shortly before the filing of this bill, and about four years after the passage of the act permitting such confirmation. That years prior to such application the applications of the persons who had purchased the other portions of lots O and P, which persons, as aforesaid, entered into possession of said portions, and valuably improved the same for a score of years, had been presented to this defendant, and confirmation of title to them had been made. That prior to any application by the complainants the public building of the defendant, in which were the police offices, public offices, jail, and municipal court room, were destroyed by fire, and the defendant was compelled to rent accommodations for the said purpose at a large rental, which this municipality, being entirely bankrupt, was scarcely able to pay. That the defendant was also without locality for a pound, and yard in connection therewith, necessary for the impounding of stock running at large in violation of the ordinances, and also without locality for the erection of a house for the hook and ladder truck and horses, which were used in the public service of the said city. The only place available for such purposes, belonging to the said city, was the lot indicated upon the plan annexed to the said bill as the market lot, which was too small to accommodate all of the said city purposes, and was situated on Palafox street, the main street of the said city, and of value at least four times greater than that of the lots claimed by the complainants in the said bill. That the defendant, through its commissioners, taking into consideration the facts —which it alleges to be facts—that no other available space, except the market lot before mentioned, could be acquired by the defendant for the said public purposes without a large expenditure of money, when it had not a cent to expend, (the said mentioned market lot was too small, and was of a value which rendered a sale of it necessary for the purpose of meeting the debts of the defendant, and meeting its current expenses;) that the property in possession of the other purchasers in lots O and P was covered by large and valuable brick buildings, while the lots claimed by the complainants were, and have always been, unoccupied and unimproved,—concluded that it was equitable to the said other purchasers, and to the public, for which it was trustee, that the said market lot should be sold for the public benefit, and that the lots claimed by the complainant should be occupied by defendant for the public uses heretofore mentioned; and accordingly the said market lot was sold, and the money therefrom applied as aforesaid, and the defendant took possession of the lots claimed by the complainants, and erected thereon a brick public building, a brick pound, and a brick house for the said hook and ladder truck and horses, at a cost of several thousand dollars.

"That the said lot was sold, and said buildings were completed, without objection from the complainants, and without intimation from them that they desired a confirmation of such title as they had acquired, and more than two years before any application was made by the complainants, or any one else, to the defendant, for a confirmation of such title. That this defendant has absolutely no ground upon which said buildings could be erected, has

no money with which to purchase such ground, or to build such buildings, and if it be deprived of such buildings, which it now occupies, will be entirely without the necessary public buildings, or the means of procuring them."

A replication was filed by complainants, and testimony taken by them, showing the time of erection of buildings by defendant, the payment of taxes by complainants, and want of knowledge of complainants of the erection of such buildings until after their erection.

Complainants filed a writing admitting all the statements of facts in the answer to be true, when relevant, and not contradicted by the testimony of the complainants.

On the hearing a final decree was rendered against the defendant, requiring it to execute to complainants a deed to the property in controversy, or, in the alternative, to pay the price paid by the complainants therefor, with 8 per cent. per annum interest from the time of purchase to date.

The statute of Florida upon the construction and effect of which the case, in large part, depends, is as follows:

"An act to permit the Provisional Municipality of Pensacola to sell certain of its public property, and to quiet the title to certain other of said property already sold.

"Whereas, certain portions of the public places within the Provisional Municipality of Pensacola have been heretofore sold by the city of Pensacola and valuable consideration received by it therefor; and whereas, certain other portions of the public places are not needed for public uses and it is desirable to sell the same; now, therefore, be it enacted by the legislature of the state of Florida:

"Section 1. That the Provisional Municipality of Pensacola be and is hereby authorized to execute deeds of conveyance to the holder of any public property of or in said municipality to any such property so held, wherever it shall be shown to the satisfaction of the board of commissioners that the city of Pensacola sold the said property and received value therefor from said holder or his grantor, and it shall appear equitable to said board that such conveyance should be made, due execution and delivery of such deed of conveyance shall vest the title in the grantee therein, his heirs and assigns forever.

"Sec. 2. Be it further enacted, that the said board of commissioners shall have power to sell to any purchaser any of the public places in, or of, said municipality, which are in the opinion of the said board unnecessary for streets, alleys, parks, squares or other public uses, and a deed executed and delivered by the said municipality, after due receipt of the purchase money—shall vest the title in the purchaser and his heirs and assigns forever. Approved June 2d, 1887."

In this court the appellant assigns as errors (1) the overruling of the demurrer to the bill of complaint; (2) the rendition of the final decree against the defendant.

There is no doubt that the bill should, in the first instance, have stated more specifically whether the property, with respect to which it had been filed, was proprietary or public property, so as to enable the court to see whether such property was within the scope of the statute of Florida above quoted, or complainants' right to relief stood upon other grounds; and if the defendant and appellant had insisted on its demurrer the complainants would have been driven to allege, at least, that the doubts respecting their title to the lots in question arose from the fact that the prop-

erty was not proprietary, but held in trust for public uses. Defendant and appellant, however, did not stand upon the demurrer, but answered over, and in the answer expressly set forth that the property in question was public property.

"An answer setting forth material facts, which should have been stated in the bill, but were omitted, is a waiver of the right to object to the bill for cause of the omission." Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. Rep. 955.

When it is desired to bring up the judgment of the lower court, upon demurrer, for examination, the party must stand by his demurrer, and not plead over in bar. Aurora City v. West, 7 Wall. 92; Railroad Co. v. Harris, 12 Wall. 84; Cavender v. Cavender, supra.

The case shows, as appears by the full statement herein made, that the appellant in this court, defendant in the court below, pretending to have the right to sell and convey certain real property, sold and attempted to convey the same, receiving and holding the purchase price, but, after recognizing the ownership and possession of the purchaser, resumed possession of the property, and thereafter, having full power to convey, refuses to convey or restore the property, and neglects and refuses to return the purchase money.

The main contention is that this case is not one which entitles complainants to any relief in a court of equity, and that, if the averments of their bill are true, they have a complete and adequate remedy at law. This defense is included in the issue made by the demurrer originally filed; but it is repeated, and persisted in, in the answer. As we view the case, it seems difficult to present a clearer case for relief on the ground of equity. The appellant has obtained the appellees' money under an agreement to sell and convey; and unjustly, although having the power to convey, refuses to convey or return the price. Jurisdiction to decree specific performance of a contract of sale of real estate is one of the well-established heads of equity jurisprudence. Pom. Eq. Jur. §§ 108, 110. Story says:

"It is well known that, by the common law, every contract or covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract or covenant, and as such, if it is unperformed by the party, no redress can be had, except in damages. This is, in effect, in all cases, allowing the party the election either to pay damages, or to perform the contract or covenant, at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and, considering it a violation of moral and equitable duties, they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse." Story, Eq. Jur. (5th Ed.) § 714.

But it is said in this case that the complainants have a complete and adequate remedy at law, and suggest that, if it is the absolute duty of the appellant to convey the property in question to the appellees, a mandamus would be a complete remedy. To this two objections present themselves—First, that the remedy by mandamus cannot be invoked as an original proceeding in the

courts of the United States, (Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. Rep. 633,) and that, although the local law may afford such remedy, the jurisdiction of the United States court to afford such remedy as it can furnish is not thereby ousted, (Barber v. Barber, 21 How. 582; Payne v. Hook, 7 Wall. 425; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. Rep. 940.) In this connection our attention is called to the case of Smith v. Bourbon Co., 127 U. S. 105, 8 Sup. Ct. Rep. 1043. An examination of this case shows that where, in the same bill, equity relief was sought against one defendant, and legal relief against another,—there being no privity between the last named and the complainant,— it was held by the supreme court that the equitable relief should be granted, and the legal relief denied; and the case would be entirely applicable to the instant one, if we had here two defendants, one owing equitable, and the other legal, relief, but entirely disconnected in their relations.

And, second, under the act in question, the complainants would be without relief on an application for mandamus in the local court. The appellees do not assert a clear legal right, but rather an equitable one, and the peculiar wording of the statute under which relief is sought is such that the suggestion of equitable considerations on the part of the Provisional Municipality of Pensacola would entirely defeat a remedy by mandamus. It is also suggested in the brief of the learned counsel for the appellant that an action of ejectment would furnish a complete remedy to the complainants; but how this can be, when it is conceded that the complainants have not a legal title, because of the original want of power to convey on the part of the municipality, we are unable to see.

It follows that the appellant cannot complain of the overruling of the demurrer, and that his first assignment of error is not well taken.

The second assignment of error involves the merits of the case. Prior to the passage of the enabling act, in 1887, the case was that the municipality of Pensacola, ultra vires, had sold, and delivered possession of, the lots in question, receiving and retaining the purchase price, and fully recognizing the purchaser's title. Its right, under these circumstances, was to repudiate the sale, and thereon its duty was to return the purchase price. The enabling act of 1887, however, changed the status of the case. Considering the said act as permissive, only, and not mandatory, it cannot be denied that thereby the municipality had power to carry out its contract in full, and convey the premises, or to rescind the same, in which last event, equity and good conscience required the return of the purchase money. As the appellees say, "it [the municipality] then stood as a private person, to all intents and purposes, subject to all the rules of conduct and estoppel applicable to other persons." As was said by the supreme court in Marsh v. Fulton Co., 10 Wall. 676–684, "the obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property

of others without authority, the law, independent of any statute, will compel restitution or compensation." See Louisiana v. Wood, 102 U. S. 294; Chapman v. County of Douglass, 107 U. S. 348-355, 2 Sup. Ct. Rep. 62. And if the municipality had the power of election, and proposed to change the status of the case, it ought, if not at the earliest moment, within a reasonable time, at least, to have rescinded the contract and returned the consideration, or to have confirmed the contract and made a deed. See Oil Co. v. Marbury, 91 U. S. 592; Metcalf v. Williams, 144 Mass. 452, 11 N. E. Rep. 700; Broom, Leg. Max. (8th Ed.) 295. In this case the appellant retained the purchase money, gave no notice of a desire to rescind, save such as could be inferred from taking possession of the property (vacant lots) shortly before the institution of this suit, and continued to levy and collect taxes on the property, as belonging to the appellees, until and including the year 1891.

The decree in the case, which is assigned as erroneous, requires the appellant to carry out the contract, or return the consideration. It seems to be perfectly fair to the appellant, as requiring nothing but equity. Unless the appellant is to be allowed to hold the property sold, and retain the purchase money, under the plea of necessity, we fail to see wherein it can complain. Its answer in the case sets up no equity,—only necessitous circumstances. Further than this, we are inclined to the opinion that the act of 1887 is more than permissive. It is mandatory. The authorities go to the extent that when authority is given under a statute, whether by the word "may," or other permissive words, for an act to be done by a public officer, and it concerns the public interest, or is for the benefit of third persons, it is mandatory. There seems to be no doubt that if the words, "and it shall appear equitable to said board that such conveyance should be made," had been omitted from the first section of the statute, the statute would have been mandatory. Suth. St. Const. §§ 461, 462, and cases cited; Supervisors v. U. S., 4 Wall. 435. With those words in the statute, it would seem, under the authority of Supervisors v. U. S., supra, that unless there should be, in fact, equitable reasons against making such conveyance, the statute would still be mandatory. The true construction of the statute seems to be that thereby the incapacity of the vendor to sell and convey is entirely removed. The contracts of sale of public property theretofore made are valid and enforceable, if otherwise than for want of power they would have been enforceable; that is, if, under equitable principles, the power being conceded, the vendee would be entitled to a specific performance. The words, "and it shall appear equitable to said board," can refer only to existing, well-defined equities, and ought not to be construed into vesting an arbitrary discretion in the municipality.

The answer in the case, as said above, sets forth no equities, and the learned counsel, in argument, suggests none, as existing in favor of the municipality of Pensacola, save that the appellees had neglected to build upon and improve the lots in question.

We can easily see how, if the appellees had built upon and im-

proved the lots in question, it would have raised an equity in their favor when the municipality elected to rescind; but we wholly fail to see how the failure of the appellees to build upon and improve their own property could raise an equity in favor of the municipality. But, be this as it may, equity will not permit the municipality to hold both the property and the purchase price; and, as the decree appealed from permits the municipality to rescind the contract of sale on return of the purchase price, we approve the same.

We have considered the other points discussed at the bar, and have examined the authorities relied upon in support thereof, but an elaboration of them is unnecessary, as the conclusions resulting do not affect the jurisdiction of the court a qua, nor, in our judgment, the equity of the decree appealed from. Affirmed, with costs.

LAND TRUST OF INDIANAPOLIS et al. v. HOFFMAN.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

No. 141.

1. EQUITY JURISDICTION—STIPULATIONS AS TO NATURE OF SUIT—APPEAL.
Parties cannot by stipulation convert a case which is essentially a suit in equity to remove a cloud on title, and cancel deeds, records, sales, etc., into an action at law for slander of title; and where such a stipulation has been filed, and trial accordingly had to a jury, an appellate court might well refuse to review the judgment on writ of error.

2. SLANDER OF TITLE—RECONVENTIONAL DEMAND—PETITORY ACTION.
Where, in an action for slander of title under the Louisiana law, defendant admits the slander, and sets up title in himself, the suit thereby becomes a petitory action, in which the burden of proof is thrown on defendant to establish his title.

3. SAME—PLEADINGS AND PROOF.
Where in such case defendant sets up title in himself under a tax deed, plaintiff is entitled to prove, without specially pleading the same, that the taxes for which the sale was made were in fact paid prior to the tax sale.

4. LIMITATION OF ACTIONS—ACTIONS TO INVALIDATE TAX TITLE.
The Louisiana statute, requiring actions to invalidate any title acquired by tax sale to be brought within three years, (Laws La. 1874, Act 105, § 5,) does not apply as against a landowner whose possession has never been interrupted.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana. Affirmed.

Statement by PARDEE, Circuit Judge:

On the 14th of December, 1889, Mrs. Wilhelmina Hoffman, widow of Joseph Bourdette, filed her petition in the civil district court for the parish of Orleans, alleging "that she is the owner, and in possession, of a certain square of ground in the sixth district of this city, designated by the number 27, comprised within State, Bond, Ferdinand streets and the division line of Burtheville;" and further showing that the defendants (plaintiffs in error) claimed to have purchased said property from the Western Land & Emigration Company, a corporation of the state of Indiana, which company bases its pretended claim of ownership on an alleged act of sale from the state of Louisiana, through Isaac W. Patton, state tax collector, before Joseph H. Spearing, notary public, on December 15, 1888, which act purports

to be made by the Western Land & Emigration Company, as pretended transferee of Domingo Negrotto, Jr., who is claimed to have purchased the petitioner's property at a tax sale made for taxes claimed for the year 1878; that defendants have placed on record, in the conveyance office of this city, their pretended title, as aforesaid, and by their claims of ownership, which they constantly make, and by the aforesaid registry, are slandering the petitioner's title; that the existence and registry of the aforesaid pretended titles create a cloud upon the petitioner's title, which should be removed; that the pretensions of the defendants and its transferees are absolutely without foundation, and devoid of merit, because petitioner's property was not assessed at all for the year 1878, and therefore could not be legally sold for the taxes of 1878; that the property claimed to have been sold for said taxes, and purchased by Negrotto and the Western Land & Emigration Company, was the property belonging to Joseph Bourdette, who never owned or had any interest whatsoever in petitioner's before-described property, and, so far as concerns petitioner's property, the aforesaid sale and title of the Western Land & Emigration Company are absolutely null and void, and petitioner denies that the said Negrotto or the said Western Land & Emigration Company ever purchased or obtained a legal title to the property belonging to Joseph Bourdette, all of the pretended proceedings of the tax collector being illegal and void; that her aforesaid property is not worth more than $1,000.

The prayer of the petitioner is "that defendants be cited to answer, that an attorney at law be appointed to represent them, and for judgment restraining defendants from further slandering petitioner's title by setting up any claim of ownership, decreeing their alleged titles null and void, and erasing and canceling the same from the records of the register of conveyance for the parish of Orleans, and for general relief."

On the 16th January, 1890, defendants appeared, filed their petition and bond for the removal of the cause, and the case was transferred to the circuit court, where the record was filed on the 8th of March, 1890. On the same day the record was filed in the lower court, defendants answered, pleading: (1) A general denial to each and every allegation in plaintiff's petition contained, except as may be so far hereinafter specially admitted. (2) Alleged the enactment of the statute known as Act 82 of 1884 by the general assembly of Louisiana. (3) That, in compliance with the provisions of said act, the tax collector of the upper districts of the city of New Orleans did advertise and offer for sale, and, having fulfilled the requirements of said act, did sell and adjudicate unto Domingo Negrotto, Jr., the following described square, to wit, "square 27, sixth district, bounded by Pitt, Jeannette, and State streets and the division line of Burtheville, measuring 217 feet by 300 feet, assessed in the name of Widow Joseph Bourdette." (4) That Negrotto paid the price to the tax collector, who gave him a receipt therefor, together with a proces verbal of sale, entitling him, as adjudicatee, to a deed for said property, as provided by said statutes. (5) That, in compliance with section 4 of said act, the said purchaser did assume to pay, and take said property subject to, all unpaid taxes on the same subsequent to December 31, 1879. (6) That Negrotto, the tax purchaser, transferred, set over, and assigned to the Western Land & Emigration Company all his right, title, and interest in the proces verbal delivered to him by James D. Houston, state tax collector, and Isaac W. Patton, the successor in office of said Houston, did execute and deliver unto the Western Land & Emigration Company a title from the state of Louisiana to said square, as per act, before Spearing, a notary public, on the 15th day of December, 1888, and that on the same day said act of sale was duly registered in the conveyance office of this parish. (7) That the Western Land & Emigration Company paid all the state and city taxes due and owing on said square. (8) That the tax title so acquired by the Western Land & Emigration Company, as transferee of the said Domingo Negrotto, Jr., is, under the provisions of said Act 82 of 1884, § 3, conclusive evidence—First, that the property was assessed according to law; second, that the taxes were levied according to law; third, that the property was advertised according to law; that the property was adjudicated and sold, as recited in said act; fourth, that all

the prerequisites of the law were complied with by the officers, from the assessment up to and including the registry of the deed to said purchaser. (9) That on the 12th day of April, 1889, the Western Land & Emigration Company sold said square to the defendants, and that the same exceeds in value the sum of $2,000. (10) Defendants, assuming the character of plaintiffs in reconvention, aver that the Land Trust of Indianapolis, Louis T. Michener, William J. Richards, and William W. Smith, trustees, are, by virtue of the above-recited act, the true and lawful owners of said square of ground above described, unlawfully withheld and possessed by Mrs. Wilhelmina Hoffman, widow of Joseph Bourdette, entitled to be recognized as owners, and as such put in possession. They pray that plaintiff's demand be rejected, and that there be judgment in their favor in reconvention, recognizing them as the true and lawful owners of said square, and, as such, put in possession thereof, with costs, etc.

To this answer and plea in reconvention plaintiff filed a general replication. Subsequently, on 13th of May, 1891, defendants filed, first, the plea of prescription of three years, under section 5 of Act 105 of 1874; and, second, the peremptory exception that plaintiff is absolutely without right to stand in judgment and maintain this suit, and prayed that said exceptions be sustained, and plaintiff's suit dismissed, and for judgment in their favor on their reconventional demand. Finally, after several continuances, the case came on for trial on the 1st February, 1893. Up to this time the plaintiff had treated the cause as a suit in equity to remove a cloud upon her title, while defendants regarded it as an action at law for slander of title. On the day of trial the parties filed a stipulation, in which it was agreed "that this suit be considered and tried as an action at law for slander of title, in which defendants, in their reconventional demand, assert title and ownership to the land in controversy. It is further agreed that the value of the property in controversy exceeds the sum of $2,000." A jury was accordingly impaneled, and the trial of the case was proceeded with on the pleadings as recited. During the trial defendants below (plaintiffs in error) took three bills of exceptions, one to the admission of certain testimony and evidence, and the remaining two to the charge of the judge to the jury. From an adverse verdict and judgment defendants sued out a writ of error, and assigned error as follows:

First. The court erred in admitting the evidence offered by plaintiff for the purpose of proving payment of the tax of 1878 upon the property in controversy, and for which said property was sold by the tax collector, because said testimony and evidence were irrelevant, and not responsive to the pleadings, and because, no plea of payment having been filed by the said plaintiff of the tax of 1878, for which the property in controversy was sold by the tax collector, no evidence tending to show payment of said tax was admissible, as stated in bill of exception No. 1, pp. 32, 33, 34, 35, 36, 37, 38, 39, 40.

Second. That the court erred in refusing to charge the jury that plaintiff's action was prescribed by the lapse of three years, under section 5 of Act 105, approved March 28, 1874, which requires that "any action to invalidate the titles to any property purchased at tax sale, under and by virtue of any law of this state, shall be prescribed by the lapse of three years from the date of such sale." And the court erred in holding and ruling, and instructing the jury, that "the plaintiff being in possession, and her possession never having been interrupted, the defendant, plaintiff in reconvention, must recover upon the strength of his title, and that the provision with reference to prescription did not apply to such a case," as stated in defendant's bill of exception No. 2, pp. 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57.

Third. That the court erred in refusing to charge the jury "that they could not consider and must ignore the testimony and evidence and all evidence tending to show payment of the state tax for the year 1878 for which the property in controversy had been sold and adjudicated by the tax collector, because, under the plea of the general issue, evidence of payment could not properly be received or considered; that the plea of payment is a

peremptory exception, going to extinguish the action, and which the Code of Practice of Louisiana requires to be expressly and specially pleaded, and, no plea of payment having been filed by the plaintiff in this cause of said tax for the year 1878, for which the property in controversy was sold and adjudicated by the tax collector, all evidence tending to show the payment of said tax must be entirely ignored, and not considered by the jury; that the jury were without power to weigh any testimony or evidence regarding the payment of said state tax for the year 1878, because the same was irrelevant, and not responsive to any of the pleadings in this case."

And the court erred in charging the jury that "if the plaintiff in reconvention recovered, it must be upon the strength of its title, which it had offered, and it is competent for the defendant [the original plaintiff] to establish that the tax, the nonpayment of which was the basis of the title of said plaintiff in reconvention, had been paid before the proceeding which resulted in the tax sale occurred," all as stated in the bill of exception No. 3.

E. Howard McCaleb, for plaintiffs in error.

Geo. Denegre, Walter D. Denegre, and T. L. Bayne, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) The case made by the pleadings is one where a party in possession seeks to remove a cloud from the title to real estate, and to cancel deeds, records, etc. The suit, therefore, is essentially an equity suit, (Pom. Eq. Jur. § 1398; Story, Eq. Jur. § 692,) and, under the law and practice of the United States courts, should have been prosecuted on the equity side of the court. The decree rendered in the court below, brought up for review, is to all intents an equity decree. We might well, therefore, decline to review this case under the writ of error sued out, and leave the parties to the results of the arbitration by the judge and jury, to which they agreed. Surgett v. Lapice, 8 How. 48; McCollum v. Eager, 2 How. 61; Hayes v. Fischer, 102 U. S. 121; Walker v. Dreville, 14 Wall. 441; Kelsey v. Forsyth, 21 How. 85; Marin v. Lalley, 17 Wall. 14.

Taking the case, however, as the parties by stipulation have tried to make it, and considering it as properly brought to this court for review by writ of error, we will examine the errors assigned. The stipulation of parties is to the effect that this suit is to be considered and tried as an action at law in the courts of Louisiana for slander of title, in which the defendants, in their reconventional demand, assert title and ownership to the land in controversy. Under this stipulation the pleadings, as made by the parties, properly consist of plaintiffs' petition and the defendant's answer in reconvention. The replication filed by defendant in error, plaintiff in the court below, when proceeding on the supposition that the cause was an equitable one, is necessarily to be disregarded, under the agreement made in the case, or, at most, considered as a general denial to the demand in reconvention. "Replications are not permitted by our law, and so all allegations in answer are open to every objection of law and fact, as nonage, coverture, fraud, and the like.

as if specially pleaded. If defendant be surprised, the proper remedy is continuance or a new trial." 2 Hen. Dig. "Pleading V," p. 1155, and cases there cited. In a suit for slander of title, in which the defendant admits the slander, and sets up title in himself, the suit thereby becomes a petitory action, in which the burden of proof is thrown upon him to establish his title. Livingston v. Heerman, 9 Mart. (La.) 714; Walden v. Peters, 2 Rob. (La.) 331; Proctor v. Richardson, 11 La. 186. In the leading case of Livingston v. Heerman, supra, Mr. Justice Porter, for the court, said:

"Now, when a suit is commenced like the present, defendant should do one of two things,—either deny that he said so, which would amount to a waiver of title, or admit the accusation, and aver his readiness to bring suit. In the first alternative the courts would proceed to try the fact whether he had defamed the title or not, and give damages accordingly; in the second, they would order suit to be commenced. This, it appears to me, is the regular course. The object of this law was intended to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion; to force the defamer to bring suit, and throw the burden on him of proving what he asserted. If this course had been pursued here, the defendant Heerman directed to bring suit, in the language of the law, to prove what he said, and the plaintiff relying on it, possession would have been maintained in it until a better right was shown. Instead of doing this, he has chosen to maintain the truth of what he has advanced by stating thereafter the title in his answer, and averring it to be a better one than the plaintiff's. Having done so, I think the court can examine it as well in that answer as if set forth in the petition. It is only, in fact, anticipating the order which the court must have given, and coming forward at once with that title which the court would have directed him to produce in another suit. His adopting this course at his own choice cannot change the mode in which the proof must be adduced. He must make out his title alleged, and cannot take from the plaintiff the advantage which he derives from his possession by varying the form by which he thought proper to make good his claim to the premises."

In the case of Telle v. Fish, 34 La. Ann. 1244, the plaintiff brought a petitory action against the defendants, who called their vendor in warranty. That vendor set up a tax title. Plaintiff thereupon filed a supplemental petition, in which he urged that the tax title was fraudulent, unreal, null, and void. Defendants and warrantor moved to strike out this supplemental petition, and, during the progress of the trial, objected to the introduction of any evidence under the allegations of the petition, on the ground that it was in the form of an answer, or rejoinder to an answer, which is not allowed under Louisiana laws, and objected to all evidence in support of the alleged simulation and fraudulent character of the tax sale. In passing on this objection the court said:

"Construing the allegations in the supplemental petition touching the nullity of the tax sales as a mere means of defense urged by plaintiff, and as of no greater importance than objections advanced orally, we find no error in the ruling of the judge in refusing to strike out the supplemental petition. His ruling on that point, and on all the other objections of defendants and warrantor, hereinabove enumerated, is fully sustained by the decisions in the cases of Hickman v. Dawson, 33 La. Ann. 438; McMaster v. Stewart, 11 La. Ann. 546; Maillot v. Wesley, Id. 467,—in which the right of the plaintiff in a petitory action to meet the title opposed to him, even at tax sale, by all means of attack, as though specially pleaded, has been recognized as a correct rule of practice."

In Maillot v. Wesley, supra, which was an action of revendication, the court said:

"As our law does not permit either a replication or a rejoinder, all matters of defense set up in the answer must therefore be considered as open to every objection, and not as if such objections had been specially pleaded. Thus the plaintiff may resort to the exceptions of nonage, coverture, fraud, violence, and the like, without pleading them, because he is not permitted to reply."

In Hickman v. Dawson, supra, which was a petitory action, in which the plaintiff alleged title and the defendant set up a tax title, the court said:

"In such a case all matters of defense set up in the answer must be considered as open to every objection of law and fact, as if such objection had been specially pleaded. The title which defendant sets up in such an action is presumed to be traversed or resisted in all its vital elements, and is thus open to every attack which might be leveled at it in a direct action in nullity."

The first and third assignments of error in this case, based upon the first and third bills of exception, present substantially the same question, and that is whether the plaintiff in the trial court, under the stipulation of the parties, and in accordance with the practice in Louisiana, (the defendant in reconvention,) was authorized to present and have considered by the jury evidence tending to show that the tax for the year 1878, the nonpayment of which was the basis of the tax title pleaded in reconvention, had been paid prior to the sale for taxes.

It was urged in objection that such testimony and evidence was irrelevant, and not responsive to pleadings, and that, being a plea of payment, under the Louisiana Code of Practice, it must be specially pleaded; but the trial judge overruled the objections, on the ground that the defendants in the original suit, by setting up title in themselves, became plaintiffs in a petitory action, and therefore plaintiff (defendant in reconvention) had the right to prove any fact tending to destroy or impeach defendants' title as though specially pleaded, and to show that the tax for 1878, for which the property was sold by the tax collector, had been paid prior to said sale. The evidence objected to was certainly relevant, as tending to show the absolute nullity of the tax title forming the basis of the reconventional demand, and, under the authorities above given, we are of the opinion that such nullity was not required to be specially pleaded in order to render the evidence admissible. The case is not at all like a suit on a money demand, where payment can only be proved under a special plea, as is well settled in Louisiana practice.

There remains to consider the second assignment of error, which is that the court erred in refusing to charge the jury that plaintiff's action was prescribed by the lapse of three years, under section 5, Act 105, Laws La., approved March 28, 1874, which requires that "any action to invalidate the title to any property purchased at tax sale under and by virtue of any law of this state shall be prescribed by the lapse of three years from the date of such sale." The court refused to give the charge requested, holding that the defendant, the former plaintiff, being in possession, and her possession never

having been interrupted, the plaintiffs in reconvention must recover upon the strength of that title, and that the provision with reference to prescription did not apply to such case.

It is a general rule that the statute of limitations does not run against the party in possession. The particular statute in question was held subject to this rule by the supreme court of Louisiana in the case of Breaux v. Negrotto, 43 La. Ann. 427, 9 South. Rep. 502; McWilliams v. Michel, 43 La. Ann. 984, 10 South. Rep. 11. See, also, Lague v. Boagni, 32 La. Ann. 912; Barrow v. Wilson, 39 La. Ann. 403, 2 South. Rep. 809; McDougall v. Monlezun, 39 La. Ann. 1005–1010, 3 South. Rep. 273. The case of Smith v. City of New Orleans, 43 La. Ann. 734, 9 South. Rep. 773, seems to hold directly the contrary, and that the special prescription in question begins to run from the day of sale. This case, however, cannot be regarded as authority, because a rehearing was granted therein on the ground of conflict with Breaux v. Negrotto, supra, and, pending reargument, the case was compromised and taken out of court. If the case of Smith v. City of New Orleans should be considered as authority, and as overruling Breaux v. Negrotto, we do not see how it will help the plaintiffs in error, because the date of sale in that case, and we think properly, is fixed by the court at the date of the tax collector's deed, and the record of this present case shows that the tax collector's deed to Negrotto was executed on the 15th day of December, 1888, less than three years before the institution of the suit attacking such title.

We note the authorities cited by plaintiffs in error to the effect that in all public sales in Louisiana, whether made by auctioneers, sheriffs, or tax collectors, the adjudication is regarded and treated as the completion of the sale. Rev. Civil Code, arts. 2601, 2617; Baham v. Bach, 13 La. 287; Freret v. Meux, 9 Rob. (La.) 414; Macarty v. Gasquet, 11 Rob. (La.) 270. But we are of the opinion that the principle invoked applies only to actual parties to the sale, and that third persons cannot be affected until after the act of sale is passed, and ought not to be affected until the sale is recorded. See Rev. Civil Code, arts. 2610, 2442. It is difficult to see how an action can be brought to invalidate the tax title before it is made. Of course the party can proceed by injunction to prevent the tax title from being made, but a suit for nullity, or to invalidate the tax title, would be premature before making the same. Besides this, we notice that in Lague v. Boagni, supra, the supreme court of Louisiana held that the prescription in question did not apply in case of absolute nullity in the tax title.

On the whole case, we find no reversible error. The judgment of the circuit court is affirmed, with costs.

IVORY et al. v. KENNEDY et al.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1893.)

HOMESTEAD—DEED OF TRUST—FORECLOSURE—SUBROGATION.

Deeds of trust by two grantors and their wives, representing themselves as one family, and claiming but one homestead, were made to secure a loan, a portion of which was used to pay off vendors' liens on a specific part of the lands. Subsequently the widow of one of the grantors claimed a right of homestead in such part under Const. Tex. 1876, art. 16, § 50. *Held*, that the mortgagee was subrogated to the right of the holders of the vendors' liens as to such specific part, and on foreclosure was entitled to sell the whole tract, except the two homesteads, and, if sufficient was not realized to satisfy the mortgage debt, then to sell the homestead claimed by the widow, to satisfy so much of the decree as should not exceed the sum used to pay off such vendors' liens. McCormick, Circuit Judge, dissenting. Pridgen v. Warn, 15 S. W. Rep. 559, 79 Tex. 588, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas. Decree amended and affirmed.

Statement by PARDEE, Circuit Judge:

This bill was brought by Holmes Ivory, complainant, appellant here, and A. S. Caldwell, Bolton Smith, and J. M. Judah, nominal complainants, in the circuit court of the United States for the eastern district of Texas, at Galveston, against Walter Kennedy, for himself, and as surviving partner of the firm of Walker & Kennedy, and as independent executor of the last will and testament of John F. Walker, deceased, and against Sarah M. Kennedy, wife of Walter Kennedy, and Serena K. Walker, widow of John F. Walker, for herself, and as independent executrix of the last will and testament of John F. Walker, and against Mrs. M. W. Kennedy; James Bute, Henry Mayer, Jacob Kahn, and Henry Freiberg, doing business under firm name of Mayer, Kahn & Freiberg; C. W. Alsworth; D. F. Rowe; Gus Lewy and A. Uedeman, doing business under the name of Gus Lewy & Co.,—to foreclose two deeds of trust held by the complainant, Ivory, and made by the defendants Walter Kennedy and John F. Walker, Sarah M. Kennedy and Serena K. Walker, their wives, in which deeds of trust Caldwell, Smith, and Judah, nominal plaintiffs, were trustees. All of the other defendants were charged with having some interest in the mortgaged property, which interest was subordinate to that of complainant. It was substantially charged in the original and amended bill that defendants Kennedy and Walker and their respective wives mortgaged to complainant 3,389 acres of land to secure the payment of $20,000 and interest according to the first deed of trust, and $10,000 and interest according to the second deed of trust. The 3,389 acres of land are described by metes and bounds, and lie in a body in Brazoria county, Tex.

The first deed of trust recites that the entire purchase money for 2,186 acres of the land described in plaintiff's bill was paid by the plaintiff for the defendants Kennedy and Walker, and that as to the remainder of the land certain vendors' liens and judgments on it were paid with the remainder of the money borrowed from the complainant after paying the purchase price for the 2,186 acres, and that complainant, having advanced the money to take up valid and subsisting liens on the land, among others, purchase-money notes, was entitled to be subrogated to the equities of the holders of the unpaid purchase-money notes at least, which at the hearing amounted to $6,558.70, as against any claims of homestead set up by the defendants Kennedy and Walker, except the original homestead of 200 acres. From the operation of the deeds of trust was excepted the original 200 acres of land, with the buildings, which Kennedy and Walker had designated as their homestead,—they being brothers-in-law, living together as one family. The defendants Gus Lewy and A. Uedeman were dismissed, the defendant James Bute disclaimed, Mayer, Kahn & Freiberg appeared and answered, defend-

ant Alsworth appeared and answered, D. F. Rowe did not answer. All of these defendants who answered claimed judgment liens or other liens on the property described in complainant's deeds of trust and bill of complaint; and the court held that the liens of all these defendants were subordinate to that of complainant.

No exception is taken by either complainant or defendants to the judgment of the court in regard to these defendants. The defendants Walter Kennedy and Serena K. Walker, for themselves, and as independent executors of the will of John F. Walker, deceased, and Sarah M. Kennedy, for herself, answered jointly, admitting the execution of the deeds of trust and notes, and that they owned the land when the deeds of trust and notes were executed, and claiming one homestead of 200 acres, which is the homestead designated and expressly excepted in said deeds of trust, and which was in bill of complaint alleged to be omitted from the deeds of trust, but claiming also an additional homestead of 200 acres, not then designated, out of the land included in the deeds of trust, alleging that Kennedy and Walker each were the head of a family, and each entitled to 200 acres of land, and they alleged that complainant had expressly waived any right he might have as the assignee and holder of the original unpaid money notes. A subsequent and amended answer was filed, designating by metes and bounds the additional 200 acres claimed as the additional homestead. There is an agreed statement of facts and other evidence in the record which warranted a decree in favor of the complainant, recognizing his lien, under the deeds of trust on the whole property, for $36,504.24, subject to the homestead of the defendant Kennedy, excepted and reserved in the deeds of trust, and also subject to the homestead claimed and designated by Serena K. Walker, and recognizing a vendor's lien in favor of complainant for $6,558.70 out of the said $36,504.24 on the 1,203 acres known as the "Waverly Place," subject only to the Kennedy homestead, as designated in the deeds of trust.

There was also evidence showing that in the applications made by the said Kennedy and Walker for the loans of the several sums, and describing the security offered, the said Kennedy and Walker declared that they constituted only one family, occupying only one residence; and the deeds of trust recited "that the therein-described property was not their homestead, nor claimed, used, or enjoyed by them as such, and that they have other property which they occupy and claim as such;" and that, after the execution of the original deed of trust to secure $20,000, and prior to the advance and loan, the said Walter Kennedy, Sarah F. Kennedy, John F. Walker, and Serena K. Walker, in order to induce the complainant to advance and loan his money upon the security aforesaid, made and presented to complainant an affidavit in which, after reciting the negotiations regarding the loan, it was further recited as follows: "Whereas, the said Holmes Ivory is unwilling that the money arising from said loan and now in the hands of Francis Smith and Caldwell & Co. be paid to said Walter Kennedy and John F. Walker until the homestead rights of the said Walter Kennedy and wife and of said John F. Walker and wife in the said premises are clearly defined: Now, therefore, to facilitate the speedy closing of the said loan, and to induce and secure the payment of the said money on said loan, we, Walter Kennedy and Sarah M. Kennedy, his wife, and John F. Walker and Serena K. Walker, his wife, do hereby declare under oath that the said Serena K. Walker is the sister of Walter Kennedy; that the affiants all live together as one family on the tract of land of 200 acres known as the 'Old Kennedy Homestead,' situated in Richardson league, in said Brazoria county, Texas, particularly described as follows: * * * and that we, and each of us, use and occupy the said 200 acres as our homestead, and that we do not in any wise use or claim any other land as our homestead."

On the hearing the court rendered a final decree, in substance as follows: Giving judgment for the complainant against the defendants Walter Kennedy, for himself, and as independent executor of John F. Walker, deceased, and Serena K. Walker, as independent executrix of John F. Walker, deceased, for the sum of $36,504.24, being the principal and interest secured by both deeds of trust. The decree then goes on and provides for judgment for such other of the defendants who appeared and answered and proved claims against Kennedy and Walker for the amount of their respective claims, classi-

fies their liens, and subordinates them to complainant's and divests title to the lands out of the nominal plaintiffs, Caldwell, Smith, and Judah, and apportions the costs between the different parties. Paragraph 11 declares that the complainant has a valid and subsisting first lien on the lands and premises described in his bill of complaint for the sum of $36,504.24, and interest until paid at the rate of 12 per cent. per annum, except as to 200 acres of said land, which is hereby adjudged the homestead of the defendant Walter Kennedy, and 200 acres here adjudged the homestead of Serena K. Walker. Paragraph 12 decrees that the deeds of trust be foreclosed as to all the parties to the suit; that J. J. Dickerson be appointed to make the sale; commands him to seize and sell the lands, and apply the proceeds of sale to the satisfaction of plaintiff's judgment, and the balance remaining, if any, to be paid into the registry of the court, to be distributed among the other defendants as their equities may appear. The decree then goes on describing the land as described in complainant's deeds of trust and bill of complaint, and excepts from the operation of the decree 200 acres of land described in a designation of homestead by the defendants Kennedy and Walker,—the original homestead, about which there is no question. It also excepts 200 acres of land designated by Serena K. Walker as her homestead, "and by this judgment set apart to her, subject to the vendor's lien for $6,558.70 and interest, as hereinafter limited." The last paragraph in the decree is as follows: "Said sale shall be made in the following manner: The said J. J. Dickerson shall first sell all of said property to satisfy said judgment, except the Waverly place, of which the two homesteads above described are a part, and which said Waverly place is described as follows: Beginning at the southwest corner of a tract of land sold to W. J. Hutchings off the east end of said Waverly plantation; thence north along the west line of said Hutchings tract to the south line of the Drayton place; thence west along said south line to the Brazos river; thence with the meanders of the river to the south line of the Waverly plantation as owned by Mary W. Kennedy and Wm. Kennedy, trustee of Mary W. Kennedy, in May, 1876; thence along said south line to the beginning,—being the same tract of land sold to Kennedy and Walker by Ball, Hutchings, John Sealy and Geo. Sealy by deed dated Nov. 21, 1881, recorded in Book V, pages 698 and 699, Brazoria Co. Records. Should plaintiff's said debt not be satisfied by said sale, the said Dickerson shall then sell the Waverly place, less the homestead above described, to satisfy so much of the balance of said judgment as shall not exceed the said sum of $6,558.70 and interest; and if, after the sale of said Waverly place, less said homestead, there shall remain a balance unrealized of the $6,558.70 and interest, then the said Dickerson shall sell the Serena K. Walker homestead to satisfy said balance, and, if said sale of said homestead shall realize more than such unpaid balance of $6,558.70 and interest, then the said Dickerson shall pay to the defendant Serena K. Walker the amount of such excess. And plaintiff Holmes Ivory excepts to said decree for the reasons set forth in his assignment of errors, and asks leave to appeal herefrom to the United States circuit court of appeals, which application is hereby by the honorable trial judge granted, and leave given to appeal herefrom."

The complainant perfected his appeal, assigning errors as follows: "(1) The court erred in its final decree in this: that plaintiff is by said final decree compelled to sell the Waverly plantation to satisfy the debts secured by the vendor's lien, and no other debt, whereas the plaintiff's mortgage covers said Waverly plantation in addition to other lands, and is for a larger amount than the amount secured by the vendor's lien. (2) The court erred in its final decree in this: that said decree should have ordered all of said property sold, less the homesteads of 200 acres each, to satisfy plaintiff's debt, and in the event said property failed to bring the amount of said debt, then that the homestead of Serena K. Walker, which is a part of the Waverly plantation, and subject to the vendor's lien, should have been sold to satisfy the balance remaining due, provided said 200 acres should not in any event be sold for an amount greater than the sum due on the vendor's lien."

H. P. Drought, for appellant.

F. D. Minor, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge, (after stating the case,) delivered the opinion of the court.

The first error assigned is well taken. Complainant's mortgage for the entire amount includes the 1,203 acres known as the "Waverly Place" (except the Kennedy homestead) as well as the balance of the tract, and the complainant is clearly entitled to a decree of foreclosure and sale of the tract as a whole, the only exemptions therefrom allowable being the two tracts of 200 acres each claimed respectively by Walter Kennedy and Serena K. Walker as homesteads; the one because excepted in the deeds of trust, the other because exempted under the constitution and laws of Texas.

The second assignment of error presents more difficulty. The case is shortly this: Complainant has a mortgage on the whole tract, less the Kennedy homestead. He has a vendor's lien on the 1,203 acres known as the "Waverly Place" (except the Kennedy homestead) for a part of his entire claim. Mrs. Walker is entitled to claim and have exempted out of the 1,203 acres her designated homestead of 200 acres as against the complainant's general mortgage, but not as against complainant's vendor's lien. The instructions as given in the decree are evidently inequitable, for under them the mortgagee is not only compelled to resort to the several parts of the undivided whole, but to do it in such a manner as to compel him to pay for what he has already paid for, or lose his debt; for, under the said instructions, any amount complainant should bid for the Waverly place over and above the $6,558.70 must be paid to some one else, for complainant is allowed to have it sold for that sum only; and in the event that sum is bid the homestead goes to Mrs. Walker without being paid for.

The constitution of the state of Texas (article 16, § 50) is as follows:

"The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed, or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."

The power of a court of equity to compel the mortgagee to resort in the first instance to one of the several estates mortgaged is generally exercised only for the protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. Story, Eq. Jur. § 640; Pom. Eq. Jur. §

1414. In the case of Searle v. Chapman, 121 Mass. 19, Mr. Chief Justice Gray (now Mr. Justice Gray of the supreme court of the United States) delivering the opinion of the court, the above rule was laid down, and the court held that the owner of the homestead could not compel the marshaling of securities so as to favor his homestead right, and the court said:

"The right of homestead created by our statutes is certainly entitled to no higher degree of favor than the courts have always accorded the common-law right of dower. The case cannot be distinguished in principle from the ordinary one in which a wife, who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt as a condition of asserting her right of dower against the mortgagee. Gibson v. Crehore, 5 Pick. 146-152; McCabe v. Bellows, 7 Gray, 148, 1 Allen, 269; Davis v. Wetherell, 13 Allen, 60. The judgment in Pittman's Appeal, 48 Pa. St. 315, is in accordance with our conclusion. The cases in some of the western states, cited by the learned counsel for the tenants, so far as they countenance any equity in the owner of the right of homestead as against the party in whose favor he has waived or released it, are supported by no reasons, and do not disclose how far they may have been influenced by local statutes."

The appellant contends that the decree in question "should have instructed Dickerson to sell the land, less the homesteads, to satisfy the plaintiff's debt, and in the event the debt should remain unsatisfied after the sale, that the additional homestead of 200 acres set apart to Serena K. Walker, subject to the lien of $6,558.70, should be sold to satisfy what remained unrealized, provided it should not be sold in any event to satisfy an amount more than $6,558.70, which was the amount of the unpaid purchase-money notes,—the amount the decree found it subject to;" and he relies upon the case of Pridgen v. Warn, 79 Tex. 588, 15 S. W. Rep. 559, which is a case almost identical with the present one. In that case Warn claimed a lien upon 408 acres of land bought by Pridgen of Thomas. The tract included 100 acres claimed by Pridgen as a homestead. Pridgen bought the land on credit, and executed purchase notes for it. Some of the notes came due, and Pridgen borrowed a sum of money from Warn to pay them, and for other purposes. This sum was in excess of the purchase notes, and Warn took a deed of trust on all the land to secure the total sum advanced. The supreme court of Texas held on appeal that Warn was subrogated to the rights of the vendor to the extent of the second note which he had taken up against the 100 acres in the homestead, and the court decreed as follows:

"The land found subject to Warn's mortgage will first be sold for the payment of his debt, and, should any balance of his debt remain, then the 100 acres found subject to the vendor's lien shall be sold for the payment of such balance; but the amount to be applied from the proceeds of such sale shall in no case exceed the amount of the second note paid off by him as determined in the judgment."

We find no other Texas adjudication on this question. The cases in point from other states are conflicting, and those found holding that a creditor with security is compelled to divide his security in favor of a homestead—the homestead being under the law liable to be sold for the payment of the debt—are, as intimated by Mr.

Justice Gray, either based on insufficient reasons or upon statutes of local application.

Under the circumstances of this case, we are of the opinion that we should follow the precedent set by the supreme court of Texas in a like case. We are the more inclined to this because it is all that complainant asks, and because, under the facts, the demand of the defendants for an additional homestead, in view of their representation and affidavit to induce the complainant to part with his money, is inequitable, and tends to operate a fraud upon the complainant; and while we recognize the public policy of the state of Texas as declared in its constitution in favor of the exemption of homesteads from forced sales generally, we do not think that the present is a case calling upon us to invent new precedents, or stretch the general rules of equity, in order to give the said defendants a homestead, for which, by the record, they have not paid, and which, under the law, may be, and ought to be, sold to satisfy a just debt.

For these reasons, it is now ordered, adjudged, and decreed that the last paragraph of the decree appealed from be, and the same is hereby, reformed and amended so as to read as follows: Said sale shall be made in the following manner: The said J. J. Dickerson shall first sell all the property covered by complainant's mortgage, as described in the twelfth paragraph of this decree, except the two homesteads of 200 acres each, hereby set apart to Walter Kennedy and Serena K. Walker, to satisfy the sum of $36,504.24, and interest thereon until paid at the rate of 12 per cent. per annum, and all costs as found due to the complainant in the first paragraph of this decree; and, in the event said amount remains unsatisfied, after being credited with the proceeds of said sale, then the said J. J. Dickerson shall sell the homestead of 200 acres herein set apart to Serena K. Walker, to satisfy so much of the balance due on the decree aforesaid as shall not exceed the sum of $6,558.70 and interest; and, should said 200 acres bring an amount more than $6,558.70 and interest, then that such excess be paid to the defendant Serena K. Walker; and, in the event the decree in favor of plaintiff, as found in the first paragraph hereof, shall not be satisfied by such sale or sales, then that the complainant, Holmes Ivory, do have execution for the balance unpaid against the defendants Walter Kennedy, for himself, and as independent executor of the last will and testament of John F. Walker, deceased, and against Serena K. Walker, independent executrix of John F. Walker, deceased, and for his costs.

It is further ordered, adjudged, and decreed that the decree appealed from as herein amended be, and the same is hereby, affirmed at the cost of the appellees.

McCORMICK, Circuit Judge, (dissenting.) I dissent from the decision rendered in this case and from the views expressed in the opinion of the court. There is no question raised on this appeal as to Mrs. Walker's right under the Texas law to the homestead

of 200 acres claimed by her, subject only to a vendor's lien on 1,203 acres, of which said 200 acres is a definite, separate part, specifically described by its metes and bounds. The trial court so found in her favor, and the appellant does not complain of this finding. It is too clearly supported by the admitted facts and familiar Texas law to admit of question. There is, therefore, no place to bring in any declarations made by Kennedy and Walker in reference to their homestead or the affidavits of said parties and their wives, copied into the court's statement of this case. There is no question of high equities before us, but a very plain matter of intensely Texas law as to the right of the owner of a rural homestead of 200 acres, situated as this 200-acre homestead is, to have the vendor's lien, which covers 1,203 acres, first applied to the 1,003 acres excess. There is no room here for learning drawn from Pennsylvania, Massachusetts, or the high court of chancery to determine the relation the right of homestead created by the Texas constitution bears to the common-law right of dower, or the comparative degree of favor the courts administering Texas law should accord the homestead right. For nearly 50 years the people of Texas, by successive and progressive constitutional provisions, and a constant and swelling course of judicial construction on this most prolific of all topics, have marked, illustrated, enlarged, and strengthened the stakes and lines of her public policy in reference to the protection of the homestead of the family against the devices of money lenders and of other creditors, the improvidence of borrowers, and the refinements of lawyers. So far as the case is before us, there is but one creditor here, and there is no room for the exercise of the power of the court as a court of equity to protect the equities of different creditors or incumbrancers. The owners of the homestead are not mortgagors as to it. They are citizens, in the preservation of whose family home the state asserts a jealous interest; so jealous that she has deprived them of all power to charge it by a mortgage, or any other device in the nature of a mortgage, with exceptions not involved in this case. The homestead is not charged or chargeable with a vendor's lien by the head or heads of the family whose home it is. That lien is retained, unless waived, by the vendor, to secure the unpaid purchase price; and giving the evidence of it the form of a mortgage or deed of trust does not create it, or change its essential nature. In the purchase and sale of 1,203 acres of land wholly or partly on credit there is no implied contract that the vendor shall have his lien for the unpaid purchase price of the whole 1,203 acres on that certain 200 acres thereof which the purchaser, being the head of a family, uses as his home, and no subsequent dealings of the parties can have the effect to so charge the homestead 200 acres. It appears that the amount remaining unpaid is not the whole of the purchase price of this 1,203 acres; that, besides accruing interest, one-fifth of the principal of said purchase price had been paid before the 15th November, 1887,—more than one year before appellant's first loan to said purchasers. It also

appears that before making any loan on these lands the appellant had the premises fully inspected, and was then and at all times subsequently fully informed as to all the facts touching these lands, the constituents of these families, their place of actual abode, and their pursuits, and then loaned them money on these lands to the extent of nearly $10 per acre. The presumption is strong, therefore, that in addition to having paid one-fifth of the principal of the purchase money of this 1,203 acres of land purchased by them 21st November, 1881,—more than seven years before they borrowed any money of complainant,—for less than $5 per acre, these purchasers had during these seven years by their industry or other resources greatly improved the market value of these 1,203 acres, or there had been a general advance in the value of such lands in that locality to the benefit of which these purchasers were entitled. On what fact, therefore, or principle of high equity, does this court decline to "invent new precedents, or stretch the general rules of equity, in order to give the said defendants a homestead for which, by the record, they have not paid, and which, under the law, may be, and ought to be, sold to satisfy a just debt?" What just debt? The amount remaining unpaid of the purchase price of 1,203 acres of land, which the sale of the 1,003 acres, not covered by this homestead, might satisfy, and leave this 200 acres discharged from the vendor's lien, and not liable for any part of complainant's debt, however just? Wherefore? Because these heads of the family have given a mortgage or deed of trust on the whole of the 1,203 acres (or on the 1,003 acres, as they might very well do) to secure a loan procured after the purchase of their home? By what law? By the Texas law? Or by some more equitable rule, found in Massachusetts or elsewhere, which cannot recognize the reasons that support "the cases in some of the western states," where the Texas public policy, in reference to the protection of the homestead, has been fully or partially adopted? Verily, not by the Texas law; for in language as plain as "the way of holiness," placed above the power of the legislature to change or qualify it, self-acting in the highest sense, the Texas law says: "No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money thereof, * * * whether such mortgage or trust deed or other lien shall have been created by the husband alone or together with his wife." I submit with the utmost confidence that the supreme court of Texas has set no precedent that will sustain the reasoning of the opinion of the court in this case. With equal confidence I submit that in the case of Pridgen v. Warn, 79 Tex. 588, 15 S. W. Rep. 559, the question we are here called on to decide was not in the mind of either of the parties, or in the mind of the counsel of either of the parties, or in the mind of either of the members of that august tribunal of learned, experienced, and distinguished Texas jurists.

SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD v. KALINSKI.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 123.

1. LIFE INSURANCE—MUTUAL BENEFIT SOCIETIES — FORFEITURES —RULES AND REGULATIONS.
   In the organization of the Knights of Pythias, the Endowment rank is separate from the lodge, and is for insurance purposes only. The constitution provides that when a member withdraws from his lodge, or his membership therein ceases from any cause other than death, all his right and interest in the Endowment rank are forfeited. The constitution also creates a board of control, having entire control over the Endowment rank, subject to restrictions by the supreme lodge, and with power to "enact general laws, rules, and regulations in conformity with this constitution," and to alter and amend the same, when, in its judgment, the needs of the rank require it. It is also given authority to hear and determine all appeals. Pursuant to this authority, the board enacted that, when a member of the Endowment rank became in arrears to his lodge for an amount equal to one year's dues, he should forfeit his membership in the rank, and render his endowment certificate void. In a case thereafter arising, it appeared that a member of the rank had died, owing more than the prescribed dues, but had not been suspended by his lodge, and, owing to the failure of the proper officer of the lodge to notify the section of the rank to which deceased belonged of the arrears, such section had continued to receive the monthly assessments levied on the rank. The board held that on these facts the certificate had not become void, and the beneficiary was entitled to the insurance money. *Held* that, where a like state of facts was shown, the court would follow this ruling, as being an authoritative construction of the regulations by the same body that enacted them.
2. SAME—EVIDENCE—ADMISSIBILITY.
   The record of this decision of the board of control could not be excluded on the ground that the decision was res inter alios acta, for the decision was a rule established by a competent authority, and was of equal validity with the original enactment which it construed or modified.
3. SAME—ESTOPPEL.
   This decision must also be held to prevent a forfeiture in the subsequent case on the ground that it was a public and solemn declaration of the order, which would lead a member of the rank honestly to believe that he was complying with all the requirements necessary to keep his certificate good, thus operating by way of estoppel against the order. Insurance Co. v. Eggleston, 96 U. S. 572, followed.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana. Affirmed.

Statement by LOCKE, District Judge:

This was a suit brought in the circuit court by Eugenia Kalinski, as beneficiary of Achille Kalinski, against the Supreme Lodge Knights of Pythias, upon a certificate of membership of the Endowment Rank of the Order of Knights of Pythias, certifying that he had received the rank of the order, and in consideration of certain payments, and the performance of certain conditions, his wife, the beneficiary, would be paid, upon his death, $3,000. In answer, defendant below (plaintiff in error here) set up that one of the conditions of Achille Kalinski's application was that he should keep his lodge dues fully paid, and with that condition he had not complied; that one of the rules of this Endowment rank was that, if "any member of the Endowment rank became in arrears to his lodge for an amount equal to one year's dues, he shall forfeit his membership in the section and said rank, and render

void his endowment certificate;" that Kalinski, the deceased, at the time of his death, although he had paid the assessments to the Endowment rank in full, was in arrears to the Syracuse Lodge, of which he was a member, for more than a year's dues; and that he had forfeited his membership, and the certificate was null and void. A trial being had, and a verdict found for plaintiff for the full amount claimed, a new trial was granted, which also resulting in a verdict for the plaintiff, a writ of error was sued out, in which was assigned as error the refusal of the court to give the charge as asked, and giving the charge as it was given. These alleged errors, and the facts proven in the case, are fully set out in the bill of exceptions, which is:

"Be it remembered that at the trial of this cause before the jury on the 11th day of February, 1893, the defendant, in support of its answer, and plea, offered in evidence (1) the application of Achille Kalinski for membership in Section 363 of the Endowment Rank of the Order of the Knights of Pythias, hereto annexed, and marked 'Exhibit A,' as part of this bill; (2) the constitution of the Endowment Rank of Knights of Pythias of the World, including the revised general laws and regulations adopted by the board of control October 24, 1890, marked 'Exhibit B1,' and 'Exhibit B2,' made part of this bill; (3) also the constitution and by-laws of Syracuse Lodge, No. 50, Knights of Pythias, located at New Orleans, La., marked 'Exhibit C,' and made part hereof. That all of said documents were received in evidence without objection, and were accepted by the court as determinative of the rights of the parties in the cause of action herein. And it further appearing to the court, from the books of account kept by the said Syracuse Lodge, No. 50, and other evidence, that the said Achille Kalinski was indebted to said lodge, of which he was a member, on the 31st day of March, 1891, and at the date of his death, May 24, 1891, in the sum of $12.50, for dues owing by him to said lodge, under By-Laws, art. 4, p. 46, and article 13, p. 54, of said lodge, which sum was in excess of one year's dues, he was required to pay, as dues, but that he had not been suspended by his lodge for that reason before his death, under the provisions of section 5, art. 16, of the constitution of the lodge, and section 3, art. 14, of the by-laws, although he had received notice from the proper officer of the lodge to pay the same, and had been told to pay the same before the next lodge meeting, but that he died before such next meeting without having paid the same; and it further appearing as a fact, not disputed, that the keeper of records and seals of Syracuse Lodge, No. 50, had, under section 6, art. 4, of the constitution of the lodge, failed to notify the section of the Endowment rank to which Kalinski belonged that he was in arrears, and that the said Syracuse Lodge failed to suspend him on account of arrears, and that the assessments due by Kalinski to the Endowment rank were received in ignorance of the fact that he was so in arrears, and had been tendered back after his death, and after several months subsequent to the application of his widow for payment of policy; and plaintiff having offered the certificate of membership issued to Kalinski upon acceptance of his application, marked 'Exhibit E,' which was accepted without objection,—both parties rested upon the evidence, and counsel for defendant thereupon requested the court to charge the jury as follows: 'The jury is instructed that the books of account kept by the Syracuse Lodge, of which the deceased, Achille Kalinski, was a member, are competent to be considered by them as evidence with reference to his indebtedness, at the date of his death, for lodge dues, and that if the jury find from these books of account that he was in arrears, in the absence of proof which opposes, or of proof showing payment of these dues, or error in the account, the entries in said accounts are conclusive proof of the amount shown thereby to be due,'—which charge the court gave, as requested, adding thereto the following: 'I charge the jury as requested by the defendant's counsel, as to the proof of the arrearages due by Mr. Kalinski at the time of his death. The books of defendant are competent proof, and they are uncontradicted, and therefore establish the arrearages as being $12.50.'

"And defendant further requested the court to charge the jury as follows: 'If you find that Kalinski was in arrears, and indebted to his lodge, for dues, at the date of his death, in an amount equal to one year's dues, you must find, as a conclusion from the fact, that he had forfeited his membership in

the Endowment rank, and that the plaintiff is not entitled to recover in this suit; and the receipt of assessments by the officers of said Endowment rank (which, it is admitted, have been tendered back, as herein above set forth) previous thereto, if in ignorance of the fact that he was so in arrears, was not a waiver of such forfeiture.' But the court refused to give the charge as requested, but in lieu thereof charged the jury as follows: 'As to the construction of the meaning, as matter of law, of the fundamental law, and of the orders of defendant's organizations, I adopt the views of the board of control of the defendant's orders in Case of John A. Manikheim; and I instruct the jury, if the jury finds as a fact that the keeper of records and seal of the order to which Mr. Kalinski belonged failed to notify the section of which he was member of the fact that he was in arrears for dues to said lodge, and also that the lodge failed to suspend Mr. Kalinski in accordance with law, and also the section of the Endowment rank had received the monthly assessments of said Kalinski up to the date of his death, then the verdict will be for the plaintiff, and against the defendant, for the sum of three thousand dollars, with interest from judicial demand.'

"The views of the board of control, referred to in said charge, as well as the instructions of the supreme chancellor to the various grand chancellors and officers and members of the various sections of the Endowment rank, is hereto annexed, and marked 'Exhibit D,' and made part of this bill."

Which refusal of the court to give the instructions requested, and giving the foregoing instructions in lieu thereof, is alleged as error.

Chas. S. Rice, John D. Rouse, and Wm. Grant, (Rouse & Grant and J. Zack Spearing, on the brief,) for plaintiff in error.

M. Marks and Wm. Armstrong, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts as above.) Under the assignment of error, the only questions for us to consider are—First, whether refusing to charge, in effect, that the forfeiture of the membership of Kalinski depended solely upon the fact of his being in arrears to his lodge to the amount of a year's dues, was error; or, secondly, whether charging that the fact that the keeper of records and seal of the order to which Mr. Kalinski belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to said lodge, and that the lodge failed to suspend him in accordance with law, and that the Endowment rank had received the monthly assessment up to the time of his death, would bar the forfeiture of his membership, was error.

The section of the Endowment rank of the order is a separate and distinct organization from the lodge, and for insurance purposes only. The dues and assessments of each are kept distinct, and the nonpayment of one does not affect the amount of the other, but it is provided that no one can be a member of a section unless he is a member of a lodge. There is no question as to the sufficiency and integrity of the original certificate of membership, but it is claimed by plaintiff in error that under the agreement of the insured, as found in his application, and under the rules of the order, he was in arrears to his lodge for an amount equal to one year's dues, and had forfeited his membership in the section and rank, and rendered void his endowment certificate. The penalty of a forfeiture of rights

under a contract of indemnity or insurance is not favored in law, and it is only by positive, direct, and unavoidable terms in the agreement that it will be enforced. Especially is it so in such a case as this, where payment or nonpayment of the amount unpaid is a nonessential to the contract of insurance; where it neither increases nor diminishes the fund from which the payment of death losses was derived, or increases or diminishes the risks to which the insured is exposed.

A careful examination of the application of Kalinski for membership shows that the only thing found therein, which can be invoked to forfeit his membership, is found in the paragraph:

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules, and regulations of the order, governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained."

There is no penalty of forfeiture declared in this language, and although he there promised to pay all dues, unless there is such penalty attached to such nonpayment by some other rule or regulation, it cannot be held to ensue. It is claimed that such rule is found in what was at that time article 10, § 1, and what has since become article 8, § 1, of the code of laws, rules, and regulations of the order adopted by the board of control of the supreme lodge of the order, which is:

"When a member of the Endowment rank becomes in arrears to his lodge for an amount equal to one year's dues, he shall forfeit his membership to the section and said rank, and render void his endowment certificate."

Upon the binding force of this rule the questions in this case depend. The deceased had bound himself to be governed, and stipulated that the contract should be controlled, by all the laws, rules, and regulations of the order, and by this measure alone can the rights of his beneficiary be determined.

The constitution of the order, which must be accepted as the fundamental, organic, and controlling law, provides for the manner of the forfeiture of the rights of members, and in article 11, § 1, declares that, if one resign, "such resignation shall cause a forfeiture of all amounts paid into, and all claims upon, the Endowment rank." Section 2 provides that:

"Whenever a member of the Endowment rank withdraws from his lodge, or whenever his membership therein ceases, from any cause other than death, he thereby severs his connection with this rank, and forfeits all his right, title, and interest in and to the endowment fund."

Section 3 provides for an appeal, in case of a suspension of a member, to the grand or supreme lodge.

This would certainly seem to provide for the manner in which and by which a member should be held to forfeit his rights of membership, and raise the very serious question whether any rule by which this manner was changed, which declared any other manner of forfeiting such membership, did not infringe upon the constitutional rights of the members, and was therefore null and

void. The well-established principle of "expressio unius exclusio alterius est" would seem to apply, and the providing one way of determining forfeiture preclude another, and more stringent. But we do not find that we are compelled to decide such question, as we consider it has already been done by the order itself.

The constitution further provides, in the organization of the order, for a board of control, and states very fully its duties and powers. Article 8, § 5, provides that:

"The board shall have entire charge and full control of the Endowment rank, subject to such restrictions as the supreme lodge may from time to time provide. They shall hear and determine all appeals, and their findings shall be final, unless reversed by the supreme lodge in session."

Section 9:

"The board is hereby authorized to enact general laws, rules, and regulations, in conformity with this constitution, for the sections and the membership of the Endowment rank, and alter and amend such general laws, rules, and regulations, when, in their judgment, the needs of the rank require such action."

In accordance with such provisions, the board of control adopted certain general laws, rules, and regulations, and provided in article 3, § 5, of the same, that the secretary of each section shall keep a financial account with each member, and in January furnish to the master of finance of the several lodges a list of the names, and request such officer to inform him whenever any member of the lodge became in arrears to the lodge, of an amount equal to a year's dues. They also provided, as quoted in article 8, § 1, that when a member became in arrears to his lodge he should forfeit his membership in the section. It was by this board, and under the powers thus given, that the laws, rules, and regulations by one of which it is claimed the forfeiture took effect in this case were enacted. But it will be seen that their authority to esablish rules was limited to those which should be "in conformity with this constitution;" otherwise, they had full control of the Endowment rank, not only to make laws, but to hear appeals. They not only constituted the chief legislative body, but also the supreme court of the order, whose findings were to be final, unless reversed by the supreme lodge in session. This was the organization, and these the established laws, of the order. The constitution had provided that when a member withdrew from his lodge, or his membership therein ceased from any cause other than death, he forfeited his rights, title, and interest to the endowment fund. The board of control had declared that if he was one year in arrears for dues the forfeiture took place. Whether this rule was or was not in conformity with the constitution, and how far it was binding, was directly submitted to the board of control, sitting as a judicial body, and passed upon.

In addition to the copies of such constitution, regulations, and by-laws, we find in the record, and made a part of the bill of exceptions, by special declaration, a finding and decision of the board of control, as found in volume 5 of the journal of the supreme

lodge of Knights of Pythias for the year 1887-88, p. 4097, in a case presented to that board by the supreme secretary.

It is contended by the plaintiff in error that this exhibit was not offered or received in evidence, and is not, therefore, a fact to be considered, and can have no bearing or weight in this case. We cannot accept these views of this exhibit. It is brought directly into this court by the plaintiff in error. Its validity is not questioned, nor that it was presented and considered by the court below; and, if the substance or matter contained is relevant, we consider it too late to object to the manner in which it is presented for consideration. When we examine the matter of this exhibit, we find that it is a decision and ruling of the board of control, to whom the constitution of this order had given entire charge of this Endowment rank, under which this certificate had been given, and who had power to make, and who had made, all laws, rules, and regulations, and in whom was the power to alter and amend such rules and regulations, when, in their judgment, the needs of the rank required action. Not only was it a decision and ruling of theirs upon a subject of which they had full jurisdiction, but one in which their word became law. The facts also presented by the supreme secretary made it a case in which any ruling established became directly relevant in the questions herein pending. The case submitted to the board of control, as shown by the record of the journal of the supreme lodge, was:

"Brother John A. Manikheim, a member of Sec. No. 63, Endowment rank, of Washington, D. C., died on the 11th day of January, 1887. At the time of his death he was in arrears to his lodge for one year's dues, but had paid all of his assessments to his section of the Endowment rank."

The decision was:

"The board of control, after a very careful consideration of the facts in this case, decided, in view of the fact that the keeper of records and seal of the lodge to which the late John A. Manikheim belonged had failed to notify the section of which he was a member of the fact that said Brother Manikheim was in arrears for dues to said lodge, and that said lodge had failed to suspend said Manikheim in accordance with the law, and that said section of the Endowment rank had received the monthly assessments of said Manikheim up to the date of his death, the Endowment rank is liable for the full amount of the endowments, and the supreme secretary is instructed to pay the beneficiaries the amount due."

The question therein presented was the exact one, in point of fact, as shown by the evidence, as in the case at bar: The brother of the order was in arrears for one year's dues, the keeper of records and seal of the lodge of which he was a member had failed to notify the section of which he was a member of the fact that he was in arrears for dues, and said lodge had failed to suspend him, and the section of the Endowment rank had received the monthly assessments up to the time of his death.

There can be but one conclusion drawn from this decision. The board of control had been, by the case presented by the supreme secretary, brought face to face with their rule providing that simply the being in arrears for a year should forfeit membership as viewed in the light of, and compared with, article 11 of the consti-

tution, and the question fairly presented whether a forfeiture of rights in a manner not provided for in the constitution was in conformity with it. Their decision was a construction placed upon article 8 of the laws which made it in conformity with the constitution, and become of equally binding effect as the previous rule. That this was so considered by the supreme chancellor of the order is plainly seen by the immediate issue of the instructions contained in the same exhibit, calling to the attention of the officers and members of the sections the importance and necessity of immediately forwarding information of arrears of dues.

It is true that subsequently to this decision, in the general laws and regulations adopted by the board of control October, 1890, the provisions of article 10, § 1, were continued in article 8, § 1, only changing the terms of arrears necessary to entail a forfeiture from six months to a year; but this in no way, do we consider, added to its force. The board of control had already construed the law of article 10, § 1, and, in effect, declared it not in conformity with the provisions of the constitution; and a re-enactment of the same, with such immaterial change, could not do away with the force of the rule of construction given.

We can in no degree accept the position urged by the plaintiff in error, that this decision was res inter alios acta, and of no weight or relevancy in this case. This case is to be determined by the rules and regulations of the order. The order had, in its organization, established a board, to whom was given an almost unlimited power to establish rules and regulations which should control the relations, rights, and duties of its hundreds of thousands of individual members, and to change and amend them as deemed best; and to hold that such a finding as this was simply to determine an individual case "out of consideration for the beneficiary," and might be changed in the next case from personal motives, would show a lack of appreciation of the principles, aims, and objects of the order, and the good faith of its board, to which we consider it justly entitled. We consider that the decision in the Manikheim Case was not only not res inter alios acta, but was a rule established by the same power, and entitled to the same respect, as the original article 10, § 1, and pronounced after more careful consideration than that with which the former was enacted. As well might it be claimed that the decisions of any supreme judicial tribunal, state or national, establishing a rule of property or of individual rights, was res inter alios acta, and could not be relied upon as of any binding force by those who had subsequently acquired property or claimed rights under identically the same circumstances. In this case even more weight should be given to such decision, for here the board was not only judicial, but was also legislative. It could not only say what the law was, but what it should be.

The question, then, turns upon whether Kalinski was at his death a member of his lodge, notwithstanding his being more than one year in arrears. The constitution and by-laws of Syracuse

Lodge, of which the deceased was a member, provide (article 16, § 5) that:

"A member who is in arrears to the amount of one year's dues, and has been notified to pay the same, shall be suspended by the chancellor commander in open lodge, and a record of the same kept in the minutes."

Until suspended in open lodge in accordance with this section, we find no law that would forfeit the membership of Kalinski, although he had been notified of his being in arrears.

But another view of this case may well be considered. In the case of Insurance Co. v. Eggleston, 96 U. S. 572, Justice Bradley, in speaking for the court, says:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

Here the order, the insurance company, in the most public and authoritative manner, had published, as a portion of the journal of its supreme lodge, the solemn judgment and decree of its highest legislative and judicial body, declaring that a member from whom the monthly assessments had been received, and who had not been suspended at the time of his death, although a year's dues in arrears, had not forfeited his membership, but his beneficiary was entitled to his benefit. This publication was made nearly four years before the death of Kalinski, and the suggestion that he may not have known of it cannot for a moment be accepted. What declaration by an insurance company could be more entitled to respect and confidence, and, if misleading, more liable to mislead? Such a published declaration, made by a private or joint-stock insurance company, would unquestionably prevent the forfeiture of any policy coming within the terms of its provisions. How much more should it have such effect within the limits of an order like this, where it is presumed that such published declarations are for the information and guidance of those whose mutuality of interest is one of the principles of its organization. Considering the decision in the Manikheim Case in either way, as the establishment of a new rule, or as the publication of the decision of the board of control, we consider the plaintiff in error as estopped from pleading a forfeiture, and we find no error in the court below, and the judgment is affirmed, with costs.

HUDMON et al. v. CUYAS.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

1. SALE—WARRANTY—STIPULATION FOR ARBITRATION—PLEADING.
In an action for breach of contract in failing to deliver certain cotton of a prescribed quality, a plea is demurrable which alleges that the sale was made on condition that all differences as to grade and quality should be settled by arbitration in Liverpool, but which fails to allege that such arbitration was a condition precedent to bringing suit.

2. PLEADING—ERROR WITHOUT INJURY.
The sustaining of a demurrer to a valid plea is not reversible error when another plea is admitted which includes all the matter alleged in the first plea, with an addition, and lets in all the proof sought to be introduced under the first plea.

3. APPEAL—HARMLESS ERROR—PLEA—EVIDENCE.
In an action for breach of contract of sale, where a demurrer to a special plea of set-off is erroneously sustained, the error is harmless when plaintiff, in support of his account, and under the general issue, introduces such evidence as to the matters covered by the special plea as would open the door for all the evidence which defendant could have offered thereunder if it had been held good. Toulmin, District Judge, dissenting.

4. SAME—INSTRUCTIONS—ABSTRACT PROPOSITIONS.
A judgment will not be reversed because the charge embraced an erroneous proposition of law, which, so far as the record shows, had no application to any evidence in the case, although the record states that there was "other evidence," the nature of which does not appear. Toulmin, District Judge, dissenting.

5. SALE—BREACH OF WARRANTY—MEASURE OF DAMAGES.
Where cotton is sold by sample, with warranty of quality, and an inferior quality is delivered, which necessitates a reselling and a purchase of other cotton to replace it, the buyer may recover as damages the cost of such reselling and replacing. Toulmin, District Judge, dissenting, on the ground that such damages are special, and can only be recovered when specially pleaded.

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

At Law. Action by J. Cuyas against Hudmon Bros. & Co. for breach of contract in failing to deliver cotton of a specified quality. Demurrers to certain pleas were sustained, and judgment given for plaintiff upon a verdict returned in his favor. Defendants bring error. Affirmed.

R. B. Barnes, (A. & R. B. Barnes and Arrington & Graham, on the brief,) for plaintiffs in error.

J. Randolph Anderson, (Charlton, Mackall & Anderson, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. In October and November, 1890, the defendant in error, a citizen of Georgia, and resident of Savannah, contracted with plaintiffs in error, citizens of Alabama, for 300 bales of cotton, to be of a named grade and price, and to be delivered at Savannah, Ga., f. o. b., under rules of the Savannah board of trade. The cotton was shipped by rail to Savannah, samples, weights, marks, etc., sent defendant in error, with railroad receipt, who thereupon paid the price, amounting to $15,900.95. Sixty-five bales of the cotton miscarried, and were paid for by the railroad. Two hundred and thirty-five bales were received, but proved to be so far below the grade and value specified in the contract and samples sent that defendant in error declined to export them, and, after due notice to plaintiffs in error and to their broker, through whom the contract had been made, proceeded to replace

the 300 bales, and had these 235 bales sold in Savannah for account of defendant in error. In his account, based on these transactions, the defendant in error charges: "Dec. 8. Cost of replacing 300 bales, * * * $300.00. Dec. 28. Time and expense attending to the resale of 235 bales of cotton, * * * $117.50." This account claims a balance due defendant in error January 31, 1891, $2,694.59. April 13, 1891, defendant in error commenced his action against the plaintiffs in error in the United States circuit court for the middle district of Alabama, claiming in his complaint this balance of $2,694.59 in three common counts: (1) As due on account; (2) balance due for breach of a contract, (setting out contract;) (3) money received to use of plaintiff; with a fourth count, as amended, claiming $16,000, (setting out contract and breach with careful detail.)

To the complaint as amended the defendants plead: (1) They did not promise as charged; (2) they are not guilty as charged; with these additional pleas:

"(3) And defendants, as further defense to the action of the plaintiff, say that at the time said action was commenced the plaintiff was indebted to them in the sum of $100, for this, that in the month of November, 1890, the defendants sold to the plaintiff one hundred bales of middling cotton, to be delivered f. o. b. Savannah, for export in the state of Georgia, at nine and nine-sixteenths cents per pound, which cotton was tendered by the defendants to the plaintiff, and the plaintiff refused to receive and pay for the same, and cotton declined in price, and defendants were compelled to sell such cotton at nine and seven-sixteenths cents per pound, to their damage as aforesaid.

"(4) And defendants, for further answer to the said complaint as amended, say that the three hundred bales of cotton referred to and mentioned in the said complaint as amended were sold to the plaintiff by defendants on condition that all differences as to grade and quality of the same should be settled by arbitration in the city of Liverpool, England, and plaintiff has never demanded of the defendants that the said differences as to the grade and quality thereof should be settled by arbitration in the city of Liverpool, England. and that such differences, if any there were, were never settled by arbitration.

"(5) And the defendants, for further answer to the said complaint as amended, say that the three hundred bales of cotton referred to and mentioned in the said complaint as amended were sold by the defendants to the plaintiff on condition that all differences as to grade and quality of the same should be settled by arbitration in the city of Liverpool, England, and it was agreed in the contract for the sale and purchase thereof that no action should be maintainable for any difference in grade and quality of the said cotton until after the award of such arbitration, and plaintiff has never demanded of the defendants that such differences as to grade and quality of said cotton should be settled by arbitration in the city of Liverpool, England, and that such differences, if any there were, were never settled by arbitration."

Plaintiff (below) demurred to plea No. 3 on the grounds: (1) That said plea fails to allege a tender of the cotton by the defendants. (2) It fails to allege an unjustifiable refusal to accept the cotton on part of plaintiff.

To plea No. 4:

"(1) There is no allegation in the plea that all the counts of the complaint are founded on the contract set out in the plea. (2) The plea is not an answer to the whole complaint. (3) The plea fails to allege that it was one

of the terms of the alleged contract that no suit should be brought until after arbitration had. (4) Said plea fails to show that the condition therein set forth was such as to prevent the maintenance of a suit. (5) The alleged agreement to arbitrate, set forth in said plea, could not prevent plaintiff from bringing or maintaining this suit."

Plaintiff demurred to the fifth plea, but his demurrer was overruled as to that plea. The demurrers to the third and fourth pleas were sustained. The sustaining of these demurrers is assigned as error. The fourth plea was bad, and the demurrer thereto was properly sustained, because said plea did not show that, under the agreement, an arbitration in Liverpool as to all differences as to grade and quality was a condition precedent to bringing suit. Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 255, 10 Sup. Ct. Rep. 945; Hamilton v. Home Ins. Co., 137 U. S. 385, 11 Sup. Ct. Rep. 133.

In addition, we may notice that the ruling complained of was without injury to the plaintiffs in error because said fourth plea is substantially embraced in the fifth plea, with an addition, which fifth plea was sustained, and let in all the proof.

As to the third amended plea, we consider that if that plea was good, and the sustaining of the demurrer to it erroneous, the record shows that it was error without injury in this case. The office of such a plea is to let in the proof of defensive matter, and this record shows that under the general issues, or in explanation and support of plaintiffs' account, either all the dealings of the parties referred to in this third plea were shown by the proof embraced in the bill of exceptions, or in other proof which the bill says was in the case, or at least so much was put in by plaintiffs as would have admitted and called for all the proof the defendant may have had on that subject, and on this point no exception is taken to the charge of the court or to the refusing of a proper request for a charge.

It is urged that the court erred in charging the jury "substantially that the plaintiff was entitled to compensation for his time and expenses in replacing 235 bales of cotton bought from defendants, which he had rejected, if said 235 bales of cotton did not come up to the grade at which plaintiff purchased the same."

After a careful examination of the record, we are unable to find the evidence supporting, or tending to support, the issue to which this charge appears to be addressed. From all that is furnished us, it appears that this substantial charge complained of is merely an abstract proposition, the giving of which may or may not have misled the jury, according to the circumstances of the trial, not shown us by the record brought up. That record says "there is other evidence in the case."

In Jones v. Buckell, 104 U. S. 554, it is said:

"With no issue made directly by the pleading, and no evidence set forth or referred to in the bill of exceptions, showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law, which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error. Such a proposition we are not required to consider."

And, again, that court says, in Railroad Co. v. Madison, 123 U. S. 542, 8 Sup. Ct. Rep. 246:

"The record, as it comes to us, presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. It has long been settled that such questions will not be considered here on a writ of error, unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried."

The account declared on embraces no item for "compensation for his time and expenses in replacing two hundred and thirty-five bales of cotton, bought from defendants, and which he had rejected."

If it did, and the charge was thus relieved of its abstract features, it would seem that there may be exceptions to the general rule that the measure of damages on the seller's failure to deliver goods according to contract is the difference between the contract price and the market price of the goods at the time when, and the place where, they should have been delivered; and that when goods are sold by sample, with a warranty as to quality, and delivery is made of an inferior quality, necessitating a rejection, a return, or a reselling of the goods, and a replacing of the special quality contracted for, the cost of reselling and replacing is necessary and natural damage, as much to be considered as difference in price. See 2 Benj. Sales, (Kerr's Ed. 1888,) § 1260 et seq.

In Penn v. Smith, 93 Ala. 476, 9 South. Rep. 609, Smith had shipped from Tennessee to Alabama flour to Penn, on order specifying brand and price, which Penn refused to take. In an action for damages Smith claimed as part of his damage compensation for time and expense of the member of his firm who came to Opelika, and made resale there of the goods rejected, and the supreme court of Alabama held that he could not recover for the time and expense of the member of the firm who came to Opelika and made the sale. In Barker v. Mann, 5 Bush, 672, Baker, a merchant in Louisville, Ky., sold, in Louisville, and to be there delivered to Mann, a merchant doing business in Brownsville, Tenn., certain goods to be shipped to Brownsville, to be used in Mann's business. Baker failed to send the goods, and Mann brought his action for damages for the nondelivery of the goods. The supreme court of Kentucky found in that case that the most difficult question was as to the measure of damages, and, after reviewing a number of English and American cases, say:

"In this case appellants promptly informed the appellees of their intention to abandon the sale, and there is no reason assigned or appearing why they could not supply the same articles within a few days from other vendors in the Louisville market. Had they done so, their necessary expense, together with their time and trouble, * * * should be regarded as elements making up their damages. * * * It is difficult to lay down any universal rule, for each case must, at least to a great extent, depend upon its own peculiar facts."

It is to be observed that the appellants did not demur to appellee's complaint, and did not object to the introduction of evi-

dence on the ground that there was no plea to admit it. On consideration of the case as brought up to us, we find no error in the rulings of the circuit court requiring a reversal of the judgment, and it is therefore affirmed.

TOULMIN, District Judge, (dissenting.) I regret that I am not able to agree with the court in the conclusions reached by it in this case, but I think there are two errors shown by the record for which the judgment of the court below should be reversed. The complaint contains several counts, two of which are for damages for breach of a contract, and the others are the common money counts. To the complaint the defendants below, (the plaintiffs in error here,) among other things, pleaded set-off, designated in the record as "Plea No. 3." The plea, in substance, is that the defendants sold to the plaintiff (defendant in error here) a lot of cotton for a specified price, which cotton was tendered to the plaintiff, who refused to receive and pay for it, and the defendants claim as damages the difference between the price agreed to be paid and the market value of the cotton at the time of the alleged breach of contract of sale.

If the averments of the plea were true, the defendants had a right of action against the plaintiff, (2 Brick. Dig. p. 415, § 172; Id. p. 416, § 192; Id. p. 423, § 14,) and a right to set up their claim in a plea; and such set-off would extinguish, in whole or in part, as the case may be, the plaintiff's demand, (Code Ala. § 2678.) To this plea plaintiff demurred, on the grounds (1) that the plea fails to allege a tender of the cotton by the defendants; and (2) it fails to allege an unjustifiable refusal to accept the cotton on the part of plaintiff.

The first ground is not well taken in point of fact. The plea does aver a tender.

The second ground is not well taken, because the defendants were not required to negative defensive matter to the claim made in their plea. If the refusal to accept the cotton was justifiable, it devolved on the plaintiff to set it up in a replication to the plea.

The court erred in sustaining the demurrers to the plea. But it is said that, if the court did err in this ruling, it was error without injury, because the record shows that the plaintiff, in testifying in explanation and support of his demand, and of his account in connection therewith, testifies to his dealings with the defendants in reference to the particular cotton mentioned in this plea. While this is true, it nowhere appears in the record that the defendants testified, or offered to testify, in support of their demand set up in the plea. It is true that the bill of exceptions states there was other evidence than that set out in the bill, and it is suggested that in the evidence omitted from the record there may have been some proof on the part of defendants in support of their plea of set-off. If we can indulge in presumptions on the subject, I think the presumption is that there was no such evidence, for the reason that it would not have been admissible, under the state of

the pleadings, after the plea of set-off was stricken out. Set-off is not available under the general issue, but must be specially pleaded. Odum v. Railroad Co., 94 Ala. 488, 10 South. Rep. 222. Besides, if sustaining the demurrers to the plea was error, the presumption of injury arises, which can be rebutted only when it affirmatively appears from the record that proof of the matter set up in the plea was allowed, notwithstanding the plea, under which alone it was admissible, had been stricken out. 1 Brick. Dig. p. 778, §§ 72, 74; Falls v. Weissinger, 11 Ala. 801; Pinkston v. Greene, 9 Ala. 19; 1 Brick. Dig. p. 780, § 100; Leslie v. Sims, 39 Ala. 161; Moody v. McCown, Id. 586; Foster v. State, Id. 229; Buford v. Gould, 35 Ala. 265.

I am also of opinion that the court erred in giving the charge set out in the record, and to which exception was taken. In view of the evidence found in the bill of exceptions, the charge was abstract. Giving an abstract charge is not an error for which the judgment will be reversed, unless it appears the jury were thereby misled to the prejudice of the appellant. But when the bill of exceptions does not, as in this case, set out all the evidence, it will be presumed that the charge given was not abstract. 1 Brick. Dig. p. 336, § 12; Russell v. Erwin, 38 Ala. 44; McLemore v. Nuckolls, 37 Ala. 662; Nesbitt v. Pearson, 33 Ala. 668. Presuming, then, that the charge was not abstract, was it erroneous? The charge was "that the plaintiff was entitled to compensation for his time and expenses in replacing 235 bales of cotton, bought from the defendants, which he had rejected, if said 235 bales of cotton did not come up to the grade at which plaintiff purchased the same." The account declared on by plaintiff embraced no item for "compensation for his time and expenses," and, in my opinion, such compensation, if recoverable at all in a case like this, is not recoverable under the special counts in the complaint. They are for damages for breach of contract. The breach alleged is that defendants failed to ship or deliver to plaintiff a lot of cotton of a specified grade or class which was bought from them by him. The complaint claims general damages, which are such as necessarily result, and as the law implies, from the wrongful act complained of. No particular or special damage is claimed, which is such damage as really took place, and not implied by law. The distinction between general damages and particular or special damage requires the plaintiff, if he seeks to recover such special damage, to notify the defendant by appropriate special averments in the declaration, so that he may not be taken by surprise. 1 Chitty, Pl. 339; 2 Greenl. Ev. § 254; 2 Benj. Sales, § 1306; 1 Suth. Dam. 763; Lewis v. Paull, 42 Ala. 136; Dickinson v. Boyle, 17 Pick. 78; Railroad Co. v. Tapia, 94 Ala. 226, 10 South. Rep. 236.

A plaintiff cannot recover upon proof without pleading. Smith v. Gaffard, 33 Ala. 172; Robinson v. Drummond, 24 Ala. 174.

The damages recoverable by the plaintiff in this case are the natural and proximate consequence of the act complained of as injurious. The measure of damages is the difference between the

price which plaintiff paid for the cotton delivered at Savannah and the market price at Savannah at the time of delivery of cotton of like grade or class; or, in other words, the difference between the value of the cotton at the time of delivery, if the representation as to quality were true, and the actual value in point of fact. Cawthorn v. Lusk, (Ala.) 11 South. Rep. 731; 1 Suth. Dam. 74, 82, 84, 91; 2 Benj. Sales, §§ 1117, 1305; Rose v. Bozeman, 41 Ala. 678, and authorities cited in the opinion; Johnson v. Allen, 78 Ala. 387; Bell v. Reynolds, Id. 511.

If the plaintiff received and resold the cotton, he could recover the difference between the price he paid and the price received. 2 Greenl. Ev. § 262; Penn v. Smith, 93 Ala. 476, 9 South. Rep. 609.

In an action of this character "the compensation to which the plaintiff is entitled is to be awarded as damages according to established rules, and its amount is a question of law, not governed by any arbitrary assessment, nor, on the other hand, left to the fluctuating discretion of either judge or jury." Rose v. Bozeman, supra; Sedg. Dam. marg. p. 29.

My opinion is that, on the pleadings and the facts, the charge of the court was erroneous. For the reasons stated, I feel obliged to dissent from the opinion and judgment of the court in the case.

TEXAS & P. RY. CO. v. MINNICK et al.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 128.

1. MASTER AND SERVANT — PERSONAL INJURIES — DEFECTIVE MACHINERY—INSTRUCTIONS.
   In an action to recover damages for the death of a locomotive engineer, which was caused by the burning of a bridge alleged to have been set on fire by a locomotive of defective design, the court refused to charge that, if a person of ordinary care would not have foreseen that the use of engines of this type could reasonably have been expected to result in injury to deceased, then there could be no recovery. *Held*, that there was no error in the refusal, for the instruction was too narrow, in confining the reasonable expectation of injury to the deceased, alone, of all the company's employes.

2. SAME—ASSUMPTION OF RISKS—INSTRUCTIONS.
   It appearing that deceased had himself been driving an engine of the alleged defective design, it was error, in the absence of anything on the subject in the general charge, to refuse an instruction that, when deceased took employment as an engineer, he assumed to understand an engine, and knew the dangers attending its use, and was presumed to have taken the risk of being injured by reason of any peculiarity in the construction of the engines in use by defendant.

3. SAME.
   It appearing that the company had no watchman or track walker at this bridge at night, and there being evidence tending to show that deceased was aware of the fact, it was error to refuse a charge that if he knew this he assumed the risk of being injured by reason thereof.

4. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.
   There is no error in refusing a requested charge, when the court has already given instructions which are, in substance, the same as that requested.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Reversed.

Statement by LOCKE, District Judge:

On the 30th day of January, 1892, W. W. Minnick, an engineer on the Texas & Pacific Railway, while running a train on that railway between New Orleans and Marshall, and at a point near Robeline, in the state of Louisiana, ran into a burning trestle or bridge, and was killed by his engine going through the bridge, and falling upon him. He left surviving him his wife, Maggie Minnick, and five children. On the 23d day of July, 1892, Maggie Minnick, his wife, instituted suit in the district court of Harrison county, Tex., on behalf of herself, and as next friend of her children, against the Texas & Pacific Railway Company, for the sum of $30,000, actual damages, growing out of the death of her husband. This cause was removed to the circuit court of the United States for the eastern district of Texas.

The grounds upon which the defendants in error seek to hold plaintiff in error liable for the death of the said W. W. Minnick, and as set forth in the amended petition filed by the defendants in error in the circuit court of the United States on the 23d day of January, 1893, are, in substance: (1) That the plaintiff in error was negligent in not watching said bridge or trestle; (2) that the plaintiff in error was negligent in operating dangerous and defective engines over and upon said bridge, by which said dangerous and defective engines said bridge was set on fire. Plaintiff in error answered—First, by general denial; second, that the deceased, W. W. Minnick, knew of the dangers attending his employment as locomotive engineer, and assumed and took the risk of such accident as caused his death; third, that there were no defects in the engine used by them, and that said W. W. Minnick, deceased, knew the kind of engine used by plaintiff in error, and that he knew there were no guards or watchmen for the bridge that was burned, and that he had assumed the risk by either of said causes.

At the trial the court charged the jury as follows:

"This is a suit by Maggie Minnick, as the surviving wife of W. W. Minnick, for herself, and for the use and benefit of John R. Minnick, F. W. Minnick, A. B. Minnick, Jennie and Fannie Minnick, as surviving children of said W. W. Minnick, deceased, against the Texas & Pacific Railway Company, for damages sustained by them, as the surviving wife and children of the said W. W. Minnick, for the death of said W. W. Minnick, which, plaintiffs claim, was caused by the negligence of defendant while the said W. W. Minnick was a locomotive engineer in its employ, near the town of Robeline, in the state of Louisiana. Plaintiffs claim that defendant was guilty of negligence in operating an engine on its road, which was defective, dangerous, and out of repair, the condition of which engine was known to defendant, or could have been known to defendant by the use of ordinary care, and which was not known to said W. W. Minnick, and that defendant was further guilty of negligence in not having its bridges, trestles, and road inspected and watched, and failed to exercise ordinary care in inspecting, and keeping in proper repair and condition, said trestles and bridges, which was known to defendant, or could have been known to defendant by the exercise of ordinary care, and all of which was unknown to said Minnick; that a defective engine of defendant set fire to the bridge or trestle through which the engine of deceased, Minnick, fell, and, falling on him, killed him, which was known to defendant, or could have been known to defendant by the use of ordinary care, and which defective engine was unknown to said Minnick; that the burning of said bridge was known to said defendant or could have been known to defendant by the exercise of ordinary care on its part, and that said Minnick did not know it. The defendant pleads a general denial, which general denial throws upon plaintiffs the burden of proving all the allegations in their petition. The defendant also pleads that the deceased, W. W. Minnick, knew of the dangers attending his employment as a locomotive engineer, and assumed and took the risk of such accidents as caused his death. Defendant also pleads that there were no defects in the engine used by it, and that W. W. Minnick knew the kind of engine used by defendant, and that he knew that there were no guards or watchmen for the bridge that

was burned, and that caused said Minnick's death, and that said Minnick took and assumed the risk of being injured by either of said causes. These are substantially the issues made between the parties, as made by their pleadings.

"The jury are instructed that it was the duty of the defendant company to use all reasonable care and prudence for the safety of those in their service, by providing them machinery, or other instrumentalities reasonably safe and suitable for the use of the servant. If the defendant company failed in this duty of precaution and care, it is responsible for an injury which may happen through a defect of machinery or other instrumentalities, which was known to defendant, or could have been known to defendant by the exercise of reasonable care and prudence on its part. If the jury believe from the evidence that, at the time of the death of said W. W. Minnick, he was in the service of defendant company as a locomotive engineer, engaged in operating an engine over the line of railway of defendant company in the state of Louisiana, and that said Maggie Minnick is his surviving wife, and that said John R. Minnick, F. W. Minnick, A. B. Minnick, Jennie Minnick, and Fannie Minnick are minors, and the surviving children of said W. W. Minnick, and that a defective and dangerous engine of defendant set fire to a bridge in the said line of railway of defendant, and thereby rendered the said bridge unsafe and dangerous, and unfit for the purposes for which it was being used by defendant, and thereby caused the death of W. W. Minnick, and you further believe the defendant knew that said engine was defective and dangerous, or by the exercise of reasonable care and prudence could have known of the condition of such defective and dangerous engine, and that defendant failed in this duty of precaution and care, and that by reason of such failure on the part of said defendant the said Minnick was killed, then you will find for plaintiffs, unless you find for defendant under some other instruction. Or if the jury believe from the evidence that one of the bridges in the line of railway of defendant company was defective and dangerous, and unfit for the purpose for which it was being used by the defendant company, by reason of its being in a burnt condition, and the jury further believe that defendant company knew of such defective and dangerous and unfit condition of said bridge, or could have known of its condition by the exercise of reasonable care and prudence, and failed in its duty of precaution and care, and that said defective and dangerous condition of said bridge was the proximate cause of the death of the said W. W. Minnick, and that, at the time of the death of the said Minnick, he was in the service of the defendant, engaged in operating an engine over the said line of railway of the defendant company, as a locomotive engineer, and that said Maggie Minnick is the surviving wife of said W. W. Minnick, and that John R. Minnick, A. B. Minnick, F. W. Minnick, Jennie Minnick, and Fannie Minnick are the surviving minor children of said W. W. Minnick, then the jury will find for the plaintiffs, unless you find for the defendant under some other portion of these instructions. If the jury believe from the evidence that the engine of defendant company, which it is claimed set fire to the bridge, was reasonably safe for the purpose for which it was being used by defendant, although not of the best or newest or safest, then the jury will find for the defendant. If the jury believe from the evidence that either the said bridge in defendant's said line of railway was not unsafe or dangerous, although not of the safest or best character, or if the jury believe from the evidence that the engine used by defendant, which it is claimed set fire to the bridge, was not unsafe or dangerous, although not as safe as other engines, then the jury will find for the defendant. Or if the jury shall find from the evidence that both the said bridge in the line of railway of defendant, and said engine of defendant, which it is claimed set fire to the bridge, were unsafe or dangerous, yet if the jury believe from the evidence that neither of these causes resulted in the death of the said W. W. Minnick, nor were the proximate causes producing the injury whereof he died, then the jury will find for the defendant. It is incumbent on plaintiffs, before they can recover, not only to prove the defects complained of existed, but also that they, or one of them, were the cause of the death of said Minnick. If the death of the said Minnick was the result of accident, misadventure, or the want of ordi-

nary care or prudence on his part, or other causes not complained of, then the jury will find for the defendant. If W. W. Minnick knew of the condition of the engine of defendant, which it is claimed set fire to the bridge, or knew of the condition of said bridge, or if said Minnick could have known of the condition of said engine or bridge by reasonable care and prudence on his part, then plaintiffs cannot recover. In case you find for the plaintiffs under the above and foregoing instructions, then you will find for them in such sum as will compensate them for the pecuniary loss they may have sustained by reason of the death of said W. W. Minnick, taking into consideration their circumstances in life, the probable pecuniary benefits that would have inured to them if said Minnick had lived, whereof you have to form the estimate according to the best lights which your reason and experience may afford you, and the testimony may have furnished. The average age of human life, and the life expectancy of deceased, as shown by approved life tables, are simply aids to your judgment, but are not conclusive upon the judgment. Your reasonable common sense, and the evidence, must form the estimate of the amount of loss; and, in case you find for plaintiffs, you will apportion the damages among plaintiffs according as you may think proper, under all evidence in the case, stating in your verdict what you find, and how you apportion the same among the plaintiffs. In case you find for the defendant, you will simply say so."

Whereupon the defendant requested the court to charge the jury as follows: "First. In this case there is no evidence that the engine that it is claimed set fire to the bridge was out of repair. But it is claimed that the kind of engine used was defective in original construction. Upon this point you are instructed as follows: The railway company had a right to adopt proposed improvements in engines, by which the escape of fire is lessened, if in doing so they use the care that an ordinarily prudent man would exercise under similar circumstances. Second. The railway company is not compelled to use the safest engines, and may test proposed improvements in engines, if they use ordinary care in doing so. Third. If a person of ordinary care would not have foreseen that the use of the engines with a Brown stack would or could have been reasonably expected to have resulted in injury to Minnick, then plaintiff cannot recover. Fourth. If the engines in use threw less fire out of the smokestack, then the fact that it threw more fire out of the ashpan would not constitute such negligence as to make the company liable in this case. Fifth. When Minnick took employment as an engineer, he assumed to understand an engine, and to know whatever dangers attend its use, and in this case Minnick is presumed to have taken the risk of being injured by reason of any peculiarity in the construction of the engine used by the defendant. Sixth. There is no law that compels the company to have track walkers or watchmen at their bridges at night, at all times. If Minnick knew there were no track walkers or watchmen at this bridge, he assumed the risk of being injured by reason of the fact that there were no track walkers or watchmen."

Which instructions the court refused. The trial resulted in a verdict and judgment for $13,500, from which the plaintiff in error has taken a writ of error to this court, assigning as error the refusal of the court below to give each of the instructions asked.

T. J. Freeman and F. H. Prendergast, for plaintiff in error.

W. H. Pope and W. C. Lane, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts as above.) The only assigned errors which we are called upon to consider are those alleged to have been committed in a refusal to give the charges requested. The charge given by the court was very full, covering very largely all questions which might arise in the case; but it is

claimed by plaintiff in error that, upon the points upon which instructions were asked, the law was not stated to the jury, or, if at all, not so fully and clearly as the circumstances and evidence of the case would demand. Considering each requested instruction in the order asked, we find the first asking that the jury be instructed that there was no evidence that the engine that is claimed to have set fire to the bridge was out of repair, but it is claimed that the kind of engine used was defective in original construction, and they be instructed as follows:

"The railway company had the right to adopt proposed improvements in engines, by which the escape of fire is lessened, if in doing so they use the care that an ordinarily prudent man would exercise under similar circumstances."

A careful examination of the testimony shows that the question is properly stated in such instruction. The contest through the entire case was not the bad condition of the engine which is claimed to have set fire to the bridge, but the mode of construction, and the attempted disposition of the sparks and cinders from the engines in those provided with the so-called Brown stack, and we fail to find any evidence showing that that particular engine was out of repair, but it was one with a Brown stack, and many of the engines had been furnished with such for the purpose of arresting sparks, and preventing their escape from the stack, and forcing them into the ashpan. But would this instruction add anything, in behalf of plaintiff in error, to what had already been given? The court had already instructed the jury as follows:

"If the jury believe from the evidence that the engine of defendant company, which it is claimed set fire to the bridge, was reasonably safe for the purpose for which it was being used by defendant, although not of the best or newest or safest, then the jury will find for the defendant."

And also charged the jury:

"Or if the jury believe from the evidence that the engine used by defendant, which it is claimed set fire to the bridge, was not unsafe or dangerous, although not as safe as other engines, then the jury will find for the defendant."

This instruction was, if they found the engine "reasonably safe for the purpose, though not of the best or newest," or "not unsafe or dangerous, though not as safe as other engines," they should find for the defendant. It cannot be urged that substituting, in the measure of the condition of the engine, "one not unsafe or dangerous," for "one that an ordinarily prudent man would use," would permit the employment of one of inferior condition. In finding a verdict under the instructions given, they had to pass upon the question of the condition of the engine,—whether or not it was reasonably safe for the purpose; and under the instructions asked they would only have had presented the question whether in using it, the company would be using the care an ordinarily prudent man would exercise. We consider the charge, as given, covered that point of law, and was fully as favorable to plaintiff in error as was that asked.

It was not a contested point whether or not the engine under inquiry was or was not out of repair, any more than in the manner of its construction, and the judge was not bound to instruct the jury that there was no evidence upon that point. It is true the whole condition of the engine on account of its construction was only in question, but we do not consider that an ordinarily prudent man would be justified in using an engine not reasonably safe in its construction, although it might be a proposed improvement. This conclusion would apply with equal force to the second instruction asked, as we do not consider that a railway company would be justified in using an engine "not reasonably safe," but "unsafe and dangerous," for the length of time it appears the Brown stack had been used, although it might be testing proposed improvements. We therefore consider there was no error in refusing the first and second requested instructions, as the subject-matter had already been included in the general charge.

But, when we examine the third instruction asked, we fail to find anything in the general charge that would cover the point there requested. Plaintiff below had alleged in her petition that defendant company had been operating defective and dangerous engines over and upon its line of road, by which the bridge was set on fire and burned, and that the defective and dangerous condition of the engine was known to defendant company, or could have been known by the use of ordinary care and diligence, and this knowledge, or the fact that it should have had such, becomes a question of law, which certainly might have weight in determining the case; and inasmuch as it does not appear, as affirmatively proven, that any one who represented the company was informed of such defect, the question whether a person of ordinary care would or would not have foreseen, or would or would not have reasonably expected, such a disaster from the use of the engine complained of as did result, should certainly have been submitted to the jury. But, while the knowledge or presumed knowledge or reasonable expectation might be inquired into, the language of the request would seem to confine the question to a limit altogether too narrow in its application. A person of ordinary care might foresee a disaster, and anticipate it,—might, on account of defective machinery or appliances, be constantly fearing and expecting it,—and yet not foresee or reasonably expect the particular individual who would be involved in it. As requested, the charge would prevent a verdict for plaintiff unless they found from the evidence that the use of the Brown smokestack would give a person of ordinary care a reasonable expectation that Minnick, of all the hundreds of employes engaged on the road would be the one injured. As asked, we find no error in refusing the instruction, but, if modified as we find it quoted in the brief of the plaintiff in error, making the foreseen or reasonably expected injury to some employe of the road, we consider it should be given.

The fourth assignment of error is not insisted upon.

The fifth assignment relates to the risks assumed by Minnick in his accepting employment from defendant company, and we fail

to find in the given charge any instructions upon that point. It was stated by the judge to be a plea in defense of the suit, that Minnick knew of the dangers attending his employment, and assumed and took the risk of such accidents as caused his death; but the record does not disclose that any charge was given upon that point, although it was a question of law. The instructions asked have to be examined in the light of the evidence of the case. The only contest in this case has been that the peculiarity in the construction of the engine with the Brown stack was what set fire to the bridge. It appears that Minnick was well acquainted with such peculiarity, as he was himself driving one. We think it a well-established principle of law that an employe assumes the risks ordinarily incidental to the business, and the manner of the employer's performing it, where there is no defect of machinery, or unknown hazards. The absence of any instruction in the general charge upon the subject of risks assumed by the employe in accepting employment would, in our opinion, justify the asking of a special instruction upon that point, and that asked appears justified by the law and evidence of the case.

The same argument would apply with equal force to the sixth instruction asked. The substance of it is that, if Minnick knew that there were no track walkers or watchmen at the bridge, he assumed the risks of disasters which might occur through their absence. Such absence would appear to be properly classed as a peculiarity of the manner of the employer's carrying on his business. It was apparently open and well known to many of the employes, and whether Minnick knew of it or not is a question correctly left to the jury.

In not giving in the general charge or any special instruction the liability assumed by the plaintiff, we consider the court below erred, to the injury of the plaintiff in error. It is therefore ordered that the judgment be reversed, and the cause be remanded for a new trial.

LOEWER v. HARRIS.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. DECEIT—SALE OF BUSINESS ENTERPRISE—CONCEALMENT OF PROFITS.
   Concealment by the owner of a business enterprise of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale is actionable, when the purchaser has no opportunity of discovering the decline, and has agreed to buy on the faith of representations as to the prior rate of profit, having told the seller that he would not buy if there had been a decline.
2. SAME—PLEADING.
   In an action of deceit, an objection that plaintiff should have alleged a fraudulent concealment, instead of a fraudulent representation, will not be heard for the first time on writ of error.
3. SAME—DAMAGES—PLEADING.
   In an action for false representations made to the purchaser of a business enterprise, the charges of accountants employed by him to examine the books, and the fees of solicitors employed to organize a corporation to take over the business, must be specially alleged.

4. SAME.
The profits which the purchaser of a business enterprise would have made out of the transfer thereof to a corporation to be organized for the purpose of taking it are too uncertain to be recoverable by the purchaser in an action for fraudulent representations, inducing the purchase, although a syndicate had promised to underwrite the capital of the corporation, thereby, in effect, promising to subscribe all the capital not contributed by others, but had not entered into any definite or obligatory contract with the purchaser.

5. EXCESSIVE DAMAGES—REMITTITUR.
Where plaintiff, upon the findings of the jury, is entitled to recover a specific sum, but evidence of damage in a larger sum has erroneously been admitted, and judgment given for such larger sum, the plaintiff may, by filing a remittitur as to the excess, obtain an affirmance of the judgment.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Harris against Loewer for false representations. Judgment was given for plaintiff. Defendant brings error. Affirmed on condition of a remittitur by plaintiff of part of the judgment.

C. J. G. Hall, for plaintiff in error.

Abel E. Blackmar, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought for damages arising from an alleged false representation made by the defendant to the plaintiff respecting the output and profits of the Gambrinus Brewing Company. The defendant had contemplated selling the brewing concern to a corporation to be formed in England for the purpose of acquiring it and carrying on the business, and in this behalf had entered into a contract with one Grant. The contract, in effect, gave Grant an option for a specified time to purchase the concern for $1,100,000, payable partly in money, and partly in the bonds and shares of the corporation; and within that time it was expected that he would organize the corporation, and perfect the transfer to it of the property and business. A prospectus had been prepared in July, 1890, for circulation, to induce subscriptions for shares, setting forth the features of the scheme, and containing statements relative to the past output and profits of the brewery. Among other things, it stated that the business had increased remarkably in volume and profit from year to year; that the output had been 38,357 barrels for the year 1887, 78,314 barrels for the year 1888, 95,555 barrels for the year 1889, and for the five months of 1890 (January 1st to June 1st) there had been an increase in the output over the corresponding period of 1889 of 2,732 barrels; that the profits for the last year's business were $128,237; and that these statements were based upon information supplied by the defendant, and contained in the reports of expert accountants who had examined the books

and accounts of the brewery for a period from April 1, 1888, to September 30, 1889. After the prospectus was prepared, the accountants reported the results of a recent examination of the business of the brewery made by them covering a period ending August 31, 1890; and this report showed a profit on the year's business of about $140,000. Grant failed to carry through the scheme within the time prescribed by the contract between the defendant and himself. Thereupon the plaintiff, who had to some extent been co-operating with Grant in London, came to New York, with a view of making an arrangement with the defendant for himself.

Evidence was given upon the trial tending to show that early in January, 1891, the plaintiff and defendant had an interview at the city of New York, and at that time substantially reached an understanding by which the plaintiff was to have an option to purchase the property upon the basis of the contract which had previously been made with Grant. He was to pay defendant $5,000 on the day when the contract of sale should be signed, and defendant was to receive all the bonds, shares, and cash on or before September 30, 1891. During that interview a copy of the prospectus of July, 1890, and of the last report of the accountants was produced, and the plaintiff asked the defendant if the brewery was still doing as well, telling him that the capitalization of the corporation would be based on the earning capacity of the business, and, if the profits were not as good as they had been, he would not want anything to do with it. The defendant said the figures of the prospectus and report were correct, and that the business was showing a gradual increase the same as it had done previously. The details of the proposed contracts were not fully adjusted until April 28, 1891, at which time the contract was signed, and plaintiff paid in the $5,000. After the January interview the parties did not meet. Between that time and the signing of the contract, the plaintiff was in London, trying to organize a syndicate to take over the property. He laid before the members the statements of the accountants showing the output and profits of the business to August 31, 1890, and told them that, at his interview with the defendant in New York, he had been informed by him that the profits of the brewery had shown a gradual increase up to that time, and they promised to underwrite the capital of the corporation. Shortly after the contract between the plaintiff and defendant was signed, the plaintiff had a further examination of the books of the brewery made by accountants, in order to obtain a statement of the output and profits from August 31, 1890, to the date of the contract, and their report was transmitted to him about May 20, 1891. This report disclosed that the output and profits of the business during the intervening period had not gradually increased, but, on the contrary, had materially diminished. The plaintiff informed the London syndicate of this report, and thereupon they declined to proceed any further with the enterprise. He then notified the defendant, and demanded the repayment of the $5,000. The evidence at the trial authorized the jury to find that

from August 31, 1890, the date to which the last report of the accountants had extended, to January 1, 1891, the output of the brewery was 28,094 barrels only, as against 31,193 barrels for the same period of the previous year; and that the average profits of the business for that four months were $5,430 per month, as against an average of $11,657 per month for the eleven preceding months.

Evidence was also introduced for the plaintiff, and received against the objection of the defendant, showing that, during the three months which elapsed between the interview at which the alleged false representation was made and the signing of the contract, the output was 14,947 barrels, as against 17,128 barrels for the same period of the preceding year, and that there was a greater proportionate decrease in the profits than in the output for that period.

Evidence was also received for the plaintiff, against the objection of the defendant, showing that the underwriting of the syndicate would have cost the plaintiff $82,250; that the promise to underwrite by the syndicate was in substance a promise to subscribe for all the capital of the corporation not contributed by others; that the plaintiff had expended $500 for solicitors' services in respect to the organization of the company, and had paid $1,000 to the accountants for their charges for the examination of the books of the brewery made after the date of the contract with the defendant; and that, if the enterprise had been carried through, the plaintiff would have made a profit out of it, above expenses, of about $93,000.

After the testimony was closed, the defendant moved the court, in substance, to instruct the jury to disregard the evidence of the output and profits or loss for the months of January, February, and March, 1891, because they were for a period subsequent to the time at which the alleged fraudulent statement was made; that, in considering the evidence, they should not give any effect to the fact that the defendant did not voluntarily inform the plaintiff that the output or profits of the brewery had fallen off after the time of the interview between the parties; that it was not the duty of the defendant to disclose the fact to the plaintiff that the output and profits had decreased after the date of the interview; and that the jury should disregard the claim for damages by reason of the profit the plaintiff would have made if the enterprise had been carried through in London, because the basis for any such damages was too speculative and problematical. The court refused to instruct the jury as thus requested, and the defendant excepted. The judge instructed the jury that they were to determine as questions of fact whether the defendant made the statement attributed to him at the time of the interview, whether the plaintiff relied upon it, and, if made, whether it was false at the time. He then instructed them, in substance, as follows: That it appeared, without any contradiction, that between the time of the interview, when it was alleged the false representation was made, and the signing of the contract, there

had been a very large shrinkage both in the amount of the business and the profits which it was earning; that, while the defendant need not have disclosed to the plaintiff anything in respect to the condition of the business, if he undertook to make any representation as to what its condition was he was bound that such representation was truthful when made; and that, in view of the fact that this inchoate arrangement continued over several months, while the precise terms of the contract were being formulated and reduced to writing, if the situation materially changed for the worse after the defendant made the representation, he was bound in good faith, and before he let the plaintiff sign the contract, and took his money, to call the plaintiff's attention to the fact that the situation was not as he had theretofore represented it to be. He proceeds as follows:

"Now, that leaves open for your consideration the situation of the business as it is shown to have been subsequent to the date of the interview; but you must be extremely careful to understand that the defendant was not under any obligation to disclose the unfortunate condition of the business after the interview, unless he had represented at that time that the business was doing substantially as well as previously. If you are not satisfied that the defendant made such a statement at the interview with plaintiff, then you are not to go into the condition of the business subsequently, because the defendant was under no obligation to volunteer any statement about its condition at all, and, unless he made a statement at the interview, was under no obligation to modify it in any way, or to make any further statement about its condition at any subsequent time."

He also instructed them that, if they found for the plaintiff upon the questions of fact submitted to them, the plaintiff was entitled to recover the $5,000 paid by him at the time the contract was signed, with interest; that he was also entitled to recover the sums paid out by him to the solicitors and the accountants; and that the jury were to determine what, if any, damages the plaintiff sustained by reason of any loss of profits which he would have made if the new corporation had become the purchaser of the property. The only exceptions by the defendant to the instructions given were as to those in respect to the amount of damages. The jury found a verdict for the plaintiff for $8,741.67.

The principal assignments of error are based upon the admission of the evidence tending to show the decrease of outputs and profits between the time of the representation and the signing of the contract; upon the admission of the evidence in respect to the sums expended by the plaintiff for solicitors' and accountants' charges; upon the admission of the evidence respecting profits the plaintiff would have made if the London corporation had purchased the property; upon the rulings of the judge upon the question of damages; and upon the refusal of the judge to instruct the jury as requested by the defendant.

We do not deem it necessary to notice the assignments of error which rest upon the proposition that the court should have taken the case from the jury, because the evidence did not establish that a false representation had been made by the defendant, or that the

plaintiff relied upon it. There was sufficient evidence upon both of those issues, not only to authorize, but require, the judge to submit the cause to the jury; and, if the verdict was against the weight of evidence, this court has no power to disturb it.

There is no merit in the assignment of error based upon the rulings of the court in admitting evidence of a decrease of output and profits intermediate the time of the representation and the signing of the contract, or the rulings as to the effect of that evidence, and the duty of the defendant to inform the plaintiff of the facts. It is an elementary proposition in the law of fraud that, if one party to a contract knowingly assists in inducing the other to enter into it by leading him to believe that which he himself knows to be false, his conduct is fraudulent, and it matters not whether the result is brought about by misrepresentation or by keeping silent when duty requires a disclosure. As was said in French v. Vining, 102 Mass. 135:

"Deceit may sometimes take a negative form, and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation."

The law requires disclosure to be made only when there is a duty to make it, and this duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party, and not to the other, or by the additional circumstance that the party to whom it is known knows that the other party is actually in ignorance of it; but when one of the parties, pending negotiations for a contract, has held out to the other the existence of a certain state of facts, material to the subject of the contract, and knows that the other is acting upon the inducement of their existence, and, while they are pending, knows that a change has occurred, of which the other party is ignorant, good faith and common honesty require him to correct the misapprehension which he has created. It becomes his duty to make disclosure of the changed state of facts, because he has put the other party off his guard. The doctrine is thus stated by Mr. Pollock, in his work Principles of Contracts, (page 491:)

"It is sufficient if it appear that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false. Thus it is where one party has made an innocent misrepresentation, but, on discovering the error, does nothing to undeceive the other."

The representation made by the defendant respecting the output and profits of the business, if made at all, was made in response to an inquiry of the plaintiff, coupled with the statement that he would not want to have anything to do with the transaction if the profits were not as good as they had been, and that the capitalization of the corporation would be based on the earning capacity of the business. The defendant understood that the inquiry and answer were addressed to the condition of things which might be relied upon by the plaintiff as the basis of the contract which was thereafter to be formally concluded. As it turned out, a period

of several months elapsed before the contract was executed, during which the plaintiff was absent from the country, and had no means of informing himself of the real state of affairs. Under such circumstances, it cannot be doubted that, when the defendant discovered that the conditions of the business were not as he had led the plaintiff to suppose them to be, it was his duty to inform him of the facts, and, by maintaining silence when he should have spoken, he was guilty of deceit.

It has been urged that the complaint proceeds only upon the allegation of a false representation, and does not aver a fraudulent concealment, but no such objection was taken upon the trial. If such an objection had been raised, it would have been within the discretion of the court to allow an amendment of the complaint.

It is apparent from the amount of the verdict that the jury allowed damages for the expenses incurred by the plaintiff for solicitors' fees and accountants' charges, and also to some extent for the loss of profits. The complaint does not allege special damages, and the objection by the defendant to a recovery for the item expended for solicitors' and accountants' charges was put upon that ground. This objection was well taken. General damages are such as necessarily result from the injury complained of, and may be recovered without a special averment in the declaration. But such damages as, although the natural, are not the necessary, result of a wrong or breach of contract, are special, and must be stated in the declaration. Roberts v. Graham, 6 Wall. 578; Vanderslice v. Newton, 4 N. Y. 130.

We are also of the opinion that the jury should have been instructed to disallow any damages arising from the loss of expected profits. The plaintiff had not entered into any binding contract with the members of the syndicate by which he would have had any right of recourse against them in case of their failure or refusal to procure the capital for the corporation, nor, so far as appears by the evidence, had the transaction with them taken any such definite or obligatory form as to preclude him from receding from it, and making new arrangements with others. The fruition of the scheme was wholly dependent upon the raising of the capital necessary to enable the corporation to take over the property. It was therefore merely a matter of conjecture whether he would have realized any profits. It is not enough that the damages which may be recovered for a wrong or breach of contract are proximate, in the sense that they are such as the wrongdoer must have contemplated as the probable consequence of his misconduct; they must also be certain, in the sense that they are not problematical. Speculative and merely possible damages are not recoverable.

Inasmuch as, upon the findings of the jury, the plaintiff was clearly entitled to a verdict for the sum of $5,000, with interest from April 28, 1892, and the erroneous rulings upon the trial were only injurious to the defendant to the extent that additional damages were allowed by the jury, the case is a proper one for permitting the defendant in error to remit the excessive recovery. Bank

v. Ashley, 2 Pet. 327. If the plaintiff chooses to remit, the judgment will be affirmed; otherwise, it must be reversed.

The judgment is reversed, unless, within 20 days, the defendant in error enters a proper remittitur, and pays the costs of the writ of error; and, if he does so, the judgment will be affirmed.

McCRACKEN et al. v. ROBISON.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. CORPORATIONS—CONTRACTS BY DIRECTORS WHO OWN ALL THE STOCK — LEGALITY.
   Directors who own all the stock of a corporation are not within the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of the beneficiaries, and such a contract, made in the name of the corporation by the unanimous consent of the directors, is not invalid as against public policy.
2. EVIDENCE—ERRONEOUS ADMISSION CURED — BEST EVIDENCE SUBSEQUENTLY PRODUCED BY OBJECTING PARTY.
   Where the issue is as to the real ownership of railway stock, any error committed in permitting plaintiff to give orally the names of all the original subscribers, and to show that subscriptions made in the name of certain persons were in fact made for and paid by others, is cured when defendants themselves produce the subscription book.
3. SAME—RELEVANCY—MATTER NOT ALLEGED.
   In an action to recover on a contract for the construction of a railroad, evidence as to alleged false representations, which are not averred in the pleadings, should be excluded.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Willard F. Robison against William V. McCracken and others for breach of a railway construction contract. Judgment was given for plaintiff. Defendants bring error. Affirmed.

For decision on motion for new trial, see 52 Fed. Rep. 726.

M. I. Southard, for plaintiffs in error.

Rush Taggart, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiffs in error were defendants in the court below. On the trial the jury rendered a verdict for the plaintiff. The principal assignment of error presents the question whether the promise upon which the action was founded was void because of an unlawful consideration. The suit was brought to recover of defendants a share of the profits made in building a railroad for the Toledo, Saginaw & Muskegon Railway Company. The nominal plaintiff really represented four persons,—Robison, Jr., Ashley, Baker, and Cummings. These four persons were the promoters of the enterprise for building a railroad from Muskegon to Ashley, in the state of Michigan. One Mason was associated with them to some extent, and insists that he was to

be interested to the extent of one-fifth of any profits they might derive from it. These persons organized the railway company, subscribed for the proportion of stock required as a preliminary by the laws of Michigan, and made themselves and some of their friends directors. They procured rights of way and local aid in the form of donations of land or money to the enterprise, and with such assistance and their own moneys undertook to furnish the roadbed and the cross-ties for the whole road, ready for laying the track and completing the superstructure. They then entered into a contract in the name of the railroad company with the defendants to complete the building of the railroad and equip it ready for business. By this contract the defendants were to have all the capital stock of the corporation and the whole issue of its first mortgage bonds for building the railroad. Contemporaneously the promoters entered into another contract in the name of the plaintiff with the defendants by which the latter agreed that if the provisions of the first contract were carried out the plaintiff should receive one-half the net profits realized by them from the proceeds of the sale of the stock and bonds after reimbursing themselves for the cost of completing and equipping the railroad. After the road had been built and equipped, but before the bonds had been sold, the defendants agreed to pay the plaintiff in notes and money, and the plaintiff agreed to accept $150,000 in full payment and discharge of all claims against the defendants under the second contract. This action is founded upon that promise, and is brought to recover the balance remaining unpaid of the $150,000.

It is insisted for the defendants that, because the promoters were directors of the railroad company at the time the contracts for the building of the road and the division of the profits were made, the latter contract was illegal, and against public policy, and did not afford a good consideration for the subsequent promise upon which the action is brought. They invoke the rule which forbids fiduciaries to make contracts or engage in transactions in which their private interests may conflict with the interests of their principals, and contend that a contract made for a corporation by its directors with a view of obtaining a private advantage for themselves at the expense of the corporation is not only voidable at the election of the corporation as fraudulent, but is unlawful, as contrary to public policy. We fail to see how the doctrine which is invoked has any application to the facts of the present case. Treating the two contracts as one transaction, conceived for the purpose of enabling the promoters to make a profit out of the construction of the railroad, we fail to see how the public, or third persons, were to be injuriously affected, or could have any just reason to complain. The promoters were not acting as fiduciaries, except perhaps as they had impliedly promised to use the aid which had been donated towards the building of the road. It is not pretended that they did not use the donations legitimately. Certainly the contracts did not contemplate any misapplication of them. The promoters were to furnish the roadbed upon which the defendants were to build the

superstructure. This they did, using not only what moneys were donated to them, but a considerable amount of their own. When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in name, they were principals in fact. The corporate organization was the machinery which they had brought into existence for carrying out the enterprise. If they had seen fit, they might have built the road themselves, and sold the stock and bonds, and kept the proceeds, and no one could have successfully challenged their right to do so. Instead of building the road themselves, and realizing all the profit they could from the sale of the stock and bonds, they preferred to contract with the defendants to accomplish the same general result. If it was an improvident arrangement, they were the only losers. If it was calculated to defraud anybody, they were the only possible victims. A quite similar state of facts was considered in the case of Barr v. Railroad Co., 125 N. Y. 263, 26 N. E. Rep. 145, and the court used the following language:

"All the stock and bonds were issued in payment for the construction of the railroad, and were taken by a syndicate of persons who assumed the contract for the work. It is true that the syndicate was made up of members of the board of directors, but, as the members of the syndicate were practically the company, and composed the whole number of stockholders, there was no one to object, and the manner in which they chose to divide up their interests in the proprietorship of the corporation and to represent them in shares concerned only themselves. No principle of law forbade the company agreeing to pay for the construction of its railroad in the way or in the amount it did. If the company's directors were interested in the work and profits of construction, and evaded a direct contract through the form or device of an intermediary contractor, that was a matter for the company or for its stockholders to take hold of. But the stockholders and members of the syndicate were the same persons, and, however wrong the transaction might be if other persons were concerned, here no injury was effected to any one interested in the corporation."

The defendants, by confounding names with things and form with substance, have built up a theory to shelter themselves from performing their own part of the contract which is as unsound as their own conduct is dishonest. There was no error in the refusal of the trial judge to instruct the jury as requested by the defendants that the promise sued upon was void.

The conclusions thus reached dispose of all the assignments of error which have been argued at the bar, except some with respect to the admission of evidence. The plaintiff was permitted to give the names of all the original subscribers for the stock of the corporation, and to show that the subscriptions which were made in the names of persons other than the promoters were in fact made for the promoters, and the payments therefor were made by them. If there was any error in admitting this testimony against the objection of the defendants that the subscription book was the best evidence, that error was cured when, at a later stage of the trial, the defendants themselves produced the subscription book. It was entirely competent to show that some of the subscribers were

merely the agents of the promoters. Error is also assigned because of the exclusion of certain evidence offered by the defendants for the purpose of showing what representations were made to them, prior to the execution of the construction contract, concerning the resources possessed by the railway company to enable it to perform its part of the contract, and to show that the defendants relied on these representations. There was no averment in the answer that the defendants were induced to enter into that contract by any misrepresentation, and the evidence was apparently offered only for the purpose of raising an issue which was not tendered by the pleadings. We think it was properly excluded.

The judgment is affirmed.

TEXAS & P. RY. CO. v. ROGERS.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 120.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—"RESIDENCE."
   Where federal jurisdiction depends upon the diverse citizenship of the parties, such diversity must appear affirmatively in the record; and it is insufficient if diversity of "residence" only appears. Telephone Co. v. Robinson, 1 C. C. A. 91, 48 Fed. Rep. 769, followed.
2. MASTER AND SERVANT—DEFECTIVE APPLIANCES—PATENT DEFECTS.
   A servant cannot recover against his master for personal injuries resulting from patently defective appliances.
3. SAME.
   If a master employs an insufficient number of men to hoist a timber to a bridge which he is repairing, this is a patent defect, and an employe injured in consequence thereof cannot recover.
4. SAME—FELLOW SERVANTS—WHO ARE.
   A laborer, acting as temporary foreman of a bridge gang, but at the same time actually assisting in the labor, is a fellow-servant of the other members of the gang, and one of them who is injured by his negligence cannot recover against the common master.

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

At Law. Action by Thomas G. Rogers against the Texas & Pacific Railway Company to recover damages for personal injuries sustained while in its employment. There was a verdict for plaintiff, and, from the judgment entered thereon, defendant brings error. Reversed.

Statement by PARDEE, Circuit Judge:

Thomas G. Rogers, defendant in error, instituted his action against the Texas & Pacific Railway Company, plaintiff in error, in the court below, and in his original petition as to jurisdiction alleged as follows: "Your petitioner, Thomas G. Rogers, who resides in Miller county, Ark., complaining of the Texas & Pacific Railway Company, a corporation created and existing by virtue of the laws of the state of Texas, with an office and local agent at Jefferson, Tex., to wit, one Charles E. Ide, respectfully represents," etc. Afterwards he filed a second amended original petition, and therein alleged as follows: "Now comes the plaintiff, and by leave of the court first had and obtained, and files this, his second amended original petition, in lieu of

his original petition filed on the 25th day of February, 1891, and his first amended original petition filed herein on the 14th day of September, 1891, and complaining of the defendant, the Texas & Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the state of Texas, respectfully represents and shows to the court that heretofore, to wit, on or about the 22d of June, 1890, plaintiff was at work for said defendant company at and near Stawn, on the line of the defendant's railroad in Palo Pinto county, Tex., with what is known as the 'gang,' assisting in the building and repairing of bridges for said defendant company as a day laborer, and under the direction and control of one Lewis Sullivan, who was the acting foreman of the said bridge gang, and the agent of the said defendant company. That while so engaged at work, under the control and direction of the said foreman as aforesaid, and while attempting with others of the said gang to hoist from the ground below to the bridge above a large and heavy piece of bridge timber, plaintiff was knocked off the said bridge by the said timber, in consequence of the timber being so heavy that it could not be handled by the small number of men who were directed to raise the same, and in consequence of the further fact that there were no means of securing the said timber after one end thereof had been raised to the top of the bridge, and there were no such appliances as were necessary for the performance of the work at which this plaintiff and other persons were engaged at the time of the injury as aforesaid. That the force of hands employed at this work was also insufficient for the safety of this plaintiff and the other employes; and that the said foreman was unskilled and unfitted for the place; and that the defendant company was negligent in the failure to provide safe and suitable appliances for the performance of the work at which they were engaged at that time; and that, in consequence of the said negligence of the said defendant company in not providing a sufficient force and suitable appliances for the performance of the said work, and in the selection and employment of incompetent foreman to control and direct the same, the plaintiff was knocked off the high trestle or bridge, and suffered serious and painful and permanent injuries, mashing, bruising, and lacerating his leg, dislocating his ankle, and otherwise injuring this plaintiff, so that he was unable to walk or to move about without the use of crutches for the space of about four months, and wholly unable to do or perform any kind of manual labor for the period of six months, after the said injury. Plaintiff further shows that said injuries also extended to his shoulder and back, and that he suffered great physical pain and mental anguish, and that his ability has been greatly impaired by the injuries complained of to make a living at his occupation or otherwise. That his said injuries were all caused as aforesaid by the said negligence, acts of omission and commission, hereinbefore complained of, and without fault or contribution on the part of the plaintiff. Plaintiff further shows to the court that, while the timber by which plaintiff was hurt was being hoisted to the top of the bridge as before stated, that there came in sight a train, and the foreman ordered the men at work on the timber to hurry up, as the train was coming; and that, while they were so attempting to get said timber out of the way of the train, the accident happened by which plaintiff was injured as aforesaid; and by reason of said injuries, and all occasioned by the said negligence of the said defendant, plaintiff has been damaged in, to wit, the full sum of ten thousand dollars as actual damages, and for this sum he prays judgment, as in his original petition."

To the said second amended original petition, the defendant filed the following answer: "Now comes the defendant in above cause and demurs to plaintiff's petition, and says same shows no cause of action. (2) Defendants deny each and every allegation in plaintiff's petition, and say they are not guilty of the wrongs charged against them. (3) Defendants say that the negligence, if any, that caused this injury to plaintiff, was the negligence of those persons working with plaintiff, and who were his fellow servants, and for whose negligence the defendant is not liable. (4) Defendants say that, if plaintiff ever had any cause of action, the same accrued more than one year before the filing of plaintiff's amended petition, and all cause of action as set forth in said amended petition filed herein is barred by the law of

limitation of one year, wherefore plaintiff cannot recover. And the defendant further says that plaintiff himself was negligent, in this: he got upon the bridge and passed (sic.) pressed on the piece of timber, and caused it to fall and injure him, which contributed to his injury."

On the trial the evidence was all reduced to writing, and at the close the judge charged the jury on the law of the case as follows: "(1) It is the duty of the railway company to furnish its employes with reasonably safe means and instrumentalities with which to perform their labors. (2) It is also their duty to provide and furnish a sufficient number of hands to assist the employes to perform their labor so as to make it reasonably safe for the laborer. (3) If you believe that the defendants failed to furnish reasonably safe means and instrumentalities for Rogers to perform his work, or if the defendant failed to furnish and provide a sufficient number of hands to assist Rogers in performing his work, then, in either case, the defendant would be guilty of negligence, and plaintiff can recover. (4) But, if the plaintiff knew the means furnished were not proper and sufficient, then he cannot recover for any insufficiency in the means furnished. (5) If the defendant knew there were not sufficient hands to assist him, then he cannot recover for any want of sufficient hands. (7) If the foreman Harris was at the bridge, superintending the work, then Sullivan would be a fellow servant with Rogers, and plaintiff could not recover for any negligence of Sullivan. (8) If Harris was not present at the bridge, and Sullivan was there superintending the work, and had authority to superintend the work in Harris' absence, then Sullivan would not be a fellow servant, and the plaintiff can recover for Sullivan's negligence in anything he did in supervising the work, but could not recover for the negligence of Sullivan in performing the work of an ordinary laborer."

The defendant in the court below (plaintiff in error here) then asked the court to charge the jury as follows: "The jury are charged that the evidence shows Rogers to have been guilty of negligence which contributed to his injury. Therefore plaintiff cannot recover. You will therefore find for the defendant. The jury are charged that in this case the man Sullivan was a fellow servant with Rogers, and therefore the plaintiff cannot recover for any negligence of Sullivan. The court refused to give said charges, and the defendant excepted then and there to the refusal of each of said charges."

From an adverse verdict and judgment in the sum of $429, the case has been brought to this court for review, upon the following assignment of errors: "(1) The circuit court erred in refusing the following charge, asked by the defendant: 'The jury are charged that the evidence shows Rogers to have been guilty of negligence which contributed to his injury. Therefore plaintiff cannot recover.' (2) The court erred in refusing the following charge: 'The jury are charged that in this case the man Sullivan was a fellow servant with Rogers. Therefore the plaintiff cannot recover for any negligence of Sullivan.'"

T. J. Freeman, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) We are compelled to reverse and remand this case because the jurisdiction of the circuit court does not appear of record. Telephone Co. v. Robinson, 1 C. C. A. 91, 48 Fed. Rep. 769. As, however, we are advised that by proper amendment the jurisdiction can be shown, we deem it proper, in view of a new trial, to shortly consider the assignments of error.

The first charge asked by the plaintiff in error and refused by the court was, in effect, equivalent to asking the court to instruct the jury to find for the defendant. The transcript purports to contain

the entire evidence offered on the trial, and that evidence shows that, if the railway company failed to furnish proper appliances to perform the work in question to such an extent that said appliance might be declared defective, the defect was a patent one, and clearly to the knowledge of the defendant in error. In our opinion, the evidence does not show that an insufficient number of employes was furnished to assist in the work, but, if a sufficient number was not furnished, that also was a patent defect. "A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks, as well as those incident to the business; and where he knows or ought to know of the defect in the appliances, and continues to work with the same, and receives injuries therefrom, he is treated as being guilty of contributory negligence, and cannot recover." Wood, Ry. Law, § 379; and the authorities there cited fully sustain this proposition. "The servant, in order to recover for defects in the appliances in business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master." Id. § 386.

The second assignment of error we consider well taken. The effect of the charge given by the court was that Sullivan, the temporary boss of the bridge gang, although a laborer, and actually assisting at the time that defendant in error was injured, was not a fellow servant with the defendant in error. Under the evidence in the case, and under the law as declared by the supreme court of the United States in Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914, as well as under the decisions of the supreme court of the state of Texas, (see Dallas v. Railway Co., 61 Tex. 196; Railway Co. v. Rider, 62 Tex. 267; Railway Co. v. Harrington, Id. 597; Railway Co. v. Watts, 63 Tex. 549; Railway Co. v. Welch, 72 Tex. 298, 10 S. W. Rep. 529,) we are of the opinion that this was erroneous, and that the defendant railway company (plaintiff in error) was entitled to the charge asked and refused, to wit:

"If the defendant in error was injured by the negligence of Lewis Sullivan, it was the act of a fellow servant, engaged in the same line of employment, and for which the company would not be liable."

We notice, further, in this case, that there was error in awarding costs in favor of the plaintiff in the court below. Rev. St. U. S. § 968.

The judgment of the circuit court is reversed, and the case is remanded, with instructions to dismiss the suit, unless, by proper amendment, the jurisdiction of the circuit court is made to appear of record.

UNITED STATES v. FRENCH et al.

(Circuit Court, D. Massachusetts. June 15, 1893.)

No. 1,258.

1. NATIONAL BANKS—OFFICERS—REPORTS—FALSE ENTRIES.
Rev. St. § 5209, provides that every president or other officer or agent of a national banking association, "who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association, * * * or to deceive any officer of the association, or any agent appointed to examine its affairs, and every person who, with like intent, aids or abets" any such officer or agent in the violation of this section, shall be imprisoned, etc. *Held* that, under this section it is an indictable offense to make a false entry in a report to the comptroller of the currency, or to aid and abet the making of such entry.

2. SAME—INDICTMENT—TIME OF MAKING ENTRIES.
An allegation, in an indictment under this section, that defendant "did make a certain false entry in a certain report of the said association," will not be construed to mean that the entry was made after the report was completed, and was in fact an alteration.

3. SAME—REPUGNANCE.
For the purposes of this section, and of an indictment drawn under it, the preparation and completion of the report; the making of the false entry therein; its verification, attestation, and delivery to the comptroller,—may be considered as simultaneous, and there is consequently no repugnance in failing to allege that any or all of these things occurred in consecutive order.

4. SAME—AIDING AND ABETTING—OFFICIAL CAPACITY.
Though the counts in an indictment, under this section, for aiding and abetting the cashier in making such false entries, describe defendant as "being then and there a director" of the bank in question, it cannot be held that they charge him with aiding and abetting in his official capacity.

5. SAME—ACCESSORY BEFORE THE FACT.
Counts in such indictment which charge defendant with procuring and counseling the false entry before the fact are valid, for such acts are covered by the clause of the section extending the penalty to any one who "abets" an officer or agent in the acts prohibited.

6. SAME—SETTING OUT REPORTS—OMISSIONS.
The omission from the indictment of the dollar marks which appeared at the head of the columns in the report, in setting out the tenor of an entry alleged to be false, is immaterial.

7. SAME.
Where the entry whose tenor is set forth contains the words, "See schedule," it is not a valid objection to the indictment that these words are not explained, for it is only necessary to set out the context, when it is presumptively a part of what is set out.

8. SAME.
It is sufficient if the indictment allege the substance of the reports in question, without setting them out in full, for whether they are such reports as the law requires can be determined by the court from the allegations that they were made in response to the comptroller's order, and those touching their attestation, verification, and other like matters.

9. SAME—PRACTICE—SPECIAL DEMURRER.
A special demurrer will not be entertained, but the paper filed as such may be retained as an assignment of causes of demurrer under the general demurrer.

At Law. On demurrer to the indictment, which was drawn under Rev. St. U. S. 5209, providing as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

For form of indictment, see U. S. v. Potter, 56 Fed. Rep. 83. Demurrer overruled.

Frank D. Allen, U. S. Dist. Atty.
Strout & Coolidge and William F. Dana, for defendant French.

PUTNAM, Circuit Judge. This case is now submitted on a demurrer filed by Jonas H. French, who is charged as aider and abettor of Joseph W. Work, cashier of the Maverick National Bank, in making false entries in reports to the comptroller of the currency. Although, perhaps, not necessary to the full extent found in this indictment, (U. S. v. Mills, 7 Pet. 138, and U. S. v. Simmonds, 96 U. S. 360,) yet counsel on each side concede that the allegations in the various counts, touching the acts of the cashier, Work, are framed like the allegations in counts 13 to 35, each inclusive, of the indictment against him, (No. 1,260,) changing false entries in various reports of the same association; so that the opinion of the court touching this indictment against French will necessarily cover the counts named in No. 1,260, (U. S. v. Work, 57 Fed. Rep. 391.)

It has been strongly pressed on the court, both on this argument and at previous hearings relating to other indictments, that a false entry in a report to the comptroller is not an indictable offense. Many propositions have been urged which would have great weight if the spirit of the statute was in doubt, or if its letter on this point was uncertain. That the general evil aimed at embraces reports to the comptroller, and that such, when falsified, are most emphatically within that evil, cannot be successfully denied, nor that the letter of the statute is broad enough to embrace them. Therefore, as the court finds nothing, either in the spirit or letter of the statute, so far as either touches this particular, which creates any cloud, it sees no propriety in seeking extrinsic aids in construing what does not need to be construed. Moreover, the court is met by a uniform line of decisions in other circuits touching this matter, sufficient to bind its legal conscience. In U. S. v. Allen, 47 Fed. Rep. 696, (decided in 1880 in the northern district of Illinois,) Judge Blodgett undoubtedly held the view of the statute in this particular now claimed by the United States; and the same was evidently held by Judge Benedict in U. S. v. Bartow, 10 Fed. Rep. 874, (decided in 1882 in the

southern district of New York;) by Judge Hammond in U. S. v. Means, 42 Fed. Rep. 599, (decided in 1889 in the southern district of Ohio;) by Judge Coxe in U. S. v. Hughitt, 45 Fed. Rep. 47, (decided in 1891 in the northern district of New York;) and by the United States circuit court in the eastern district of Virginia in U. S. v. Bain, referred to in Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. Rep. 781.

The next two points urged by the defense can be more conveniently met together. They are, in substance, that the statements of time are repugnant, because some of the facts necessarily occurred in consecutive order, and also that there is a fatal defect in the allegations touching the making of the false entries, which the defense interprets by the following words: "When the entry was made the report is averred to have been complete." In connection with these propositions, but apparently not as a separate branch of defense, reference is made to the fact that some of the counts expressly allege transmission of the reports to the comptroller, and that these allegations do not set out time or place; but they are entirely unimportant with reference to any phase of this indictment, as they are mere surplusage, for reasons stated in the various opinions of this court in U. S. v. Potter, 56 Fed. Rep. 83.

The statement of the counsel for the defense that the report is "averred" to have been complete when the entry was made, is not strictly correct. There is no such averment in terms, and the most that can be claimed is that this can be deduced from what is averred. Moreover, the counsel go beyond the prior opinions of this court, already referred to, when they state that they are to the effect that the false entry "must be made at the time and in the course of the official drawing up of the report." The court was not called on to express an opinion on that proposition.

The substance of the position of the defense seems to be that the allegation in the indictment that Cashier Work did "make a certain false entry in a certain report of the said association" necessarily implies that, after the report was completed, he altered it, by making a new false entry in it. It is true that the English language is not always so precise as some tongues more philosophically constructed, and very many of its words and of its most common expressions are susceptible of more than one interpretation. Nevertheless, the same are constantly used for all purposes, including that of criminal pleading. In this view, the words of the statute, "or who makes any false entry in any * * * report," might be strained to include only a report beforetime completed, yet it must be conceded that, if such was the intention, there would have been used, in lieu of this expression, the word "alter," or some of its kin. The court, on examining the forms in Wharton's Precedents of Indictments and Pleas, touching entries criminally made in completed instruments, finds the words, "falsely altered," used in every instance, and nowhere the words, "did make false entry in," or the words, "did falsely enter in." There is no reasonable presumption that the entries charged in this case

intend the alteration of existing completed reports, more than there is that Shakespeare had in view conflicts already waging when he used the words:

"Beware
Of entrance to a quarrel."

Plainly, in both the statute and the indictment, the expression covers making a false entry in the preparation of a report, or in the process of completing it. Whether the statute could be construed to also include a false alteration by a cashier of his report after its verification and attestation, and before its delivery to the comptroller, and without a new verification and attestation, need not now be determined.

So far as the law is concerned, the preparation of the report, the completing of it, the making of an entry in it, false or true, the verification, attestation, and delivery to the comptroller, may be simultaneous and instantaneous; and there are no repugnances in not specifically alleging that any or all of these things occurred in consecutive order. The language of the court in the opinions in U. S. v. Potter, already referred to, is appropriate here, and disposes of the particular propositions it is now considering. The court there said:

"The criticisms on the use of the words 'then and there,' and the allegations of time, in the counts charging false entries in reports, and alleging that the accused was president of the bank, seem to require a refinement and strictness not known to the law. In innumerable instances known to every practitioner of experience, where there are set out many connected or related facts, though some may cover the whole of a day, and others only an instant, or a small part of a day, the words 'then and there' are used interchangeably, and without further specification, unless there is some presumption of law, or necessity of pleading, which does not exist in this case. The existence of the bank, and the tenure of office by the accused, are properly laid in terms to have the effect of a continuando, and stand by themselves. All the other facts might, in contemplation of law, have occurred simultaneously, or have taken only an instant in their occurrence, or occupied the whole of a day, and there is no presumption of law which required that they should be described as occurring in consecutive order."

With reference to the objection that in the aiding and abetting clauses occur the words, "being then and there a director," the counsel for the accused claim that the supreme court in U. S. v. Northway, 120 U. S. 327, 7 Sup. Ct. Rep. 580, decided that like words necessarily constitute an allegation of an act of an officer in his official capacity. We do not so understand. In U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. Rep. 512, that court went, apparently, beyond the questions submitted, and pronounced certain counts good in their entirety. But in U. S. v. Northway it did not assume to decide more than was certified, which, touching this point, was whether it was necessary to allege that the person aiding and abetting Fuller, the cashier, knew that Fuller was such cashier. It is true that, with reference to the person charged as aider and abettor, the indictment did contain the words, "being president and agent of the association," and that the court used the following language: "The

acts charged against the defendant could only be committed by him in his official capacity." But the letter of that portion of section 5209 relating to aiding and abetting, and the history of it, with the reasons for its adoption, as properly explained by the counsel for the accused, show clearly that the court, by this expression, could not have had reference to the particular matter now under consideration. There were other counts in the indictment in U. S. v. Northway charging misapplication of the funds of the bank; and the court, in the expression used, must have had reference to these. While in some cases this expression, "being president," "being director," etc., has been assumed to be sufficient to show that the person charged occupied the relation to the bank necessary under those parts of section 5209 which reach only certain official classes, yet it is too plain to need discussion that in the present case it can be rejected as surplusage. In those parts of the indictment directly charging the accused with aiding and abetting, there is nothing whatever to indicate that he did it in his official capacity. Therefore, without assuming to decide whether or not he might properly have been so charged, it is sufficient to say that the precise proposition made on this score by the defense cannot be maintained.

With reference to the claim that the counts are invalid which charge procuring and counseling before the fact, it seems from the definitions of the word "abet," wherever found, and especially from the expressions of Lord Hale, cited in Bish. St. Crimes, § 272, appearing on the brief for the defense, that it may well be construed as including what is thus objected to. As the evil to be remedied is as broad as the larger definition of the word, the court sees no occasion for limiting its effect. "The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." U. S. v. Hartwell, 6 Wall. 385, 396.

Except for the fact that the primary portions of section 5209 are limited in terms to certain classes named, and therefore, if they stood alone, none others could be included in the punishment, (U. S. v. Hartwell, already cited, page 397,) any persons could have been indicted as principals in the misdemeanors which they declare, whether present at the act, aiding it in any form, or whether counseling, procuring, or urging it in advance. It was plain, moreover, that the "cashier, teller, clerk, or agent" named in that section might be far less culpable than others behind them, and, indeed, be but little more than the mere instruments of the true offenders. To meet this difficulty the provision touching aiding and abetting was brought in by a later enactment. The entire purpose to be accomplished would not be effectuated, if the clause in question should be construed not to include all who may be principals in misdemeanors according to the ordinary rules of the common law.

That provisions of this character with reference to misdemeanors are not subject to the doctrines applicable to principal and accessory in case of felony, was settled in U. S. v. Mills, 7 Pet. 138, and therefore there is no ground for claiming that any technical rule of the common law must be applied for limiting the natural force of the words in question.

In U. S. v. Northway, already referred to, the count under consideration in the fourth question certified to the supreme court (page 333, 120 U. S., and page 584, 7 Sup. Ct. Rep.) seems to have followed, in this respect, those at bar, and charged the accused with aiding, abetting, inciting, counseling, and procuring before the misdemeanor was committed. As the learned judges who sat in the circuit court certified up only the one proposition covered by the fourth question, it is evident that in all other respects they considered the count sufficient, and the statute applicable to counseling and procuring in advance of the act; and this court concurs with them.

The objections of the counsel for the defense to the allegations of intent are fully met by U. S. v. Britton, already cited, for the reasons explained in the prior opinions in the cases against French, Dana, and Potter. The intents alleged in the counts at bar are precisely the same, and are alleged in precisely the same language, as found in U. S. v. Britton. The fact that they are not distributed among several counts, as in U. S. v. Britton, is not important, because it is plain that several intents may be alleged in one count, and only a portion of them proved, as may be found convenient or possible at the trial. Neither is it of any consequence that U. S. v. Britton touched false entries in books, and the indictment at bar false entries in reports; because Rev. St. § 5209, so far as the intents are concerned, enacts the same with respect to one as the other.

The omission of dollar marks, which undoubtedly appear at the head of the columns in the reports, but which have not been reproduced in setting out the tenor of the alleged false entries, has been held in the former opinions in the case against Potter to be immaterial; and this is in harmony with the counts found in U. S. v. Britton, already referred to, where the same omission existed. Touching the point made by the defense that this entry is not set forth in its entirety, because the words "See schedule" are not explained, counsel misinterprets the opinions in the prior case against Potter. These laid down the mere proposition that the context should be set out when it modifies the entry and is presumptively a part of it. The counsel construe this as though it read, "when it may so modify." Whether it may modify or not, and if it does modify, whether this will be important, cannot in this instance be known from anything appearing on the face of the indictment, or until the case goes to trial.

The court is unable to sustain the proposition that the allegations of falsity in the various counts are argumentative. This will appear at once to be ineffectual, by considering that the counsel for

the accused state that the entry of overdrafts of $128.98 is what is negatived, when in fact the pleader has alleged that the false entry purported to show that there was due for overdrafts the sum named "and no more," and it is these last words which are negatived. To claim argumentativeness here is to attempt to refine pleadings beyond anything to which the court is accustomed; and if at common law they would bear such refinement, the proposition would be sufficiently met in the federal tribunals by the provisions of Rev. St. § 1025, prohibiting the quashing of indictments for mere matter of form.

The defense also claims that counts 11 to 15 are insufficient because they do not set forth the reports in full. This involves a difficult question of pleading. The rule which requires the setting out of the entire instrument by its tenor seems limited mainly, if not wholly, to cases of forgery, counterfeit money, and threatening letters. In libel, where the tenor is required, only so much need be set out as the prosecutor relies on. Amer. Crim. Law, § 2600; Bish. Crim. Proc. § 791. Bishop on Criminal Procedure (section 332) says: "If an instrument in writing is introduced into a pleading, it may, except where special reasons forbid, be equally well described by its legal effect as by its words." Assuming this to be correct, the rule applied to forgery, counterfeiting, and threatening letters would seem to be exceptional, and therefore not one from which any general principle can be deduced.

In Com. v. Stow, 1 Mass. 53, an indictment for issuing a false certificate to a parishioner, showing that the holder was a member of a certain religious society, and therefore relieved as rate payer, the person indicted being authorized to issue it if it had been true, the certificate was set out by its tenor. Whether or not this was necessary was not decided; but the common rule was applied, that, where the pleader sets out the tenor, he is held to it. This certificate, however, would seem to come quite closely within the reason usually given for requiring the entire tenor to be set out in forgeries. A reason frequently given, that, wherever the written instrument furnishes the gist of the offense, its entire tenor must be set out, is of too general a character to be satisfactory; because the questions arise, when do such instruments thus furnish the gist of the crime? and why are they said to furnish it in cases of forgeries, threatening letters, and counterfeiting, and not larcenies of bank notes or commercial paper? Careful law writers have undertaken to give a more specific reason. Gabbett's Criminal Law (volume 1, p. 370) says that the reason which requires the entire tenor of an instrument is that "the court might see how far it be any of those instruments, the falsely making or knowingly uttering of which the law has said shall be considered forgery." Heard's Criminal Pleading says (page 221) the cases show that this is the true criterion. To the same effect is Reg. v. Coulson, 5 Denison, Cr. Cas. 592, where Wilde, C. J., said it is only necessary to set out the entire tenor "when the court can derive assistance from seeing a copy of it on record, as when the case turns on the nature and character

of the instrument." Substantially the same phraseology is used in Whart. Crim. Law, § 1468. In Lloyd's Case, 2 East, P. C. 1122, it was held that the tenor of an alleged threatening letter must be set out, because otherwise "it would be leaving to the prosecutor to put his own interpretation upon it; and to the jury, the construction of a matter of law." That the requiring of the whole tenor is not for the mere purpose of description is plain from the old case of Com. v. Bailey, 1 Mass. 62; where, in setting out an alleged counterfeit bank bill, the figures and words in the margin were omitted. The court held that this omission was unimportant, and added: "The whole bill, all that is evidence of a contract, is set out, and set out truly and precisely."

It would seem, therefore, that the rule is limited to pleading instruments which are of such a character that their legal effect can only be ascertained by examining the entire tenor; that is to say, of such a character that every word may be presumed to have some weight in ascertaining the substance. Ordinarily, this relates only to instruments which effectuate a contract; but threatening letters, which have been put in the same category, seem to require an examination of the entirety, for the purpose of ascertaining whether or not, on the whole, they are of the character alleged. This reason, however inconsistent the common law may appear in not applying it to bank notes and other commercial instruments when charged as the basis of a larceny, shows why it is that in libels it is necessary to set out only so much of the tenor as the prosecutor relies on, and why, in perjury,—an offense of the highest character,—it is sufficient to set out only the substance of the portions of a written instrument with reference to which the perjury was committed. Whart. Crim. Law, §§ 2253-2255; U. S. v. Chapman, 3 McLean, 390,—in which it was held that in charging perjury in a bankrupt's schedule, alleged to be false as to certain items, the generality need not be set out; Com. v. Warden, 11 Metc. (Mass.) 406,—an indictment based on an alleged false answer to a bill in equity; and various forms in Wharton's Precedents of Indictments and Pleas, including perjuries with reference to a false enlistment, a false invoice at the custom-house, and a false return of an insolvent creditor's estate.

Whether or not the reports in the case at bar are such as the law calls for can be easily determined by the court from the existing allegations touching the fact that they were made in response to the comptroller's order, and touching their verification, attestation, and other like matters; and in no way would the court be aided by the mass of material they contain, which, so far as the law on this point is concerned, is rubbish. The matters of detail which these reports contain cannot, within the meaning of Chief Justice Wilde, assist the court to see how far they are instruments within the statute in question, nor can they aid it in checking the prosecutor or the jury, as suggested in Lloyd's Case, ubi supra. In the view of the court, the rule applied by the

common law to forgeries, counterfeiting, and threatening letters is exceptional and unphilosophical, and, with the modern rules of criminal practice and procedure, there is no occasion for extending it. In this the court has in mind that in federal tribunals the accused has his exceptions as a matter of right, in criminal cases as well as in civil, wherever a writ of error lies; and, even where there is no writ of error, he may object to the introduction of a written instrument when offered in evidence, and then raise every question of its construction, and every legal objection, which could be raised if its entire tenor was set out in the indictment. As, therefore, it is nowhere assigned as a reason for setting out the entire tenor that it is necessary for the purpose of informing the accused of the offense with which he is charged, or for any other purpose for which certainty and particularity are required, it follows that, with the present methods of criminal practice and procedure in federal tribunals, the omission to set out the whole of these reports can in no way prejudice the accused, and must, at the most, be a matter of form under Rev. St. § 1025.

Therefore, in the absence of any authorities brought to my attention by the counsel for the defense in reference to this point, I must hold that to incumber indictments with voluminous documents, of which only small portions are needed for informing the accused or the court of the particularity and identity of the offense charged, tends to increase the mass of pleadings to an embarrassing extent, without apparent advantage, and subjects the prosecutor to great danger of variance in unimportant details, to the defeat of justice. It seems to the court that the counts in this case which do not contain these reports, fully and sufficiently inform the court and the accused of the offense with which he is charged, and enable him, in all respects, to prepare his defense conveniently and safely, and that if at the common law anything beyond this would be required, yet under the statute already referred to the omission is a mere matter of form.

Whatever other propositions are sought to be raised by the defense are too general to require the attention of the court, or are covered by U. S. v. Britton, already cited, or by the opinions of this court in the cases already referred to.

The court regrets that it has not had the benefit of the precise forms of indictments which have been before various federal tribunals in other cases under Rev. St. § 5209. It is aware that some of the questions of pleading involved in this opinion are close, and that, touching them, the court is without the aid of settled precedents or clear authority, and is liable to err. Nevertheless, notwithstanding the unwillingness of the court to put the United States and the accused to the expense and labor of a trial which may prove abortive by reason of errors hereafter found by the appellate tribunal, the court is unable to come to any other conclusion than that the indictment must be sustained in its entirety. The court has found it sufficient to investigate the propositions raised by counsel, and has not undertaken to seek out others for itself,

and therefore is not prejudiced as to any such which may hereafter arise.

The accused has filed a paper as a special demurrer. The court does not know of any rule of law by which special demurrers, properly so called, are admissible in criminal proceedings, barring one or two exceptions not necessary to be mentioned here. Moreover, as the accused has filed a general demurrer, further pleadings, until that is disposed of, are, of course, at the discretion of the court. The paper, therefore, cannot be filed as a special demurrer, but, if the accused desires, it may be allowed to stand as an assignment of causes of demurrer.

Demurrer overruled, and the indictment adjudged sufficient; the accused to answer over according to the statute.

UNITED STATES v. WORK.

(Circuit Court, D. Massachusetts. June 15, 1893.)

No. 1,260.

At Law. Indictment of Joseph W. Work for violating the national banking laws. On demurrer to indictment. Demurrer overruled.

Frank D. Allen, U. S. Dist. Atty.
Elder & Wait and E. A. Whitman, for defendant.

PUTNAM, Circuit Judge. This indictment covers two classes of counts. Counts 1 to 12, each inclusive, charge false entries in reports to the comptroller of the currency; and the views of the court touching them will be found in the opinion filed this day in U. S. v. French, (No. 1,258,) 57 Fed. Rep. 382. The remaining counts—Nos. 13 to 35, each inclusive—charge the accused, as cashier of the Maverick National Bank, with making false entries in the books of that association; and it is admitted by the counsel for the accused, and also claimed by the counsel for the United States, that these counts—13 to 35, each inclusive—are substantially similar to counts 1 to 18 in the indictment in U. S. v. Potter, (No. 1,212,) which counts have already been sustained by this court in opinions filed October and November, 1892. 56 Fed. Rep. 83, 97. The special demurrers offered may be filed as assignments of causes of demurrer under the general demurrer. Demurrer overruled, and the indictment adjudged sufficient; the accused to answer over according to the statute.

UNITED STATES v. TAYLOR.

(Circuit Court, E. D. Virginia. August 18, 1893.)

ELECTIONS—OFFENSES AGAINST UNITED STATES LAWS—INDICTMENT—SCIENTER.
An indictment for obstructing United States officers in the discharge of their duties, by ejecting them from the polls where an election for a member of congress is being held, is fatally defective, when it does not charge a scienter.

Indictment of Robert Taylor for obstructing officers of the United States at a congressional election. Dismissed.

F. R. Lassiter, U. S. Dist. Atty.
James Lyons, for defendants.

HUGHES, District Judge. This is one of several indictments found against Robert Taylor and sundry other persons. The indictments charge the defendants named in them with unlawfully interfering with the election for a congressman of the United States, which was held on the 8th day of November, 1892, at the second precinct of Jackson ward, in the city of Richmond. It sets out that Clinton De Priest was United States supervisor of that election at that precinct, and that De Priest called to his support three United States deputy marshals to prevent himself from arrest and ejection from the polls, viz. George M. Travers, E. N. Rowe, and L. M. O'Brien. It charges that the accused hindered, interfered with, and obstructed, assaulted, and prevented the said De Priest, supervisor, and Travers, Rowe, and O'Brien, deputy marshals, in the lawful discharge of their duties under the laws of the United States at said election at said precinct, and prevented their free attendance and presence at the polls of election, and their full and free access to and egress from the polls, and violently ejected them from the said polls of election, and caused them to be removed from the said polls, and to be carried to and incarcerated in the city jail of the city of Richmond, without any legal authority or process whatever, other than a pretended warrant of arrest issued by said Robert Taylor, one of the defendants, contrary to the law of the United States, and against the peace and dignity of the United States.

The place of the holding of the United States circuit court for the eastern district of Virginia, by the grand jury of which the indictments were found, is not given. The term or time at which the court was held is not stated, and cannot be gathered from the indictments. The concluding charge of the indictment, embraced in the phrase, "contrary to the law of the United States, and against the peace and dignity of the United States," refers, textually and grammatically, only to the warrant of arrest, which it charges to have been issued by said Robert Taylor. A very forced construction of the language of the conclusion of the indictment is necessary to apply this essential charge to the allegations of violence at the polls, which is the real gravamen of the indictments.

It is useless, in the cases at bar, to consider the effect of these irregularities upon the validity of the indictments. There is a further omission in these instruments, which is of graver moment. It is hornbook law that in indictments for a large class of offenses a scienter must be charged. In an indictment for uttering forged paper, for instance, it is not sufficient to charge that the paper was forged, and that it was uttered by the accused; but it must be distinctly, and in express words, charged that the acccused well knew the paper was a forgery when he passed it upon another person. This knowledge, this scienter, cannot be supplied by inference or implication from other allegations of the indictment. So

in regard to assaults upon officers of the law while engaged in the discharge of duties imposed by law. An assault by one person upon another may be criminally prosecuted with success under an indictment that does not charge a scienter, for here the common-law offense of assault is complete, whatever may be the character of the person assailed. But if, by statute law, the offense of assaulting an officer of government, in the discharge of a duty imposed by law, for the purpose of obstructing him in that duty, be made an offense, then something more is necessary than to charge that John Smith assaulted James Brown. The indictment must charge, not only the assault, but the offense of obstructing an officer of government, engaged in performing a duty imposed by law, and all such indictments must charge the scienter. For one person to assault another, who may happen to be an officer exercising some official function at the time, would be simply an offense at common law, unless the assailant knew that the assailed was an officer, and committed the assault upon him because he was an officer. In such a case the scienter is an essential ingredient of the offense, and must be expressly and particularly charged.

A fortiori is this so in cases of offenses against the United States, like those charged in the indictments at bar. The offense consisted in obstructing officers of the United States, as such, and assaulting and imprisoning them, while discharging their duties, under the laws of the United States, at the polls, in the election of a member of congress of the United States. The indictments could not have been found in this court unless the offenses charged had been committed against officers of the United States, acting as such in the line of duty imposed by laws of the United States. To assault an officer of the United States while happening to be engaged in performing some duty enjoined upon him by federal statute is only a common-law offense; and it becomes a statutory offense only when the assailant knows that the assailed is an officer of the United States, and makes the assault for the purpose of obstructing the officer in the discharge of duty imposed by laws of the United States. In such cases the scienter is an essential ingredient of the offense. As said by Judge Story in U. S. v. Keen, 5 Mason, 453, "In cases of that sort, it is the official character that creates the offense, and the scienter is necessary." To this may be added what the present chief justice said in Pettibone v. U. S., 148 U. S. 202, 13 Sup. Ct. Rep. 542: "If any essential element of the crime is omitted, [in the indictment,] such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital." The indictments at bar are absolutely silent in this particular. None of them charge that the accused obstructed, assaulted, and incarcerated De Priest, Travers, Rowe, O'Brien, and others, knowing that they were officers of the law, engaged in performing duties enjoined by law, and, what is more important, knowing that they were officers of the United States, engaged in performing duties imposed by laws of the United States. They are therefore fatally

defective. Authorities on this point might be vouched in profusion, but the principle is so plain that I do not think it necessary to cite them.

All these indictments must be dismissed.

MAGONE, Collector, v. AMERICAN TRADING CO.

(Circuit Court of Appeals, Second Circuit. December 6, 1892.)

CUSTOMS DUTIES—TARIFF ACT OF MARCH 3, 1883—PAPER SCREENS — CLASSIFICATION

Screens imported during the year 1888, which were composed of paper, as their component material of chief value, and of wood and metal, which were used on the floors of dwelling houses, or other places, to intercept heat, light, or moving air, or to conceal portions of rooms or objects, and which were then known in trade and commerce of this country as "paper screens," were not dutiable at the rate of 40 per cent. ad valorem, as screens, under the provision for "all other mats not exclusively of vegetable material, screens, hassocks, and rugs," contained in (paragraph 378, Tariff Ind., New) Schedule K (entitled "Wools and Woolens") of the tariff act of March 3, 1883, (22 Stat. 510,) but were dutiable at the rate of 15 per cent. ad valorem, under the provision for "Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act," contained in (paragraph 388, Tariff Ind., New) Schedule M (entitled "Books, Papers, etc.,") of the same tariff act, (22 Stat. 510.)

Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by the American Trading Company against Daniel Magone, collector of the port of New York, to recover duties paid under protest. There were verdict and judgment for plaintiff, and defendant brings error. Affirmed.

During the year 1888 the American Trading Company, the defendant in error, made three importations of screens from Japan into the United States, at the port of New York. These screens were classified for duty as "screens," under the provision for "screens" contained in Schedule K of the tariff act of March 3, 1883, (22 Stat. 510; Tariff Ind., New, par. 378,) and duty was exacted thereon, of the defendant in error, at the rate of 40 per cent. ad valorem, by Daniel Magone, the plaintiff in error, as collector of customs at that port. Schedule K, entitled "Wools and Woolens," after providing for wools and hairs, and manufactures of wools, worsteds, and hairs, including various kinds of carpets or carpetings, and all druggets and bockings, provides (Tariff Ind., New, par. 378) that "carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified, forty per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description; and the duty on all other mats, not exclusively of vegetable material, screens, hassocks, and rugs, shall be forty per centum ad valorem." The defendant in error duly protested against this classification and this exaction, claiming in its protests that these screens were dutiable at the rate of 15 per cent. ad valorem, as "manufactures of paper, or of which paper is component material, not specially enumerated or provided for," under the provision for such manufactures contained in Schedule M (entitled "Books, Paper, etc.") of the aforesaid tariff act, (22 Stat. 510; Tariff Ind., New, par. 388.) The defendant in error made due appeals, as prescribed by law, and, within 90 days after adverse decision thereon by the secretary of the treasury, brought this suit

at law in the circuit court of the United States for the southern district of New York to recover all duty exacted on these screens in excess of duty at the rate of 15 per cent. ad valorem. These screens were the ordinary movable screens, such as are used on the floors of dwelling houses or other places to intercept heat, light, or moving air, and protect therefrom persons sitting behind them, or portions of rooms, or any other thing that it is desired to keep from sight. They were composed of paper, wood, and metal, were about 4½ feet high, and consisted, some of three, and some of four, folds. The value of the metal in these screens was from 15 to 16 per cent. of the whole value thereof; the value of the wood, from 20 to 22 per cent.; and the value of the paper, from 65 to 62 per cent. At and prior to March 3, 1883, screens like these screens were known in trade and commerce of this country as "paper screens." Both sides having rested, counsel for the plaintiff in error moved the circuit court to direct the jury to find a verdict for the plaintiff in error as to these screens, on the ground that they were provided for, eo nomine, in Schedule K of the aforesaid tariff act of March 3, 1883, (Tariff Ind., New, par. 378,) and were therefore promptly subjected by the plaintiff in error, as said collector, to duty at the rate of 40 per cent. ad valorem. The circuit court refused to direct the jury to find for the plaintiff in error, but, on the contrary, directed a verdict for the defendant in error. There was a verdict and judgment accordingly, and the plaintiff in error sued out this writ of error.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for plaintiff in error.

Curie, Smith & Mackie, (W. Wickham Smith, of counsel,) for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The plaintiff in error was defendant in the court below. The suit was brought to recover duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, upon certain importations made by the plaintiff in October and December, 1883. The importations were the ordinary movable screens, such as are used on the floors of dwelling houses or other places to intercept heat, light, or currents of air, or to conceal objects or portions of the room. They were composed of paper, wood, and metal. They were about 4½ feet high. Some had three and some four folds. The value of the metal in the screens was from 15 to 16 per cent. of the whole value thereof; the value of the wood, from 20 to 22 per cent.; and the value of the paper, from 62 to 65 per cent.; and at and prior to March 3, 1883, such screens were known in trade and commerce in this country as "paper screens." The collector classified this merchandise for duty under that part of Schedule K ("Wools and Woolens") of the tariff act of 1883 which reads as follows:

"Carpets and carpeting of wool, flax, or cotton, or portions of either or other material, not otherwise herein specified, 40 per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides and other portions of carpets or carpeting shall be subjected to the rate of duty herein imposed on carpets or carpetings of like character or description, and the duty on all other mats not exclusively of vegetable material, screens, hassocks and rugs shall be 40 per centum ad valorem."

The plaintiff duly protested against this classification, claiming in its protest that the screens were dutiable under that part of

Schedule M of the same act at the rate of 15 per centum ad valorem, as "manufactures of paper, or of which paper is a component material, not specially enumerated or provided for." We conclude that the screens referred to in the paragraph of the wool section, as well those "not exclusively of vegetable material," as all others, are articles ejusdem generis with the other articles named in the group. Consequently, we are of the opinion that the importations in question should have been classified as manufactures of paper, and that the ruling of the circuit court, directing a verdict for the plaintiff upon that ground, was right.

The judgment is affirmed.

BONNELL et al. v. STOLL et al.

(Circuit Court, D. New Jersey. July 8, 1893.)

PATENTS FOR INVENTIONS—ANTICIPATION—BED SPRINGS.

Claim 2 of letters patent No. 405,821, issued June 25, 1889, to Bonnell & Lambing, covers "a spring bed bottom formed in sections, and having the top whirls of springs at the adjacent ends of the sections united by a spiral wire wound loosely around them, so as to allow the sections to fold, and yet afford a yielding connection." *Held*, that the claim was anticipated by the prior constructions known as "Lace-Web Spring" and the "Maier Bed."

In Equity. Suit by Elliot M. Bonnell and John S. Lambing against Robert P. Stoll and others for infringement of a patent. Bill dismissed.

James A. Whitney, for complainants.

F. C. Lowthrop, for defendants.

ACHESON, Circuit Judge. The plaintiffs sue for the infringement of letters patent No. 405,821, for improvements in bed springs, granted them on June 25, 1889. The patent shows a bed bottom composed of spiral or helical springs arranged in parallel rows, and connected by spiral wires running lengthwise of the bed bottom, which is formed by two sections, so as to fold the one upon the other. There are two claims, but, upon the argument, infringement of the second claim, only, was insisted on. That claim is as follows:

"(2) A spring bed bottom formed in sections, and having the top whirls of springs at the adjacent ends of the sections united by a spiral wire wound loosely around them, so as to allow the sections to fold, and yet afford a yielding connection, substantially as specified."

The functions of this connecting spiral wire, as declared by the specification, are threefold, namely, "loosely and yieldingly connecting the springs," furnishing "a spiral filling for the interspaces" between the four adjacent springs, and "serving as a hinge" for folding the sections. The specification states, and the prior patents show, that it was not new to connect the tops and bottoms of bed springs with spiral wires, and that springs had been furnished

with hinged connections. It is not, however, deemed necessary to refer particularly to the earlier patents. It is enough to consider two prior constructions designated in the proofs as "Defendants' Exhibits Lace-Web Spring and Maier Bed." The former is a spring bed bottom constructed of helical springs joined together by coiled wires, made in two sections, united by five spiral wires forming a longitudinal strip of wire netting, which acts as a hinge to allow the two sections to fold together. The "Maier Bed" is composed of two spiral spring bed-bottom sections, with a spiral wire hinge connection, consisting of three spiral wires; the two outer ones intermeshing with the spiral hinge wire, and being wrapped, respectively, in a loose manner, about the top portion of the whirls of the adjacent rows of springs of the two sections. These two constructions possess, respectively, all the distinguishing characteristics of the plaintiffs' patented improvement. In each the two bed sections are united by a yielding spiral wire connection between the top whirls of the adjacent rows of springs, permitting the two sections to fold the one upon the other, and affording a spiral filling for the interspaces between each adjacent set of four springs along the connecting line. Neither in function nor in operation is there any substantial difference between the spiral wire connections of the two sections of these old constructions and that of the patented bed spring. The employment of a single spiral wire to form the connection, instead of several, conduces to simplicity and cheapness of manufacture, but it introduces no new principle, and does not involve invention, in a patentable sense. At the most, it was the mere carrying forward of the original idea or method, resulting in an improvement in degree, only. Smith v. Nichols, 21 Wall. 112, 119. The court there said:

"But a mere carrying forward, or new or more extended application of the original thought; a change only in form, proportions, or degree; the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results,—is not such invention as will sustain a patent."

This principle has been enforced in many more recent cases. Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. Rep. 531; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. Rep. 394; French v. Carter, 137 U. S. 239, 11 Sup. Ct. Rep. 90; Grant v. Walter, 148 U. S. 547, 553, 13 Sup. Ct. Rep. 699. These and other like decisions of the supreme court lead to a conclusion adverse to these plaintiffs.

Let a decree be drawn, dismissing the bill, with costs.

THE LURLINE.

WETMORE v. HAWKINS.

(Circuit Court of Appeals, Second Circuit. 1892.)

No. 45.

ADMIRALTY APPEALS—NEW EVIDENCE—WHEN RECEIVED.

In an admiralty case the circuit court of appeals will, on motion, strike from the files depositions taken on appeal by a party who might easily have produced it in the trial court, and who was as well informed then as now as to its materiality and necessity.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by John P. Hawkins against the yacht Lurline, (William B. Wetmore, claimant.) There was a decree for libelant, and the claimant appeals. Heard on motion of the claimant to strike from the files certain depositions taken by libelant on appeal. Granted.

An application subsequently made to the supreme court for a writ of mandamus to compel the judges of this court to receive and consider these depositions was denied. See 13 Sup. Ct. Rep. 512.

John Murray Mitchell, for appellant.

Geo. A. Black, for appellee.

Argued before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Motion granted, for the reason that the testimony taken on deposition in this court was available to libelant on the trial in the district court, witness and books being both present there; that it does not appear that he was prevented from presenting such testimony except by his own choice; that he was as well informed as to its materiality under the issues when he closed his case as he is now, and was expressly notified by respondent's motion to dismiss that the latter contended libelant's proof as to the amount of labor performed was insufficient.

THE DENNIS VALENTINE.

LAVERTY et al. v. THE DENNIS VALENTINE.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

ADMIRALTY—TENDER—COSTS.

A libel for salvage having been filed by the owners of a steam tug in their behalf only, claimants paid into court the full amount claimed by libelants, with accrued costs. *Held*, that libelants, thereafter failing to establish a right to more than the amount so paid, were properly charged with costs accruing subsequent to such payment. 47 Fed. Rep. 664, affirmed.

Appeal from the District Court of the United States for the District of Connecticut.

In Admiralty. Libel by James Laverty and others, owners of the steam tug Empire, against the steam lighter Dennis Valentine. John Ingham and another, claimants, paid the sum of $100, and $50 accrued costs, into court. Subsequently, to protect the Valentine against further claim, the master and crew of the Empire were made parties. A decree was entered awarding to libelants $100, the amount of the tender, with costs accrued at the date thereof, less the costs of the claimants accruing after the tender, and giving $50 to the master and crew. 47 Fed. Rep. 664. The libelants appeal. Affirmed.

Josiah A. Hyland, for appellants.

Jos. F. Mosher, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Although the awards may be moderate in amount, we find no such violation of just principles, or clear and palpable mistake, or departure from the path of authority, as would warrant an increase thereof by this court. The libel as originally filed was that of the owners of the steam tug only. It does not even contain the general clause, "for themselves and others interested," etc. The claimants' payment into court of $100 for services of the steam tug and $50 accrued costs was, therefore, a tender of the full amount of the claim advanced against them up to the date of such tender, and the decree of the district court correctly awarded against the libelants all costs accruing subsequent thereto, their subsequent litigation having failed to establish their right to recover more than the amount of claimants' offer. The appeal on this branch of the case is frivolous. Decree affirmed, with costs of this court.

THE EXE.

WILLIAMS v. THE EXE.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

SHIPPING—DANGERS OF NAVIGATION.

Where a stanchion sufficient to resist the pressure of much heavier cargoes on previous voyages gave way from the pressure of a comparatively light cargo on a voyage during which dangers of navigation were encountered, which dangers had been excepted in the bill of lading, the inference is not of a defect in the stanchion, but of injury from the excepted dangers.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Williams against the steamship Exe for damage to cargo. The district court rendered a decree for libelant. 52 Fed. Rep. 155. Respondent appeals. Reversed.

J. Parker Kirlin, for appellant.
Sidney Chubb, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a suit to recover damages against the steamship because of the nondelivery in proper condition of certain teas, shipped on the steamship at the port of Hiogo, Japan, for transportation to the port of New York, under a bill of lading of which the libelant became the assignee. The bill of lading contained a clause exempting the steamship from liability "for all and every the dangers and accidents of the seas and navigation, of whatever nature or kind." The teas were injured by sea water, which during the voyage entered the hold where they were stored; and the answer asserts that the failure to deliver them in proper order was caused by the dangers and accidents of the seas and navigation. The district court decreed in favor of the libelant. The decision proceeded upon the ground that the damage was caused, not by dangers of navigation, but because of the insufficiency of the interior structure of the vessel to protect the cargo from water damage.

The facts disclosed by the record are these: The teas were stored in one of the holds of the steamship, which was located above the ballast tank, and which was supposed to be a water-tight compartment. The water which injured them entered the hold from the ballast tank, through a hole caused by the giving way of a bolt. Extending from the floor to the roof of the hold was an iron stanchion, 1½ or 2 inches in diameter. It was used as one of the supports for shifting-boards when grain was carried, to prevent the cargo from shifting. It rested at the roof and at the floor of the hold in an iron socket. The socket at the floor was formed with two lugs, through each of which a screw bolt passed through the iron floor of the hold into the iron roof of the ballast tank, thus securing the socket to the floor. When the cargo was unloaded at New York, it was found that this stanchion had an abrupt bend at a short distance above the socket. One of the lugs of the socket was broken off. One of the bolts was broken in two, and the other bolt was so loose as to play up and down through the floor of the hold and the roof of the ballast tank. Part of the broken bolt remained firm in its bearings, but the other bolt had become worn to such an extent as to allow the water to pass around it from the ballast tank to the hold. The tea boxes near the stanchion were somewhat battered, and one, which was in contact with it, was considerably broken. There had been no shifting of the cargo.

There is no direct evidence about the condition of the stanchion fastenings at the beginning of the voyage, as no special examination of them seems to have been made. It is shown, however, that at that time the stanchion was not bent. The steamship was a first-class all steel vessel, only four years old. There had been no leak on previous voyages, and the floor of the hold was dry when the teas were put in, and subsequently, when other cargo for the voyage was put in. The voyage occupied nearly three months, and on several occasions severe weather was encountered. Extracts from the log read as follows:

"August 22d. Steamer rolling very heavily, and at times making heavy plunges. August 23d. Very high, confused sea. Steamer rolling very heavily." "September 3d. Steamer pitching heavily at times." "September 5th. Steamer plunging heavily. Shipping water on deck over all." "September 23d. Steamer rolling heavily. Shipping water on deck fore and aft."

Similar entries appear in the log from time to time until as late a date as October 28th. From the description of the appearance of the cargo in the hold, and the rust upon the fracture of the broken bolt, it is inferable that the mishap occurred during the earlier part of the voyage.

Upon this evidence, we think the libel should have been dismissed by the district court, and the steamship exonerated. Undoubtedly, in every contract for the carriage of goods there is an implied engagement on the part of the carrier to furnish safe and suitable means of transportation, and, in the case of a carrier by ship, to supply a ship which is not only seaworthy, but is also reasonably fit to carry the cargo stipulated for in the bill of lading. It is also elementary law that a carrier by vessel cannot escape liability for the loss or injury of goods during transportation through dangers of navigation caused by his own previous default, notwithstanding an exception in the bill of lading from liability for sea perils. So, if the damage to the cargo in the present case, though immediately caused by a danger of navigation, would not have been incurred if the steamship had been in a reasonably fit condition to resist the escape of water from the ballast tank into the hold, the libelant should recover, notwithstanding the exempting clause. Our dissent from the conclusion of the court below proceeds upon a different view of the effect of the evidence to that taken by the learned district judge. In his opinion, after stating, in substance, that the pressure of the comparatively light cargo against the stanchion during the motion of the ship would not have been sufficient to bend the stanchion, the learned judge said:

"In my judgment, the damage proceeded from either the original insufficient strength of the stanchion, or from its bad condition or bad fastenings at the commencement of the voyage."

Inasmuch as the stanchion had been sufficient to resist the pressure of much heavier cargo on previous voyages, and as no evidence tending to show any original fault in the structure was given, the suggestion that it might have been originally of faulty construction must be rejected. Indeed, it is not contended by the counsel

for the libelant that there was any original defect in the stanchion, either of principle or in detail of construction, but the contention is that the bolt which became loose was old and worn, and gave way when the stanchion was not subjected to any unusual strain. If the bolt was thus insufficient, there was a breach of the implied warranty of the carrier, and the loss is to be attributed to that cause, and not to a danger of navigation. Whether it was or was not is the real question of fact in the case.

The fact that this stanchion, an iron rod, 1½ or 2 inches in diameter, located where it was not exposed to the impact of any heavier object than a lot of chests of tea, and in apparent good order at the beginning of the voyage, was found at the end of the voyage bent in the manner described, is most persuasive. It could not have been thus bent except by some unusual and extraordinary strain or wrench. Unless the strain or wrench was caused by some sudden or violent straining of the vessel on some of the occasions when she was plunging and rolling heavily, or by the pressure of the cargo which yielded and surged with the surging of the ship, or by a combination of these conditions, the cause of it cannot be explained or even conjectured. The force that could so bend the stanchion would be sufficient to break the lug, and it is altogether probable that the same strain which bent the stanchion broke the lug and the bolt passing through that lug. If the broken bolt was the first to give way, it is not strange that the increased tension upon the other during the subsequent rough weather of the voyage should have started it, and worn away the screw threads. The giving way of a defective bolt would not account for the bend in the stanchion. We regard it as altogether more probable that the bolt gave way, not because it was loose and worn, and unable to meet the strain to which it was ordinarily exposed, but because it encountered an extraordinary strain. We conclude, therefore, that the primary cause of the loss was the excepted cause,—the violent seas, which set in motion the train of events that resulted in the entrance of the water into the hold and the injury of the cargo. We find nothing in the proofs to justify the contention for the libelant that those in charge of the steamship were negligent in not seasonably discovering the water, and removing it from the hold.

The decree is reversed, and the cause remanded, with instructions to dismiss the libel, with costs of the appeal and of the district court.

THE HUGO.

BRAUER et al. v. COMPANIA NAVIGACION LA FLECHA.[1]

(District Court, S. D. New York. July 8, 1893.)

1. SHIPPING—LOSS OF CARGO—CATTLE SHIP—JETTISON—NECESSITY.
   One hundred and twenty-nine cattle, out of a shipment of 165, on board the steamship Hugo, were thrown or driven overboard by the officers of the ship, in bad weather, during a voyage from New York to Liverpool. The officers of the ship claimed that the weather was so violent that the sacrifice was necessary to save the ship. This was denied by the cattlemen on board. On all the evidence the court found that the necessity for clearing the decks of the cattle was exaggerated by the officers of the ship, and accordingly *held* that the vessel was liable for the loss of all sound cattle, or such as were not fatally wounded or maimed at the time they were cast overboard, or were negligently or designedly suffered to go overboard through the open gangways of the ship.
2. BILL OF LADING—STIPULATIONS—EXEMPTION FROM NEGLIGENCE—ENGLISH LAW.
   A clause in the bill of lading providing that the cattle "were to be at owner's risk; steamer not to be held accountable for accident to, or mortality of the animals, from whatever cause arising, * * * or negligence of the shipowner,"—was *held* invalid to protect the ship in this case, as was also the further stipulation which would substitute the British law for our own.

In Admiralty. Libel for damage to cattle. Decree for libelants.

McFarland & Parkin, for libelants.
Butler, Stillman & Hubbard and Mr. Mynderse, for respondents.

BROWN, District Judge. The above libel was filed to recover damages for the loss of 129 cattle, out of a shipment of 165, upon a voyage of the steamer Hugo from New York to Liverpool in October and November, 1891. The steamer sailed from this port on the 24th of October. During three days from October 30th to November 1st inclusive, the vessel met heavy weather during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few were forward under or near the turtle back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches forward and aft of the engine room in pens built in the wings on the port and starboard sides of the ship, all of which were lost.

The storm was heaviest on the afternoon and night of Saturday the 31st, the wind and seas coming first, and heaviest, from the northwest, but on Saturday hauling to the northward and to east northeast, with cross seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday the 31st; but these were repaired, and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about 10 or 12 cattle that had become maimed and helpless were sent overboard through those gangways. The

[1]Reported by E. G. Benedict, Esq., of the New York bar.

chief loss was during that night and the following morning, when shortly after daylight, the captain gave orders to open the forward gangways also, and the whole deck was cleared of all the cattle, save the 39 under the turtle back. The following is a translation of the account given in the ship's log, the master and most of the crew being Spanish:

"(Sea time) October 30, 1891.

"On the fifth hour (5 P. M.) a heavy sea destroyed some of the cattle houses on the port side and opposite hatches No. 4 and No. 3. We immediately fixed up in the best manner that it was possible the houses and the oxen, the boards that were lying loose on the deck we threw overboard. Nightfall, the weather slightly clear towards the horizon with signs of heavy rain clouds, wind fresh from the northwest, seas very lively from the same direction and from the west, coming on board with less force than during the afternoon, and in this way we passed the night. At daylight wind very fresh from the north, with seas from the same direction and from the northwest. On the twentieth hour we stopped the engine in order to arrange the houses that had been broken during the night opposite No. 4, and replaced the oxen that were outside of their houses. At nine o'clock they were all back into their places, with the exception of one which remained on hatch No. 5, and which notwithstanding all our endeavors to get him to rise, it has been impossible, he remaining on the same hatch No. 5. Subsequently and while the engine was still stopped, we gave food and drink to all the oxen. On the 22d hour after all was arranged, we again started under full steam and continued to sail in the direction of our course and without further mishaps we arrived at the middle of the day, and there being no observation, we situated ourselves by dead reckoning in the latitude and longitude noted.

"31st. Commencing this day with very strong wind from the north northeast with very lively seas from the same direction and from the northwest, which came on board from all over, flooding the houses and bridges always full of water, and governing our course as noted in the table. In the second hour weather very hard from the north northeast, the heavens and the horizon closed, and with rain accompanied by very heavy seas with full crest, also from the northwest, which strike against the sides of the vessel, coming on board, and making the vessel labor terribly. At this hour, some of the houses opposite No. 4 were destroyed; several of the oxen being loose, we stopped the engine and remained crosswise to wind and seas, seeing that the weather was becoming worse at every moment, and that the barometer continued to fall rapidly, (at this time, 29:55,) we determined to open gangway No. 4 in order that the oxen that were loose could go over, which was done with much precaution to avoid personal mishaps. Once that it was opened, the oxen that were loose were carried over with the heavy rolling of the vessel; these were about 10, with the one mentioned on the previous day which was almost dead, which we threw overboard with ropes.

"Towards nightfall, weather quite a hurricane, the machinery stopped, and laying crosswise to the wind and waves, the vessel rolling and making all suffer very much. At twelve hours, we set the mainsail with the object of steadying the vessel. The greater portion of the oxen are down and many are carried from port to starboard with the boards from the houses loose on account of the heavy rolling of the vessel, and with a thick and heavy sea that comes on board on both sides. In this way and with the weather declared into a hurricane, we passed the balance of the night.

"At daylight, hurricane. All the deck is in a lamentable state; the cattle from port to starboard and from starboard to port, some with their legs broken, others dead, with so much suffering, others with their legs tangled in the rail, and some during the night, by the blows of the seas and the rolling of the ship, had gone on through the gangway to the water. On the nineteenth hour (7 A. M. Sunday) we decided to open gangway No. 3, which was done with much precaution, as it was impossible to go on deck on account of the rollings, and the seas that continually came in, and we im-

mediately commenced the sad operation of throwing over all the cattle that were loose on the decks and in sorry plight, some with ropes, and others dragging them to the gangway, and from here, the seas that were boarding us would carry them over. We have noticed the absence of some of the hatch wedges, very likely knocked out by the cattle during the night, and have immediately replaced them with new ones. The hurricane continues with as great force and fury, the barometer 29.21. Notwithstanding our precautions to avoid personal mishaps, at 10:30 in the morning more or less, a sea carried out through gangway No. 3 one of the boys named Enchortiately; he was carried over. We noted his absence immediately, as he had not become separated from the side of the vessel, we threw him a life preserver, and with the aid of thin rope we were able to save him. On coming on deck, we noted that he was bleeding from ear, no doubt having received a blow on that part. We put him to bed.

"On the 23d hour, the wind carried away the mainsail, leaving nothing but the bolt ropes of the same. At noontime the stern was clear, there being no more cattle. There are only some remains of the houses, towards the bow and gangway of No. 3 is clear as also the hatchway. There remain on board only 39 oxen, and those up by the bow forward of No. 3 which are the ones that suffered less from the effects of the hurricane. At noontime there was no observation, the heavens being completely closed, and we situated ourselves in latitude and longitude noted in its proper place. In this day, as in the previous one, it had been impossible to sound the well on account of the storm. Operating the steam pumps every two hours, we noted that they sucked a great deal of water, no doubt by reason of the straining of the vessel.

"The losses that we have suffered are the following: 126 head of cattle; the mainsail; a number of rail posts, and the ladder.

"November 1st. We commenced this day with the engine stopped and the rigging taut, with hurricane, the vessel crosswise to the wind and seas. Towards afternoon the wind slackened somewhat in force, but the high and crested seas continued the same, striking the vessel as in the previous day, and with much rolling. On the 4th hour we put up the staysail to steady the rolling of the ship. Night came on with the wind very hard from the north, accompanied by terrible seas with heavy crests, which strike against the hull, making the vessel shiver.

"At eight o'clock the wind commenced to decrease and the seas gradually to go down. * * * "

The testimony of the master and of the first officer and the boatswain accords in the main with the statements of the log in regard to the handling of the cattle and the force of the storm.

There were six cattlemen provided by the shippers for the care of the cattle. Several were inefficient. The testimony of Joyce, the foreman, and of Edwards, apparently an efficient man, is to the effect that the violence of the storm was very much exaggerated; that they had been many years making voyages in charge of cattle; that they had been through much heavier weather; and that the sacrifice of the cattle on the afternoon of Saturday and the morning of Sunday was without reason or necessity. In the great contradiction between these witnesses and the ship's witnesses as to the force and effect of the storm, I have come to the conclusion that there is little candor on either side. The fact that aside from some of the pens, and except the cattle which the men forced overboard, nothing of any account belonging to the ship herself was carried away, is conclusive to my mind that the ship was in no peril, and that there was no such actual hurricane, or any such extraordinary storm as the language of the log or the

testimony of the officers would indicate. It is manifest that Joyce and Edwards, who were persons of much experience in transporting cattle, were greatly incensed at the sacrifice of the cattle and the brutal treatment inflicted on them. They have not apparently any beneficial interest in this litigation; and if the storm was as violent as the claimants would make out, and the peril such as to demand the sacrifice of the cattle, Joyce and Edwards would not have felt the resentment they evidently display. If the peril was real, they had experience enough to know it. At the same time this resentment has probably led them to belittle the force of the storm and to give perhaps an additional color to what was done. Joyce testifies:

"Answer. They took the cattle in their charge, of course, and they started to cutting the ropes and getting them over the best way they could; we would not assist them in any way whatever; I would not allow any one to put a hand to them of my men. * * *

"64 Question. How many were put over the first day? A. That I could not tell; they had them scattered all over the ship—quite a lot.

"65 Q. Were there some put overboard from forward and some from aft? A. Both places—put them over aft first.

"66 Q. Will you state how they put them overboard? A. They shifted the rail as it is called—the gangway; then they tore up the pens facing the gangway so they would slip on the iron deck; they then would take pitchforks and everything else, and sticking them in them drive them up to this place, and when the ship lurched over like they would shove them and the cattle would slip off; if they didn't slip off, 4 or 5 sailors would put their backs to them and shove them over; once they started going they had to go.

"67 Q. Was this done on one side, or both sides? A. It could only be done on the one side—the starboard side.

"68 Q. Why could it not be done on the port side? A. Because that was the weather side.

"69 Q. Which was the weather side? A. The port side.

"70 Q. Did the vessel have a list? A. She had a list when we put about—on account of the trysails being over.

"71 Q. State whether, or not, anything was done to get the cattle overboard, except what you have stated? A. One bullock—a white bullock—in particular was very stubborn.

"72 Q. What was done with him? A. They put a rope on him and dragged him as far as the gangway, and then they used a maul on him—a big hammer.

"73 Q. What did they do with it? A. They hit him in the head and tried to kill him, they could not kill him, and they took ropes and got him over the best way they could; of course, when they started I didn't watch everything; I had no reason to watch.

"74 Q. When they put the rope on him, how did they get him to the gangway? A. With a switch and derrick; these ropes lead from the derrick to the deck; they attached that around his horns; dragged him up to the gangway and swung the gangway around; when they got to the gangway, they took the rope off. * * *

"113 Q. What was done, if anything, by the crew with the stalls to enable them to get the cattle overboard? A. They knocked them down. * * *

"118 Q. Do you know whether, or not, the crew of the steamship took up the flooring put there for the cattle? A. Yes sir; they took up everything.

"119 Q. What was the object in taking up the flooring? A. To get the cattle overboard.

"120 Q. How would that help them to get the cattle overboard? A. Because there was cleats on the floor and they could get a foothold; when they got them up, they just had the smooth deck.

"121 Q. Did you, or not, see one of the crew of the steamship go overboard? A. A boy, yes sir.

"122 Q. Were you on deck at the time? A. Yes sir; standing at the engine room.

"123 Q. What was he doing? A. He was shoving a bullock over; it was his own fault; the bullock started to go and he kept shoving, and he slid over with him.

"124 Q. Will you state whether, or not, any of the bullocks that were put overboard, were dead when they were put overboard? A. No sir; they were all as healthy as when shipped.

"125 Q. How many cattle were discharged at Liverpool? A. 38 head.

"126 Q. What became of the other one—you said that there were 39 left? A. Throwed him overboard.

"127 Q. For what reason? A. Because he was dead.

"128 Q. Had he been injured? A. He got down and got cramped up.

"129 Q. In what condition were the 28 delivered? A. Good condition; not a blemish on them.

"130 Q. Do you know anything of the entries in the log of the steamship? A. No sir; if I asked them that question, they would tell me to mind my own business.

"131 Q. Who did you ask? A. I say if I did; they never show us anything of that kind.

"132 Q. How did the weather at that time compare with other storms that you have encountered when in charge of cattle being shipped on steamers? A. I would not call it a storm; I call it kind of squally weather.

"133 Q. Have you ever passed through storms much worse than that? A. Yes sir; 20 times worse.

"134 Q. How did your cattle come through on such occasions? A. Sometimes I lost a lot; sometimes they come through all right.

"135 Q. Have you, or not, at other times passed through such weather as that without losing any cattle? (Objected to.) A. Ought not to have lost a bullock this time; ought to land all of them at Birkenhead—no need to have lost a bullock. * * * "

Edwards, who had been on cattle voyages for many years, testifies in regard to Sunday morning as follows:

"Question. Tell me what you first knew or heard of their driving the cattle overboard? Answer. Well, I see them all getting together and getting their mauls—that is, heavy hammers on board ship—and forks—they asked me for a fork, I didn't know what they wanted it for.

"Q. Did you ask what they wanted it for? A. To run the cattle over, they said.

"Q. This was in the morning? A. Yes; that was between half past six and seven o'clock that morning.

"Q. Well, go on and tell me what was said? A. They started in the after place, and as soon as they started I went in there and told the other men about it, and I stopped work right there; as soon as they finished the forward part I stopped. I did not touch none of the after part at all, because they were busy then tearing up the sheds and stalls and getting the gangway ready. As soon as they got the gangway ready they tried to shove some off, but they had to take the flooring up—the false flooring which the carpenters put in in New York. After they got that up and the sheds out of the way, every time she gave a lurch, four or five went over.

"Q. They found they could not drive them over when the flooring was down? A. No; there were cleats there on the flooring for the cattle's footing—on the false flooring; they attempted it but had to take it up, and then on the smooth deck the cattle slipped and slid.

"Q. So that they would slip on the smooth deck and they could force them overboard? A. Yes sir.

"Q. Who was it told you that they were going to drive the cattle overboard? A. The sailors.

"Q. Did you have any conversation with the captain about it? A. No sir; didn't have none whatever, only he called me up before he started and said he would have to clear that hatch there.

"Q. Which hatch was that? A. That was right after; it must have been No. 3 and No. 4 hatch.

"Q. Was that hatch covered by the stalls? A. Yes sir; it was covered with the flooring—the cattle was over it. * * *

"Q. Did you say anything to the captain or the first officer about their driving the cattle overboard? A. No sir; I did not say anything to them, but he called me up and told me he was going to get that hatch cleared off, that he was afraid the weather might get worse, and there would be danger to the ship, or something like that. * * *"

The statement of Edwards is confirmed by the master's own account of his reason for dragging the cattle overboard. The master testifies:

"Question. What did you do during the afternoon of the day to improve the situation? Answer. Before nightfall I saw that I had to go through a tremendous hurricane, according to the indications of the barometer. * * * I convinced myself that I had tremendous weather and that I was to have a hurricane that night.

"Q. And then you opened the gangway? A. Towards nightfall I opened the gangway of No. 4 hatch.

"Q. On the starboard side? A. On the starboard side, and when it was opened some of the cattle went overboard. On the same night, or rather, this same afternoon, I opened the gangways on the port and starboard side opposite the deck house because I supposed that in the horrible hurricane that we would have during the night the waves would break the cattle out of their places on the port and starboard bows and carry them down to the alleyways where there was no resource for their safety. And as I thought, opening this during the night, without my seeing them, but as I had expected, the cattle washed down; the waves broke the houses and washed them down. I do not know how many went over by those gangways during the night, neither do I know how many went over by gangway No. 4, what I saw was that in the morning when daylight appeared I saw from here to here (indicating the places where the stalls are on the starboard side)—I saw there from the bridge looking over myself that many of the cattle had their legs sticking out the sides of the vessel through the rail, some one leg, others two legs, and others with all four. This must have happened without doubt during the night. And on that night as I saw the horrible hurricane, between ten and twelve o'clock—I don't remember the exact hour—opposite each one of the four masts of the vessel I placed oil bags in the water in order to calm down the waves.

"Q. Over which side of the vessel was this done? A. On the port side, to windward.

"Q. Did you sleep that night? A. No sir.

"Q. Describe the situation of affairs the next morning? A. In the following morning, as I have said before, a great many of the cattle had their legs outside of the rail, the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down with the exception of those towards the bow, and some were dead, others broke, others with their horns broken off, some were on their backs, making a heap of cattle and boards all mixed in one. When I saw this condition of things the first officer come to the bridge where I had been all night, and I asked him his advice as to what to do in this situation. He says to me 'The weather is too strong, the sea becomes more crested, the heavens still more threatening.'

"Q. How was the barometer? A. I then went to see the barometer, and during that time it was falling very rapidly. I expected that the hurricane would come with still much greater force.

"Q. Had waves been breaking over the vessel during this time? A. The waves would break on the deck, over the bridge, over the houses that had already been broken, and there was water everywheres. And there we could see a calamity. The opinion of the first officer and my own opinion, after having looked at the weather and the barometer, was to determine to open gangway No. 3.

"Q. About what time in the morning of November 1st, was this? A. About 6 or 7 o'clock—just about daylight.
"Q. And you then opened gangway No. 3? A. Gangway No. 3 was opened.
"Q. Had you been able to have breakfast that morning? A. No sir.
"Q. What was done after opening gangway No. 3? A. We breathed happy when we saw it open. * * *"

Notwithstanding this description of the situation during Saturday, it is clear from the master's statement, and especially that of the first officer, confirming the statements of the cattlemen, that before the night of the 31st there had been but little damage to the cattle. The first officer says, in answer to the question,

"What damage if any, had been done to the cattle? A. At that time, the 31st, in the afternoon they were not in a very bad state; some of them had already lain down."

The master and the first officer intimate that none but dead animals, or those with broken limbs, were cast overboard. The log imports no such restriction; while the testimony of the boatswain and the carpenter shows the contrary. It is plain that the account given by the master and first officer cannot be accepted without considerable abatement and modification. They intimate that the cattlemen were not on deck during the storm; but the details testified to by the cattlemen prove the contrary. The boatswain says:

"On the 21st many dead we directed to have thrown overboard, and some of the live ones followed the dead of their own accord. * * * Owing to the movement of the vessel, they could not retain their footing, and when they fell, the seas would carry them out of the gangways. * * * They were more or less injured, because with the breakage of the houses they were struck by the pieces of the lumber, and many were going around fastened together with those boards."

On Sunday morning he says that most of them were dead, and a great many were with broken legs, and some were alive from hatch No. 2 forward; that

"They fixed some ropes so as to hoist and pull over those that were dead and with legs broken, so as to pull them opposite to the gangway (No. 3.) They were washed overboard, and among the dead there were also some that were alive that would jump overboard. * * *"

He does not say that they could not retain their footing and jumped overboard, because the flooring and cleats which supported them had been torn up by the crew; Joyce and Edwards explain this.

The carpenter testifies:

"Question. How was it with the cattle and the pens aft on the morning of November 1st? Answer. The houses aft were also all broken on the morning of the 1st.
"Q. How about the cattle? A. Some of them were going around loose, others were fastened together with pieces of the boards, and generally knocked about the deck."

The carpenter also testifies that the stalls which had been broken at No. 4 hatch were repaired about 5 P. M. of Saturday the 31st; and the cattle put back in their places; and that the stalls remained in good order until they were again broken some time after.

"Question. When did they break again? Answer. Those and a great many others were broken again during the night."

The first officer, in answer to the question whether the cattle were lost by being thrown overboard could have been saved, even if the sea had moderated, says:

"Answer. I don't know; they might have lived or they might not have lived. One of them that remained injured and wounded on board, died in two or three days, and the same might have happened with the others.

"Question. What is your judgment about it? Answer. My opinion is that after having suffered so much, I do not think they could have lived."

The evidence shows that within a few hours after the cattle were driven overboard on Sunday morning, the wind abated, and afterwards, the seas.

The log does not say that the seas carried away the false flooring, and the cleats thereon, by which the cattle were supported. I do not credit the officers' testimony in that regard; both because Joyce and Edwards testify that it was purposely torn up, and because the moving about of the unhurt oxen on Sunday morning, even those hampered by being fastened together, shows that the cleats still remained.

During a considerable portion of the storm the steamer was hove to, i. e., as applied to a steamer, taking the heaviest seas upon her quarter—in this case upon her port quarter.

In the translation of the log and of the first officer's testimony, this situation is described as "lying crosswise to the wind and sea." The words in Spanish are "Atravesados al viento y mares." Considerable controversy has arisen as to the meaning of this phrase. There is high authority that the phrase has been used at times as a nautical phrase meaning "lying to;" that is, with the wind and sea not abeam, but at a less angle. In ordinary use the word "atravesados" would mean at right angles, or abeam. On the whole testimony I am persuaded that in this case the expression was in fact used in that sense, which is the only sense which an experienced naval officer testifies it could have in the connection in which it appears. This conclusion is confirmed by the fact that the boy who was swept off the gangway with the cattle, and who remained for some 15 minutes in the water, was pulled up the same gangway, showing that the vessel did not move much either forward or aft, as she must have done had she not at that time had the wind very nearly abeam. This agrees also with the ship's heading E. S. E., as given by the master, while the wind was from N. to N. N. E. at that time. The seas accompanying that wind would come athwartships or crosswise as stated in the log; while the seas coming from the former wind—from the northwest—would be six points aft.

Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navigation, he is entitled to the benefit of his record. He had some, though not large,

experience in the transportation of cattle; and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship, and the necessary determination of the master's own judgment at the time, that in the circumstances testified to, I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt, was made on the morning of Sunday, the 1st of November; not from any pressing necessity, but solely from mere apprehension; and I am further persuaded that there was no reasonable or apparent necessity for this sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the unsound. Even the master says in answer to the question—"Were these cattle standing up that went overboard? Answer. They were down. Some may have been up. I don't know."

His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate, or to save any. His state of mind is shown by his concluding words "We breathed happy when we saw it open." (No. 3 hatch.)

If the readiness of the master to make this indiscriminate sacrifice was hastened by the provisions of the bill of lading, which provided that the cattle "were to be at owners' risk; steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising * * * or negligence of the master or other servants of the shipowner,"—this sacrifice and the consequent pecuniary loss, furnish but another illustration of the impolicy of all such stipulations. They are invalid by the law of this country; and the further stipulation which would substitute in such matters the British law for our own, is but another form of the previous stipulation against liability for negligence, and equally invalid. The Brantford City, 29 Fed. Rep. 373, 396; The Iowa, 50 Fed. Rep. 561; Liverpool & G. W. Steam. Co. v. Phenix Ins. Co., 129 U. S. 397, 461, 9 Sup. Ct. Rep. 469.

The libelants are entitled to a decree for damages for such of the oxen voluntarily sacrificed as were either in a sound condition, or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening and night previous; this must be determined, if not agreed upon, on a reference; with costs.

THE CENTURION.

BREGARO v. THE CENTURION et al.

AMERICAN SUGAR REFINING CO. v. SAME.

(District Court, S. D. New York. June 27, 1893.)

SHIPPING — DAMAGE TO CARGO — CHARTERED VESSEL—NEGLIGENT STOWAGE—CARGO STOWED BY CHARTERER—LIABILITY.

A steamship which had sugar stowed in the hold, with hogsheads of molasses in the between decks above it, delivered her cargo damaged, certain of the hogsheads having been broken during the voyage, and the molasses having drained down and damaged the sugar. The cargo was stowed in that manner by the charterer, contrary to the advice of the officers of the ship. On the evidence the court found that the stowage was not reasonably sufficient to meet ordinarily rough weather. After the molasses had flooded the hold, the sluiceway became so choked that the molasses could not be pumped up. The charterer claimed that the ship was liable, because the choking of the sluiceways was due to certain sweepings of soda, etc., left over from the ship's previous voyage, and not sufficiently cleaned out when the ship was delivered to the charterer at New York; and that such sweepings, combining with the molasses, produced a hard cement, which choked up the passages. The vessel, when tendered to the charterer, was in generally fair condition, and was inspected by charterer, and thereupon accepted without objection. The bill of lading was signed by the agent of the charterer, and the charter contained the provision that "no claim is to be made against owners for loss of cargo." *Held*, that the charterer was primarily liable for the bad stowage, and the fact that, after inspection, no objection had been made as to the condition of the ship on accepting her under the charter, prevented charterer from holding the ship liable for the choking of her sluiceways and inability to use her pumps. But, *held*, that the ship is generally liable for bad stowage, whether done by owner or charterer. Hence, the fact that charterer's agent signed the bills of lading was immaterial, and, the clause in the charter exempting the ship from liability for loss of cargo not covering a loss by negligence, *held*, that the cargo owner was entitled to a decree for his damage against both ship and charterer, the damage to be collected in the first instance from the charterer, who was bound to indemnify the ship, and any deficit to be paid by the ship.

In Admiralty. Libels by Jose Bregaro and by the American Sugar Refining Company against the Steamship Centurion and the New York & Porto Rico Steamship Company to recover for damage to cargo. Decrees for libelants.

McFarland & Parkin, for libelants.
Convers & Kirlin, for claimants.
George A. Black, for charterers.

BROWN, District Judge. The first of the above libels was filed to recover for the loss, through alleged bad stowage, of a portion of 250 casks of molasses, stowed in the between decks of the steamship Centurion on her voyage from Ponce, Porto Rico, to New York in February, 1893.

The second libel was to recover for damages caused to some sugar stowed in the hold beneath the molasses, and damaged by the leaking of molasses through the between decks above. The shipowners denied negligence, and alleged rough weather and peril of the seas

as the cause of the loss. After the arrest of the Centurion, the New York & Porto Rico Steamship Company was brought in as defendant in the second libel upon the petition of the owners of the Centurion, upon the analogy of the fifty-ninth rule, showing that the steamship was at the time under a charter to the last-named company, under whose servants and agents exclusively her cargo was stowed, and alleging that there was no fault or negligence in the owners, but, if any, in the charterers only, and that the latter were personally bound to pay any damages arising therefrom and to indemnify the shipowners against it. Various exceptions in the bill of lading were also set up. The charterers in answer to the petition alleged that the damage arose through the defective condition of the ship's decks, bilges, scuppers, sluiceways, and bulkhead, and a neglect of the pumps. The evidence shows that the vessel was let to the charterers for a term of six months, at the rate of £740 per month; that the owners should provide and pay for provisions and wages of the captain, officers and crew, for insurance of the vessel, and some other charges; for coal, etc.; and that the captain was to be "under the orders and direction of the charterers," who were "to indemnify the owners from all consequences or liabilities that may arise from the captain in signing bills of lading;" that the charterers should "not be responsible for losses incurred by reason of default, etc., of the pilot, master or crew in the navigation of the ship, including damages by collision; but no claim to be made against owners for loss of cargo;" "all derelicts, salvage and towage to be for owners' and charterers' equal benefit;" "if the charterers should be dissatisfied with the conduct of the captain, officers or engineers, the owners on receiving the particulars of the complaint were to investigate and if necessary make a change in the appointment."

The bills of lading were not signed by the master, but by the agent of the charterers. The stowage of the cargo was attended to by a supercargo appointed by the charterers, in accordance with the terms of the charter; and the supercargo insisted upon stowing the molasses in the between decks, contrary to the advice of the officers. Soon after starting, in moderate weather, some of the hogsheads were found to be rolling, and some additional checks were applied. On the third day out, in a moderate gale, but in a cross sea, the ship took a heavy lurch to starboard, by which the hogsheads in No. 2 'tween decks hold were so shifted and lodged in the starboard wing, that the vessel did not right, but kept a list of about three feet to starboard through the rest of the voyage. On arrival at New York after a voyage of nearly eight days, 88 casks of molasses out of the 250 were found broken and empty; and in others there was a partial loss from being adrift and more or less turned over, causing leakage through the open vent holes. The molasses ran down the pipes into the No. 2 hold beneath, along the sides of the ship, so as not to injure the upper tiers of sugar; but the lower tiers were damaged and partly dissolved through the swashing of the molasses from side to side at the bottom, where it accumulated to a depth of from one to two feet.

It is clear that the loss of the molasses in the No. 2 'tween decks, as well as the damage to the sugar in the hold beneath, arose primarily from the extraordinary drainage; and that this was caused by the shifting of the molasses casks in No. 2 'tween decks, upon the lurch of the ship, by which many of the casks then and subsequently were broken to pieces. A secondary cause of the loss of the sugar was, that the sluiceways in the hold beneath became choked.

The question whether the shifting of the cargo is fairly to be ascribed to sea perils, or to the defective stowage of the molasses, has been most assiduously treated by counsel. Upon a careful study of the testimony I am constrained to find that it arose from the place and mode of stowage, and that the stowage was not reasonably sufficient to meet ordinary rough weather such as was to be reasonably anticipated and provided for. The respondents' witness Butler, a stevedore, testified: "We are supposed to have everything well stowed and secure against ordinary rough weather —no hurricanes though." On the occasion when the molasses shifted, the weather did not approach a hurricane. It was rough; but no more than a gale, such as is often encountered, with cross seas. The weather was not extraordinary; and before any rough weather was encountered, the movement of the casks in No. 2 'tween decks was observed, which the supercargo sought to check.

It is suggested that the shifting of the cargo may not have been caused by any lack of proper dunnage or coigns, but from the width of No. 2 hold, which was without supports where the hogsheads lay in tiers of 10 casks; and that as the ship rolled, the weight of the 9 hogsheads upon the one next to the wing was enough to break those hogsheads from the mere weight of the tiers. This hypothesis is to some extent sustained by the fact that in No. 3 'tween decks, where there was support from stanchions, there was no shifting or breakage. I do not see, however, that this hypothesis, even if correct, relieves the respondents. For it was their duty to stow properly and securely in the place selected for stowing the molasses; and if supporting stanchions to divide the weight of the casks were needed for security in ordinary rough weather, then they were bound to provide proper stanchions. The officers objected to stowing the molasses in the 'tween decks of this ship, where the width was greater than in the hold, the support less, and any rolling more heavily felt. Though molasses, as appears from the evidence, is sometimes carried in the 'tween decks, it does not appear what additional precautions in such cases are taken to prevent shifting or breakage. If the supercargo had a right to stow in the 'tween decks where the liability to shifting and breakage was greater, he was bound to provide the additional precautions to make that place secure against ordinary rough weather. The fact, however, that some rolling of the hogsheads was perceived and complained of soon after the voyage began, and before any rough weather was experienced, shows that the stowage was defective from the first, and discredits the hypothesis that the mere weight of the casks, in the rolling of the ship, was the cause of the derangement and shifting of cargo. The Bur-

gundia, 29 Fed. Rep. 607; The Barracouta, 40 Fed. Rep. 498; The Timor, 46 Fed. Rep. 859; The Glamorganshire, 50 Fed. Rep. 840; The Mascotte, 51 Fed. Rep. 605, 2 C. C. A. 399; The Maggie M., 30 Fed. Rep. 692; The Edwin L. Morrison, 27 Fed. Rep. 136, 141.

For the bad stowage, which was the cause of the loss, the charterers, and not the ship, as between themselves, are primarily responsible. The supercargo was the special representative of the charterers, and the cargo was stowed by his orders, and under his direction. The loss of sugar was the immediate result of the great accumulation of molasses which ran into the hold below. If this result might have been avoided by ordinary skill and diligence on the part of the ship's officers and crew, by keeping the bottom clear of molasses by pumping, no doubt the ship would have been primarily chargeable for so much of the loss as arose through lack of pumping. The Sloga, 10 Ben. 315, 320. But the evidence leaves no doubt that the sluiceways became so choked that nothing could be drawn up by the pumps after the inundation of the hold.

The charterers claim that the sluiceways and limbers became choked because certain sweepings of soda and bleaching powder were left in the ship from the previous voyage, and not cleaned out as they should have been, when she was delivered to the charterers in New York; that those sweepings, combining with the molasses, produced quickly a hard cement, which choked up the passages; and that the owners had agreed to deliver the ship to the charterers in good condition and properly cleaned. The evidence shows that the vessel had been cleaned out and was in a generally fair condition before delivery to the charterers; but that some portions of the soda ash, etc., were not removed. The vessel when tendered was, however, inspected by the charterers, and thereupon accepted without objection. The formation of a cement, in combination with leaking molasses, in a second loading afterwards, is so remote and indirect a consequence as not to involve the ship in responsibility for a loss arising from such a cement, if that was the cause of choking. If the ship was not properly cleaned when tendered in New York, it was for the charterers to object at that time; or to complete the cleaning themselves, and charge the expense to the ship. The latter would be the legal measure of damage from that neglect, if any. Stewart v. Railroad Co., 4 Biss. 362, 363.

I do not find upon the testimony any evidence of negligence in the management of the ship for which her owners are responsible, that contributed to this loss. The charterers by the terms of the charter became the owners pro hac vice as respects all matters pertaining to the handling and delivery of cargo; but not as regards the navigation of the ship, for which, under the express terms of the charter, the owners remained the responsible principals. As this loss arose from the improper stowage of the molasses and the extraordinary drainage consequent thereon, and not from any fault in the management of the ship, the charterers are

primarily answerable for the loss both of the molasses and of the sugar.

The bill of lading in this case was not signed by the master, but by the agents of the charterers. It is on that ground contended in behalf of the ship, that she is not chargeable, even secondarily, for this loss; that the shipper and the libelants were put upon inquiry, and were, therefore, chargeable with notice of the charter and of its special provision, that "no claim was to be made against owners for loss of cargo;" and the analogy of various decisions as regards supplies of coal to chartered vessels is cited in support of this view.

I cannot sustain this contention. In the first place, the provision that "no claim is to be made against owners for loss of cargo," is shown by its context to be nothing more than a stipulation between the owners and the charterers, adjusting their liabilities upon the voyage as between themselves; it has no relation to claims of the shippers of cargo against the ship for any negligent performance of the duties which the law imposes on the ship as a common carrier. The analogy to cases of supplies, moreover, wholly fails in this important particular: that here the ship was let to the charterers for the very purpose of carrying cargo, and for aught that appears, with the usual mutual lien, which the law gives as between ship and cargo. The charter makes the charterers the owners pro hac vice as respects the transportation of cargo, and by necessary implication authorizes freights upon those usual terms. The charter even expressly provides that the owners shall have "a lien upon all subfreights." In the cases of supplies of coal by charterers, on the other hand, there is no such authority from the owners, express or implied, to purchase coal on the ship's account, but the contrary. The charter contains nothing that even by implication excludes the ordinary security of a lien in favor of the cargo against the ship for the performance of the ship's duties in the business for which she was chartered. The ship is, therefore, liable for bad stowage; because the duty to stow properly is one of the duties of carriage which the owner has expressly authorized. The Freeman v. Buckingham, 18 How. 182; Niagara v. Cordes, 21 How. 7. The ship is liable for damage from bad stowage whether the stowage is done by the owners' agent or the charterers'; and equally so whether there is any bill of lading or not. It was therefore immaterial whether the bill of lading was signed by the master, or by the charterers. The Euripides, 52 Fed. Rep. 161, 163, and cases there cited; The Keystone, 31 Fed. Rep. 412, 416, affirmed on appeal.

The result is that the libelants are entitled to a decree against both the ship and the charterers for the damages sustained; but, as the shipowners are entitled to be indemnified by the charterers, the decree will provide that the damage be collected in the first instance from the charterers, and that any amount not collectible from them shall be paid by the ship; and that the shipowners recover against the charterers such sum as they may be called upon to pay, with costs.

GANN et al. v. NORTHEASTERN R. CO. et al.

(Circuit Court, N. D. Georgia. October 5, 1891.)

REMOVAL OF CAUSES—LOCAL PREJUDICE—CITIZENSHIP.

Under the corrected judiciary act of March 3, 1887, (24 Stat. 552,) a suit cannot be removed from a state to a federal court on the ground of local prejudice, when plaintiffs are not all citizens of the state in which the suit is brought, and are yet jointly interested in the cause of action against the nonresident defendant who applies for removal. Young v. Parker, 10 Sup. Ct. Rep. 75, 132 U. S. 267, followed.

In Equity. On motion to remand to the state court. Granted.

Lumpkin & Burnett, T. W. Rucker, and J. H. Lumpkin, for complainants.

Barrow & Thomas, for defendants.

Before LAMAR, Circuit Justice, and NEWMAN, District Judge.

LAMAR, Circuit Justice. This is a motion made on behalf of the plaintiffs in the above-entitled case, to remand this cause to the superior court of Clarke county, Ga., in which it was originally brought, on the ground that this court has no jurisdiction to hear and determine the issues involved in it. The case is this:

The complainants, who are quite numerous, were stockholders in the Northeastern Railroad Company, a Georgia corporation, and, with but four exceptions, were citizens of Georgia. One of these exceptions was a citizen of New Jersey; another, a citizen of Alabama; a third, a citizen of Virginia; and the fourth, who is now deceased, was a citizen of Maryland. The suit was brought against the said Northeastern Railroad Company, the Richmond & Danville Railroad Company, and the Richmond & West Point Terminal Company, all Virginia corporations, and the Central Trust Company of New York. The bill filed in the state court, among other things, contained, substantially, the following material allegations: In 1870 the Northeastern Railroad Company was chartered by the legislature of Georgia for the purpose of building a railroad from Athens to or near Clayton, in the northeastern corner of the state, so as to connect with other lines, making, with its connections, a through line to the west, and a competing line to the north and east; and its stock was subscribed upon the understanding and with the purpose that the road should be built in accordance with the plan expressed in its charter, the city of Athens being a large subscriber of the stock. At that time there was a railroad, which had been in operation for a number of years, running from Atlanta northeast to Charlotte, known as the "Air-Line Road." The Northeastern Company built its line, under its charter, to where it intersected the Air-Line road, at Lula, and graded a considerable portion of its right of way beyond that point; the company all that time, and up to 1881, being in a prosperous and solvent condition.

About the year 1881 the Richmond & Danville Company obtained control of the Air-Line road, which, with its other connections, gave that company a through line of road from Atlanta to the north

and east, and, by branches in the Carolinas, a through line to the west, through Tennessee. The completion of the Northeastern road, in accordance with the provisions of its charter, would have made that road a competing through line to the north and east with the Richmond & Danville road. Accordingly, as soon as it acquired possession and control of the Air-Line road, the Richmond & Danville Company and its confederates began a systematic scheme and effort to destroy this proposed competing line, and to render the Northeastern road a mere feeder of its main lines of road. For this purpose the Richmond & Danville Company procured a controlling influence in the Northeastern Company by purchasing a majority of the stock of the latter company, at the same time representing to the parties from whom it purchased said stock, and to orators, that it would complete the Northeastern road according to its charter purposes. This transfer of stock was effected through the Terminal Company, which was a nominal party, only, in the transaction, and was and is, in interest, practically the same as the Richmond & Danville Company; the latter company being incapacitated, under the laws of Georgia, to make such a contract. Having thus obtained control of the Northeastern road, the Richmond & Danville Company installed its own agents as officers of that road, and made rates to suit its own will in the premises, thus making the Northeastern road a party to its unlawful schemes, although a large number of its stockholders and some of its directors were opposed to such action. In November, 1881, while the Northeastern road was thus controlled, it bonded itself to the amount of $1,140,000, and to secure the same gave a deed of trust in favor of the Central Trust Company of New York, covering all the property of the road, both present and prospective. These bonds were for the pretended purpose of completing the road to Clayton, and, while their issue was under consideration, such was said by the officers of the company to be their purpose, but they were never applied to any such purpose. The Terminal Company took possession of $315,000 worth of said bonds, to which it was never entitled, as they were taken and issued fraudulently, and their proceeds were never applied to the purpose for which they had been ostensibly issued. There were other averments in the bill respecting the bad faith and alleged fraudulent practices of the defendant companies, which need not be set forth in detail, in connection with this motion, such as the piling up of a large indebtedness against the Northeastern Railroad; the breaking of its line of road into two parts; the transfer of a part of it without consideration; the leasing of another portion of it to the Richmond & Danville Company, by which the latter company was enabled to and did make rates of freight to suit its own pleasure, —all of which were alleged to be violative of the rights of the complainants in the premises, and illegal under the charter of the Northeastern road; and there was a prayer for specific and general relief, in accordance with the nature of the claims against the respective defendants.

After certain other steps in the progress of the case had been gone through with, none of which are material to this consideration, the Terminal Company made an application to remove the cause to this court, under the prejudice and local influence clause of the act of March 3, 1887, (24 Stat. 552,) as corrected by the act of August 13, 1888, (25 Stat. 433,) accompanying the application with a proper bond, and an affidavit of the vice president of the company, saying that, from prejudice and local influence, it would not be able to obtain justice in any of the courts of the state in which the suit could be tried.

Upon the filing of these papers the district judge, acting in the circuit court, entered an order that the suit be removed, as prayed for, and the removal was accordingly effected. Shortly afterwards this motion to remand was made. This motion, though subdivided into seven different parts, may properly be discussed under two heads, or more properly, perhaps, may be said to rest on but two general grounds: First, the showing made to the district judge under the prejudice and local influence clause of the statute was insufficient to warrant the removal to this court; and, second, even admitting that such showing was sufficient, the citizenship of the parties was such that a removal was not authorized.

Waiving for the present, at least, a discussion of the first ground of the motion, as above arranged, attention will be directed to the second ground of the motion to remand, because if this ground be tenable the motion must be sustained, irrespective of the showing made to the district judge by the affidavit aforesaid. Adverting to the citizenship of the various parties connected with this controversy, as stated in the beginning of this opinion, it is observed that the plaintiffs, with three exceptions necessary to mention, are citizens of Georgia, and, of those exceptions, one is a citizen of New Jersey, another of Alabama, and the third of Virginia, while the respondents are citizens, one of Georgia, two of Virginia, and the fourth of New York. The controversy, while perhaps separable so far as the plaintiffs are concerned, inasmuch as each one is a stockholder in the Georgia corporation, and would probably have the right to bring a separate suit to enforce and protect his rights as such stockholder, yet the nature of the case is such that the suit cannot be split up, as respects the respondents, because the charge against all of them, except the trust company, is that of colluding and conspiring to wreck the Georgia corporation, and depreciate its stock held by the plaintiffs, and also to divert the proceedings relative to the construction and operation of the road of that corporation from the purposes indicated in its charter. This is the gravamen of the bill. It is therefore impossible that the suit could proceed against any one of these defendants without necessarily bringing in the others,—not for convenience, merely, but in order that a full, fair, and judicial investigation may be had of the charges of fraud and collusion on the part of the three defendants, which are set out with much detail in the bill. This

being true, was the suit legally removable under the section of the act of March 3, 1887, (24 Stat. 552,) as amended and corrected by the act of August 13, 1888, (25 Stat. 433,) because of the diverse citizenship of the parties? We have more than once, in this court, following the construction generally given by the circuit courts of the United States, decided that any one defendant, being a citizen of another state than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same state as the plaintiff, may remove the suit to the circuit court upon making it appear to the court that, upon the ground of local prejudice and influence, he cannot obtain justice in the state court. In the decisions referred to, we held that this court would in these particular cases take cognizance of a suit by removal, of which it could not have taken original jurisdiction. We do not perceive any feature in this case which calls for a reconsideration of the correctness of those decisions. The question which it presents is essentially different. That question is whether a suit pending in a state court may be removed by defendant to the federal court, because of prejudice and local influence, when the plaintiffs are not all citizens of the state in which suit is brought, and are yet jointly concerned, according to the allegations of the bill, in the cause of action against the nonresident defendant who applies for the removal. In order to answer this question, it becomes necessary to examine the act of March 3, 1887, (24 Stat. 552,) as amended and corrected by the act of August 13, 1888, (25 Stat. 433,) in the light of the construction placed by the supreme court on the language now under consideration. That act, after providing, substantially, that the circuit court shall have original cognizance of actions between citizens of different states; that no suit shall be brought by original process in any district other than that whereof the defendant is an inhabitant, but, where jurisdiction is founded merely on diverse citizenship, suit may be brought in the district of the residence of either party,—provides for bringing a party into the circuit court by removal, as follows:

"When a suit is now pending or may be hereafter brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state may remove such suit into the circuit court of the United States."

Although the statutes modifying the jurisdiction of the circuit court with regard to the amount in controversy, and in some other respects, have been numerous, the language characterizing the nature of removable suits has been retained, in its essential terms, in all of them, including the act of 1887, as amended by the act of 1888, which we are now considering. In the case of Coal Co. v. Blatchford, 11 Wall. 172, Mr. Justice Field, speaking of similar language in the judiciary act of 1789, vesting in the circuit courts original jurisdiction of suits of a civil nature, thus refers to the third class of cases, to wit, when the suit is between a citizen of the state where the suit is brought and a citizen of another state:

"In the last two classes the designation of the party plaintiff or defendant is in the singular number, but the designation is intended to embrace all the persons who are on one side, however numerous; so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued, in the federal courts."

In the case of Young v. Parker, 132 U. S. 267, 10 Sup. Ct. Rep. 75, the court construing the language in Rev. St. § 639, in respect to a removal of a suit between a citizen of a state in which it is brought and a citizen of another state, on the ground of local prejudice, which was the same as that in the act of 1887, the court decided that:

"It is essential, in order to such removal, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the state where the suit is brought, and all on the other side must be citizens of another state or states."

We think this decision conclusive upon the question before us. This case is not a controversy in which all the necessary parties on one side (complainants) are citizens of the state in which the suit is brought, and a citizen of another state; and as it does not appear from the record in this case that diverse citizenship existed between all the complainants and all the defendants at the commencement of the suit, and also at the time the petition was filed for removal, the cause should be remanded to the state court.

While preparing this opinion, our attention is called to a recent decision by Mr. Chief Justice Fuller, in the United States circuit court of Virginia, on a motion to remand in a case somewhat similar to this, (Wilder v. Iron Co., 46 Fed. Rep. 676.) In that case a bill was filed in a Virginia state court, by certain stockholders and creditors, against a New Jersey corporation and certain Virginia corporations, and also certain individuals, as codefendants. The stockholders, holding different kinds of stock in the New Jersey corporation, and certain creditors of that corporation, brought the bill jointly in behalf of themselves and all of the stockholders and creditors who might join with them, except some stockholders who were named as defendants. Some of the complainants were citizens of Virginia, and some were citizens of other states. Application for removal was made by the nonresident defendant corporation on the ground of local prejudice, etc. A motion to remand was filed by plaintiff. The court held that as the suit was brought jointly, and properly so, and as the complainants were not all citizens of the state in which the suit was brought, the case must be remanded. The learned chief justice said:

"But the difficulty of this order of removal is that there is not a controversy, within the intent and meaning of the act, between citizens of the state in which the suit is brought and a citizen of another state. Any defendant, being such citizen of another state, may remove; but it is essential that a controversy should exist between such citizen of another state and citizens of the state in which suit is brought."

Quoting the language of the act of 1887, which we have given above, he says:

"The language of the act of 1867, in describing the suit, is the same; and, as to the act of 1867, it has been uniformly held that all the persons on one side must be citizens of the state in which the suit is brought, and all those on the other citizens of some other state;" citing Young v. Parker, supra. "Granted that the area of removability was enlarged by the act of 1887, inasmuch as any of the defendants may remove, still the rule under the act of 1867 applies,—that, when the citizenship on the plaintiffs' side of the suit is such as to prevent the removal under that act, it is equally effective to defeat the right under the act of 1887. The suit was brought in Virginia, and complainants are only in part citizens of that state. The petition admits this. * * * Upon the face of the bill, there is no controversy other than as stated, and this is fatal to the application."

We do not think that, in the light of the construction of this language of section 639, Rev. St., by the supreme court, in the case of Young v. Parker, supra, applied by Mr. Chief Justice Fuller, in the case just cited, to the same language in the act of 1887, we are at liberty to give that language a different construction. There are perhaps some other decisions in the United States courts not in harmony with the foregoing views, but they do not meet our concurrence.

This disposition of the case renders it unnecessary to discuss the other ground of the motion. The requisite citizenship of the parties, to give the right of removal, does not appear, and therefore the motion to remand must be and is sustained. It is so ordered.

NEWMAN, District Judge, (concurring.) In concurring in the conclusion of Justice Lamar that this case must be remanded I desire simply to say that in the case of Haire v. Railroad Co., 57 Fed. Rep. 321, I held, with concurrence of Circuit Judge Pardee, in a case of removal on the ground of prejudice and local influence, where there were three defendants, that the fact that two of the defendants were citizens and residents of this state and district would not prevent removal of the case to the circuit court of the United States by the nonresident defendant. The decision in that case was based especially and particularly on the words "any defendant" in the fourth clause of section 2 of the act of 1887. I do not understand the question there decided to be involved here. I concur in the decision in this case.

TEXAS & P. RY. CO. v. GENTRY et al.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 124.

1. FEDERAL COURTS — CIRCUIT COURT OF APPEALS — AFFIRMANCE BY DIVIDED COURT.
   Where one judge of the circuit court of appeals is disqualified, and the other two are divided in opinion, the decision below must be affirmed.
2. SAME — PRACTICE — REARGUMENT.
   In such case, where the cause is one in which the judgment of the circuit court of appeals is not "final," it is not necessary for that court to order a reargument before a full bench, nor proper to certify questions to the supreme court for instructions.

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

At Law. Action by May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry against the Texas & Pacific Railway Company, a corporation created by act of congress, for negligence causing the death of Louis D. Gentry. Verdict and judgment for plaintiffs. Defendant brings error. Affirmed.

T. J. Freeman, (W. M. Alexander, Wm. H. Clark, and W. L. Hall, on the brief,) for plaintiff in error.

Chas. J. Evans, for defendants in error.

Before PARDEE, Circuit Judge, and LOCKE, District Judge. McCORMICK, Circuit Judge, recused.

PER CURIAM. The judges being divided in opinion, the judgment of the circuit court is necessarily affirmed. The case being one in which the judgment of the circuit court of appeals is not final, it is not deemed necessary to order a reargument before a full bench, nor proper to certify questions to the supreme court for instruction. Judgment affirmed, with costs.

AIKEN et al. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

No. 139.

1. COSTS—SET-OFF—ADMIRALTY APPEALS.
An appellate court, in an admiralty case, reversed a decree in favor of the libelant, and directed a decree in his favor for a smaller sum, with the costs of the district court, but condemned him to pay the costs of the appellate court. *Held*, that costs in the appellate court could not be set off against the unpaid costs of the district court, so as to prevent the officers of the latter from collecting the sums due them from the claimant.

2. SAME—OWNERSHIP OF COSTS—COURT OFFICERS.
Under Rev. St. § 823, taxable costs earned by clerks, marshals, commissioners, and proctors are their individual property, and not that of the parties to the cause in which they have been earned.

3. SAME—EFFECT OF STATE STATUTES.
The fact that Rev. St. § 857, provides that the fees of court officers shall be recovered in like manner as the fees of officers in the state courts, will not make applicable to the federal courts sitting in New Orleans a special state statute applying only to the parish of Orleans, and which establishes a practice different from the general law of the state.

Appeal from the District Court of the United States for the Eastern District of Louisiana. Affirmed.

John D. Grace, for appellants.

Richard De Gray, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The appellee, Charles Smith, libeled the steamboat Whisper on account of injuries sustained and for wages. The appellants, Aiken and others, as claimants and owners of the steamboat Whisper, bonded the steamboat, and contested the libel. On the hearing the district court rendered judgment against the steamboat Whisper, and over against the claimants and their sureties on the release bond, in the sum $506.75. The appellants appealed the case to this court, where, on hearing, the following decree was entered:

"On consideration whereof it is now here ordered, adjudged, and decreed that the decree of the said district court in this cause be, and the same is hereby, reversed, and this cause remanded to said district court, with instructions to render a decree in favor of the appellee and libelant, Charles Smith, for the sum of six and seventy-five one hundredths dollars ($6.75) and the costs in that court. It is further adjudged and decreed that the appellee, Charles Smith, be condemned to pay the costs of this cause in this court and the costs of appeal for which execution may be issued out of said district court." See 54 Fed. Rep. 896.

The proper mandate was awarded in this court, and the same filed and entered in the district court on the 24th day of February, 1893. On February 28th, the proctor for the appellants, suggesting to the district court that the said appellants referred to in said mandate are justly and legally entitled to retain for their own use and benefit, and in part payment of the costs incurred by them on appeal, the costs due by them under the terms of said mandate, and that compensation takes place to said extent, and that for the balance remaining due and unpaid as per statement the said appellants are entitled to issue execution against libelant, and that the mandate should be so interpreted and construed, obtained a rule against the libelant to show cause why a decree should not be entered conformable to said suggestion. The district judge rendered judgment on said rule March 24, 1893, as follows:

"The appellate court decreed that the libelant should recover $6.75 damages and the costs in this court, and that in that court the appellant should recover costs. The question submitted is whether the costs in one court can be set off against the damage and costs in the other court. So far as the damages are concerned, it is ordered that the costs in the appellate court may be offset against the damages; but, the court being of opinion that, so far as the marshal's, clerks', commissioners', and attorneys' fees (taxable costs) are concerned, those officers, by virtue of having earned the costs for which the libelant has recovered judgment, respectively have liens upon said judgment for the amounts of their respective judgments for the amount of their unpaid fees, it is ordered that to the extent to which such fees have been paid the said officers the set-off be allowed, and to the extent to which such fees have not been paid the said officers the said set-off be refused. No objection being made to the power of a court of admiralty to entertain a rule or motion for a set-off of judgment, and that power being conceded, the court does not pass upon that question. Judgment rendered March 24, 1893. Judgment signed March 29, 1893."

Thereafter, on the 31st day of March, 1893, the district court entered a formal decree on the mandate of this court in terms in strict accordance therewith. From this decree, and the preliminary one of March 24th, the present appeal is taken, the appellants making nine specific assignments of error, but all raising practically

the same question, to wit, whether compensation should be allowed between the costs recovered in favor of the libelant in the district court and the costs recovered in favor of the claimants under the decree of this court to such an extent that the officers of the district court are precluded from collecting their fees earned in the prosecution of the libel, except as they can be collected from the libelant.

Section 823 of the Revised Statutes provides as follows:

"The following and no other compensation shall be taxed and allowed: To attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several states and territories, except in all cases otherwise expressly provided by law."

Under this statute the fees of the clerks, marshals, commissioners, and proctors are their individual property, and not that of the suitors or parties to the cause wherein they have been earned. U. S. v. Cigars, 2 Fed. Rep. 495; The Baltimore, 8 Wall. 392. The law was the same prior to the passage of the fee bill of 1853, now section 823 et seq., Rev. St.,) and was so held in Collins v. Hathaway, Olcott, 177. The appellants contend that the fees allowed officers are only taxable and enforceable against the party requiring their services, and, if they fail to require prepayment or security in advance, they cannot look to the party cast, nor claim any benefit under the judgment or decree rendered in the case; particularly if the opposing parties have conflicting demands which ordinarily would compensate each other; and they rely on section 857, Rev. St., which provides as follows:

"The fees and compensation of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered."

And they cite Act No. 136 of 1880, Laws of Louisiana, which is a special law, relating only to some of the courts in the parish of Orleans. Without admitting any force to the contention, we notice that the law of Louisiana with regard to recovering costs is that they are to be paid by the party cast, and the general remedy is by execution. Code Pr. arts. 549--552, inclusive; Rev. St. La. §§ 750, 751. It is true that in the parish of Orleans an exceptional system prevails of collecting costs in advance by the use of stamps, to be eventually recovered back if the adverse party is cast; but no such exceptional system can have effect in the courts of the United States, although these courts happen to sit in the parish of Orleans. There is no law nor rule of court which causes an officer to lose his fees by not requiring payment in advance. "The assumption that parties obtain personally the costs awarded on the decision of the suit in prosecution is essentially erroneous. It is so only theoretically. The general decree gives costs nominally to a party in the action, but in reality nothing passes by it into his hands beyond the reimbursement of witnesses' fees or advances actually made by him to other ends than pay-

ment of his proctors' and advocates' fees. The taxed costs belong to them, and their rights thereto will be protected by the court against the exercise of any authority over them by the party himself to their prejudice." Collins v. Hathaway, supra.

For these reasons we approve the ruling of the district judge, and we find no error in the decrees appealed from, and the same are affirmed, with costs.

UNITED STATES v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. August 21, 1893.)

No. 1,936.

1. PUBLIC LANDS—OREGON CENTRAL RAILROAD GRANT.
   Act May 4, 1870, (16 Stat. 94,) granting lands to the Oregon Central Railroad Company to aid in the construction of a railroad and telegraph line "from Portland to Astoria, Oregon, and from a suitable point of junction near Forest Grove to the Yamhill river," should be construed as making two distinct grants to two distinct railroads, one from Portland to Astoria, and the other at right angles with the first from the Yamhill river to a junction with the first near Forest Grove; and, upon completion of the first road from Portland to Forest Grove, and the second from Forest Grove to Yamhill river, and the operation thereof as one continuous railway, the grantee was not entitled to lands lying within the exterior quadrant formed by imaginary lines, drawn through the junction at right angles to the courses of the respective roads. U. S. v. Union Pac. Ry. Co., 13 Sup. Ct. Rep. 724, 148 U. S. 562, distinguished.
2. SAME—FORFEITURE.
   Such lands were forfeited by Act Jan. 31, 1885, (23 Stat. 296,) as "adjacent to and coterminous with the uncompleted portions of said road."
3. STATUTES — CONSTRUCTION —VIEWS OF INDIVIDUAL LEGISLATORS EXPRESSED IN DEBATE.
   A court cannot recur to the views of individual members of congress in debate for the purpose of aiding in the construction of a doubtful act, but it may recur to the history of the times when the act was passed, and the general state of public, judicial, and legislative opinion at that time.

In Equity. Bill by the United States against the Oregon & California Railroad Company and the Oregon Central Railroad Company to enforce a forfeiture of certain lands. Respondents filed a cross bill praying that their title be quieted. Decree for complainants.

Franklin P. Mays and George H. Williams, for the United States.
Earl C. Bronaugh and W. D. Fenton, for defendants.

BELLINGER, District Judge. This is a suit by the United States to enjoin the railroad companies, defendants, and all persons holding under them, from asserting title to certain lands included in a grant to the Oregon Central Railroad Company, and assigned by that company to the Oregon & California Railroad Company,

and claimed by the United States to have been forfeited, and to enjoin the prosecution of any suits or actions by either of said companies, or by those claiming under them, on account of the title claimed to have been derived through such grant.

The defendant companies, after answering the bill of complaint, filed their cross bill, praying to have their title quieted to the lands in question, to which the United States fully answered.

The facts in the case are stipulated by the parties. The question in dispute arises in this way: On May 4, 1870, congress passed an act granting lands to the Oregon Central Railroad Company to aid in the construction of a railroad and telegraph line "from Portland to Astoria, Oregon, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinville, in the state of Oregon." The line of this road from Portland to the point of junction near Forest Grove runs directly west, and the road from such point of junction runs nearly south to the Yamhill river. In July, 1871, the Oregon Central Railroad Company filed in the office of the secretary of the interior a map showing the location of the line of the road from Portland to a point on the Yamhill river near McMinville, and also from a junction near Forest Grove towards Astoria to a point one mile north of the summit of the range of hills dividing the Tualatin from the Nehalem valley, a distance of 20 miles. The map of definite location from Astoria to said point was filed June 23, 1876. On February 16, 1872, the secretary of the interior accepted the first 20 miles of completed road, commencing at Portland, and on June 23, 1876, he accepted 27½ miles from the 20-mile post to the Yamhill river. On September 8, 1880, the Oregon Central Railroad Company sold and conveyed to the Oregon & California Railroad Company its said road and all its title and right to the said land grant. On January 31, 1885, no part of the road from Forest Grove to Astoria having been built, congress passed an act forfeiting so much of the lands granted as aforesaid "as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road." On July 8, 1885, the commissioner of the general land office issued instructions to the local land officers at the land office at Oregon City for their guidance under the forfeiture act, with which was inclosed a diagram showing the limits of the forfeited lands, and of that part of the grant not affected by the forfeiture act. This diagram shows that the road runs from Portland west to Forest Grove, where it turns almost at a right angle, and runs south to McMinville. From Forest Grove two lines are drawn, one due north, the other due west, both terminating at the 20-mile limits. The granted lands lying within the quadrant formed by these lines and the 20-mile limits, and also the lieu lands within such lines and the 25-mile limits, are designated on the diagram as "Forfeited." The diagram also shows the forfeited lands on the line from Forest Grove to Astoria. These instructions were affirmed by the secretary of the interior on April 5, 1887. The receiver in charge of the Oregon & California

Railroad Company duly protested against the action of the land department so far as it related to the granted lands within the quadrant.

On August 8, 1885, such receiver got permission from the United States circuit court to bring suit against the receiver and register at Oregon City to restrain them from permitting filings upon the granted lands within the quadrant. Thereafter such suit was brought in said circuit court, and, a demurrer having been filed to the complaint, the court held that injunction would not lie to control the action of public officers in the determination of questions involving the exercise of official judgment, and the demurrer was sustained. Koehler v. Barin, 25 Fed. Rep. 165. It is claimed in behalf of the railway companies that the grant made by the act of 1870 was to one company for one road from Portland to Astoria and McMinnville, as expressed in the title; that, inasmuch as the grant was made without reference to the fact that, beyond the point of junction at Forest Grove, the grant on the Astoria and McMinnville sections necessarily overlapped, and there was no attempt to apportion this overlapping portion between these two sections, the company could build either section first, and to that which was first completed the grant within the full prescribed limits would in justice apply; that therefore the restriction of forfeiture in the act of 1885 to lands not embraced within the limits of the grant to the completed portion of the road saved the grant, on the line of the Astoria section, for 20 miles beyond Forest Grove.

If the act in question is construed to provide a continuous line of road from Portland to Astoria, with a branch or connecting road beginning at Forest Grove, as claimed by the government, instead of one road from Portland to Astoria and from Portland to McMinnville, as claimed by the companies, the lands saved to the company under the forfeiture act will be limited to a line drawn at the terminus at Forest Grove of the McMinnville branch at right angles to the line of that road, and by a line similarly drawn at the end of the constructed main line at Forest Grove at right angles to its line, thus forming the quadrant over which this controversy arises. In 1887 this question was considered by Secretary of the Interior Lamar, reviewing the instructions of the commissioner of the general land office, who held that the act of May 4, 1870, contemplated two distinct roads,—a road from Portland to Astoria, and a road from Forest Grove to McMinnville,—and that the forfeiture by the act of 1885 of "so much of the lands granted * * * as are adjacent to the uncompleted portions of said road" would have divided the forfeited lands from the unforfeited lands by a line drawn through Forest Grove at right angles to the unconstructed line, had it not been for the qualifying phrase "and not embraced within the limits of said grant for the completed portions of said road;" that, by this saving clause, so much of the grant adjacent to the McMinnville line as is coterminous with the completed line was saved to the company; that the words in the granting act, "a railroad and telegraph line from Portland to

Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river near McMinville," must be construed as though the words used had been "a railroad and telegraph line from Portland to Astoria, and a railroad and telegraph line from a suitable point of junction near Forest Grove to the Yamhill river, near McMinville;" that this view seems irresistible in the light of the definition of the words "point of junction," as understood in railroad language; that these words are invariably used to indicate a point where two or more railroads join, and not to designate points between the termini of a single railroad; that, as to the use of the word "railroad" in the act instead of "railroads," it is well settled in legal parlance that the singular includes the plural and the plural the singular. 5 Dec. Dep. Int. 549.

It is claimed on behalf of the United States that, for the purpose of aiding in the construction of a doubtful act, it is allowable to recur to the debates that took place upon the passage of the act, but the rule is otherwise. "The court is not at liberty to recur to the views of individual members" of congress "in debate, nor to consider the motives which influenced them to vote for or against its passage. The act speaks the will of congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason, as well as the meaning, of particular provisions in it." U. S. v. Union Pac. R. Co., 91 U. S. 79. And it may recur to the general state of opinion—public, judicial, and legislative—at the time of the enactment. End. Interp. St. § 29.

The language of the act in question is not, however, fairly open to doubt. "A road from Portland to Astoria, and from a point of junction near Forest Grove to the Yamhill river," does not describe a road from Portland to the Yamhill river. Continuous railway service between the latter points, by means of a junction of two roads, does not constitute such connecting lines a single road; otherwise, the line from the Yamhill river to the junction at Forest Grove, and thence to Astoria, if completed under the grant, would constitute such a road. There is as much reason for saying that the grant was for one road from Portland and McMinville to Astoria as that it was for one road from Portland to Astoria and McMinville; that there was necessarily an overlapping of the grant on the Portland and McMinville sections beyond Forest Grove as that there was such overlapping on the Portland and Astoria sections beyond that point. If it is admissible to say that there were two sections of a single road to which an unapportioned grant applied, and that the company might build either section, and take the entire grant, then, why may we not as well assume that there are two sections of a single road leading from Portland and McMinville to Astoria—a line not built—as that there are two sections of a line to McMinville and Astoria? If the grant is construed to apply to two sections of a road from McMinville and Portland to Astoria, the line of forfeiture must be drawn

at Forest Grove, since there was no road built beyond that point, and, as to these two interpretations, the latter should be adopted, since it is settled that, where there is doubt as to the construction of a statute which operates as a grant of public property to an individual, that construction should be adopted which will support the claim of the government. Nothing can be inferred against the state. Slidell v. Grandjean, 111 U. S. 415, 4 Sup. Ct. Rep. 475. The secretary of the interior construed the grant as though the words "a railroad and telegraph line" were repeated in the clause referring to the line from Forest Grove to the Yamhill river, so that the act will read: "For the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and a railroad and telegraph line from a suitable point of junction near Forest Grove to the Yamhill river." In behalf of the company, it is contended that, instead of such an implication, the words implied are "a railroad," etc., "from Portland to the Yamhill river," as expressed in the title of the act. But the language of the grant is not doubtful, and the title is no part of the law. The starting point of this road is not left to implication. It is expressly stated to be a point of junction near Forest Grove. The act is for a road from Portland to Astoria, and a road, not implied to be from Portland, but stated to be from a junction at Forest Grove to the Yamhill river. The fact that the word "railroad" instead of "railroads" is used is insisted upon as proof that what the act particularly describes as two roads is after all only one. The rule that in law the singular includes the plural, and the plural the singular, has frequent application in the case of railroads. It is common to speak of a system embracing many roads as though there was but a single road, probably because of the habit of using the word "railroad" to designate the company operating the road. If it should prove to be correct, as claimed by the companies, that the grant in question north of Forest Grove is in fact an unapportioned grant to two sections of a single road, there is nothing to support the contention that this entitles the company in justice, upon building one of these sections, to take the grant for its full prescribed width. Upon no principle of justice can the company make an apportionment, as may be most to its interest or convenience, where the act has not authorized it, and thus secure, for building one section of road, what was granted it for two,—for building 20 miles of road, what was granted it for 40. It is not reasonable to suppose that congress intended to offer any such an inducement to the company not to build the Astoria line.

It is a matter of common knowledge that the practice of aiding railroad construction with grants of land was mainly to open up to settlement unoccupied and practically inaccessible territory. There is nothing else to justify such grants, unless an exception is made in the case of the Pacific railroads, as a measure made necessary by the menace of disunion during the Civil War. Four-fifths of the line of road from Portland to Astoria traversed a rough and wholly unsettled district, but one known to be rich in timber, and

believed to be so in iron and coal, with considerable areas of agricultural land. The motive for the grant in question was the opening up of this hitherto inaccessible region, and the establishment of railroad connection between Portland and Astoria, the two largest towns in the state. The grant was objected to in the senate of the United States upon the ground that it was "an excessive and prodigal appropriation of land to two internal roads in the state of Oregon," and this objection was answered by a senator from Oregon that the grant was through the mountains, where the land was of little value. These are matters of history and common knowledge, and may therefore be referred to in this connection. Congress gave to the Oregon Central Railroad Company this excessive and prodigal grant of lands upon condition that it would build this comparatively long and expensive and much needed road, and also some 20 miles from Forest Grove to the Yamhill river, and the company accepted this offer. It did not comply with the essential requirements of the grant. Every foot of the road built was in the heart of the Willamette valley, and through the oldest settled portion of the country. It was an inexpensive road to build and operate. From what is thus publicly known, it is a reasonable inference that congress would not have made the grant claimed to McMinville, and that the grant from Forest Grove to that point was in consideration of the road from Portland to Astoria. There is therefore no equity in the claim now made to a continuous grant from Portland to McMinville, and no reason to support such a construction of the legislation on the subject had the language used left the matter open to doubt.

The railroad companies rely mainly on the case of U. S. v. Union Pac. Ry. Co., 148 U. S. 562, 13 Sup. Ct. Rep. 724. That was a case where the Kansas Pacific Railway Company, being in fact the eastern division of the Union Pacific Railway Company, was engaged in building a road from Kansas City to Cheyenne, by the way of Denver, under a grant of lands to the Union Pacific Company along the entire line. A local company, the Denver Pacific Railway & Telegraph Company, had graded a roadbed from Denver to Cheyenne. Congress, by a special act, authorized the Kansas Pacific to contract with the Denver Pacific for the construction of its line from Denver to Cheyenne, and to transfer to such company a proportionate share of its grant, which it did. The road of the former company entered Denver on an east and west line, while the latter road enters on a north and south line. It was contended on behalf of the government that the act authorizing the Kansas Pacific Company to contract with the Denver Pacific Company modified the prior granting act so as to cut off the grant of the Kansas Pacific at Denver, and to make an independent grant to the Denver Pacific from Denver to Cheyenne; that, this being so, the limit of the former grant would be a line drawn at the termini at right angles to the lines of the respective roads, thus leaving a triangular shaped tract of land on the outside of the elbow made by the junction of the two lines, without the grant. It was conceded

that, if this line was in fact two roads, with a junction at Denver, such a result as claimed would follow; but the court held that the original granting act, which provided a continuous grant from Kansas City via Denver to Cheyenne, was not thus modified by the provision which allowed the company having such grant to contract with another company for that portion of its line from Denver to Cheyenne. The latter act provided that the Union Pacific, Eastern Division, shall extend its line to Denver, so as to form, with that part of the line authorized to be constructed by the Denver Pacific, "a continuous line of railroad and telegraph from Kansas City, by the way of Denver, to Cheyenne," and that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the Union Pacific Railway Company, Eastern Division." The supreme court says that, so far from indicating that this was not to be considered a single line, it is difficult to see how congress could have expressed more clearly by inference that they were not to be treated as independent roads, and that this construction is re-enforced by an amendatory act of June 20, 1874, which provides that, for all the purposes of the act of 1862, the original granting act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway & Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Company at Denver. To state the case briefly, the Kansas Pacific had a continuous grant, and the fact that congress permitted it to contract with another company for the construction of a part of the line was not allowed to operate so as to cut the grant in two. The inducement upon which the original grant was made was fully realized, and whether the road was wholly built or partly purchased by the company taking the grant could make no difference. The law of that case has no application here. There was no question that the grant was a continuous one from Kansas City to Cheyenne, by way of Denver; and the only question raised was as to whether the subsequent act of congress by which the grantee company was permitted to contract with another company for that part of the line between Cheyenne and Denver cut the grant in two at the latter point. The terms of the granting act in this case are unmistakable. They provide for a continuous grant or single line of road from Portland to Astoria, with a second or branch line from a junction at Forest Grove to the Yamhill river. The theory of the government as to the continuity of these lines cannot be more explicitly stated than the act states it.

I conclude that the lands in the quadrant are included in the lands forfeited to the government by the act of January 31, 1885, and such will be the decree.

PUGET SOUND NAT. BANK OF SEATTLE v. KING COUNTY et al.

(Circuit Court, D. Washington, N. D. June 30, 1893.)

1. BANKS AND BANKING—NATIONAL BANKS—TAXATION BY LOCAL GOVERNMENT —DISCRIMINATION.
   Rev. St. § 5219, prohibits an adverse discrimination by a local government in the valuation of national bank stock for assessment, as compared with the assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money.
2. EQUITY—PLEADING—DEMURRER TO BILL.
   On demurrer a bill must be taken as true, and matter in avoidance is not available.

In Equity. Suit by the Puget Sound National Bank of Seattle for an injunction to prevent threatened proceedings to enforce payment by said bank of state and county taxes for the year 1891 upon its capital stock. Demurrer to bill overruled.

Preston, Car & Preston and J. B. Howe, for complainant.

John F. Miller, for defendants,

Cited, as sustaining the validity of the tax, the following decisions of the United States supreme court: Hepburn v. School Directors, 23 Wall. 480; Mercantile Bank v. City of New York, 7 Sup. Ct. Rep. 826, 121 U. S. 138; Talbott v. Silver Bow Co., 11 Sup. Ct. Rep. 594, 139 U. S. 438; Palmer v. McMahon, 10 Sup. Ct. Rep. 324, 133 U. S. 660.

HANFORD, District Judge. This case, having been argued and submitted upon a demurrer to the bill of complaint, the court is not called upon at this time to give an opinion upon all questions which have been debated, or do more than decide as to the sufficiency of the bill of complaint to support a decree for any part of the relief prayed for, if the averments thereof shall be confessed or proven. The bill does explicitly set forth the fact and the manner of discrimination against shareholders of national bank stock, in the valuation thereof for assessment, as compared with the assessment for the same year of other moneyed capital in the hands of individual citizens of this state, and invested in this state so as to make a profit from the use thereof as money.

The right of local governments to tax national bank stock is given by section 5219, Rev. St. U. S., but with a restriction against such discrimination as this bill charges. If the facts are as alleged, the disregard of the law in this particular on the part of the assessor and equalizing boards of the county and state renders the tax levied upon national bank stock illegal, and the complainant is entitled to protection as prayed. People v. Weaver, 100 U. S. 539; Pelton v. Bank, 101 U. S. 143; Cummings v. Bank, Id. 153; Boyer v. Boyer, 113 U. S. 689, 5 Sup. Ct. Rep. 706. By alleging the same the complainant has undertaken to prove these facts, if controverted, and opportunity for doing so should be afforded. The substance of the argument in support of the demurrer is that the bill is untrue, and that facts in avoidance have not been antici-

pated and denied. But in passing upon the demurrer the court is bound to treat the bill as being true; and the matter in avoidance, to merit attention, needs to be set forth in an answer.

The decisions of the supreme court of the United States, which are cited as sustaining the validity of the tax, are distinguishable from this case, in its present state, by the fact that in each the merits were fully presented by the pleadings of both sides, and testimony, or by agreed statements of the facts. It is true that the bill in this case does not particularize the discriminations complained of, or specify instances with any greater minuteness than the bill in the case of First Nat. Bank v. County of Chehalis, 32 Pac. Rep. 1051, in which the supreme court of this state affirmed a judgment in favor of the defendant upon a demurrer to the bill. But it is also true that the bill before me is fully as definite and specific in its statements of the facts constituting discrimination as the bill in the case of Boyer v. Boyer, supra, in which the supreme court of the United States held that an answer should have been required, and reversed the decision of the supreme court of Pennsylvania, sustaining a demurrer to the bill. Demurrer overruled.

CORLISS et al. v. E. W. WALKER CO. et al.

(Circuit Court, D. Massachusetts. August 1, 1893.)

No. 3,152.

1. INJUNCTION—PUBLICATION OF BIOGRAPHY—PUBLIC CHARACTERS.
   A person who holds himself out as an inventor, and whose reputation as such becomes world-wide, is a public character, and the publication of his biography cannot be restrained by injunction. Schuyler v. Curtis, (Sup.) 15 N. Y. Supp. 787, distinguished.
2. SAME—PUBLICATION OF BIOGRAPHY.
   A court of equity has no jurisdiction of a suit to restrain respondents from publishing a biography of complainant, or of a member of complainant's family.
3. SAME—PUBLICATION OF PICTURE—BREACH OF CONDITIONS.
   A court of equity should restrain by injunction the publication of a picture of a deceased member of complainant's family, taken from a photograph and portrait of deceased, where respondent has not observed the conditions on which the portrait and photograph were obtained.

In Equity. Bill by Emily A. Corliss and others against the E. W. Walker Company and others to restrain respondents from publishing a biography and selling a picture of George H. Corliss.

Henry Marsh, Jr., and James M. Ripley, for complainants.
Henry W. Fales, for defendants.

COLT, Circuit Judge. This suit is brought by the widow and children of George H. Corliss to enjoin the defendants from publishing and selling a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill does not allege that the publication contains anything scandalous, libelous, or false, or that it affects any right of property, but the relief prayed

for is put upon the novel ground that such publication is an injury to the feelings of the plaintiffs, and against their express prohibition.

The counsel for plaintiffs, in argument, put the case upon the ground that Mr. Corliss was a private character, and that the publication of his life is an invasion of the right of privacy, which a court of equity should protect. In the first place, I cannot assent to the proposition that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world-wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public character (a distinction often difficult to define) is not important in this case. Freedom of speech and of the press is secured by the constitution of the United States and the constitutions of most of the states. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or, by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals. Cooley, Const. Lim. (6th Ed.) 518. In other words, under our laws, one can speak and publish what he desires, provided he commits no offense against public morals or private reputation. Schuyler v. Curtis, 15 N. Y. Supp. 787, recently decided by the New York supreme court, and upon which the plaintiffs rely, is not in point. In that case the court enjoined the defendants from erecting a statue of Mrs. Schuyler. The right of publication was not in issue in that case.

There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. Rep. 482; Kerr, Inj. (2d Ed.) 1. It follows from this principle that a court of equity has no power to restrain a libelous publication. Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69; Brandreth v. Lance, 8 Paige, 24. The opinion of Vice Chancellor Malins in Dixon v. Holden, L. R. 7 Eq. 488, to the contrary, is disapproved by Lord Chancellor Cairns in Assurance Co. v. Knott, 10 Ch. App. 142. In Kidd v. Horry, 28 Fed. Rep. 773, Mr. Justice Bradley, in speaking of Dixon v. Holden, and several recent English cases, declares that they depend on certain acts of parliament, and not on the general principle of equity jurisprudence. But in the present bill it is not pretended that the publication is libelous, and therefore there can be no question as to the want of jurisdiction in this case.

As to the picture which accompanies the published sketch, the case stands on a different footing. The defendants obtained

from the plaintiffs a copy of a portrait and a photograph of Mr. Corliss, from which they have made two plates, one of which they propose to insert in the publication. But it appears from the evidence that these pictures were obtained on certain conditions, which the defendants have not complied with. This matter directly concerns the exclusive right of property which the plaintiffs have in the painting and photograph, and it would be a violation of confidence, or a breach of contract between the parties, to permit the defendants, under these circumstances, to use either of the plates. Pollard v. Photographic Co., 40 Ch. Div. 345; Prince Albert v. Strange, 1 Macn. & G. 25. The injunction is denied as to the publication, and granted as to the use of the plates.

CLYDE et al. v. RICHMOND & D. R. CO. et al.

HUIDEKOPER et al. v. DUNCAN et al.

(Circuit Court, D. South Carolina. September 15, 1893.)

1. FEDERAL COURTS—JURISDICTION—ACTION AGAINST RAILROAD COMMISSIONERS.
A proceeding by receivers of a railroad against state railroad commissioners for relief against alleged unjust and unreasonable rates for freight transportation established by such commissioners, is not a proceeding against the state, within Const. U. S. Amend. 11, inhibiting the exercise of jurisdiction by federal courts in suits brought against one of the United States by citizens of another state.

2. SAME—WHEN STATE A PARTY.
As such a proceeding presents no question of penalties, the fact that the act authorizing the commissioners to fix rates requires actions to recover penalties for disregarding them to be brought in the name of the state, and for its benefit, does not make the state in any sense a party or privy to the record.

3. SAME—SOUTH CAROLINA DISPENSARY ACT.
That the state, under the operation of the "dispensary act," approved December 24, 1892, has a material interest in such a proceeding, as a large, and perhaps the only, shipper of liquors, does not make it a party to the proceedings, so as to preclude the federal court from exercising jurisdiction.

4. RAILROAD COMMISSIONERS—ESTABLISHMENT OF RATES—DUE PROCESS OF LAW.
Railroad companies have the right to require that state railroad commissions fix just and reasonable freight transportation rates, and the changing or lowering of such rates so as to injure the railroad company in its property rights is a deprivation of property without due process of law, within the inhibition of the state and federal constitutions, and justifies the interposition of the courts to inquire into the reasonableness or justness of the rates, and a court, to that end, may appoint a special master to take testimony in relation thereto, and to report thereon.

In Equity. Petition by Frederick W. Huidekoper and Reuben Foster, receivers of the Richmond & Danville Railroad Company, appointed in the suit of William P. Clyde and others against said company and others, for relief against the action of D'Arcy P. Duncan, Henry R. Thomas, and Jefferson A. Sligh, railroad commissioners for the state of South Carolina, in changing freight

transportation rates, and establishing new rates. Reference to a special master ordered to ascertain as to whether the established rate is just and reasonable.

H. L. Bond, Jr., and J. S. Cothran, for petitioners.
D. A. Townsend, Atty. Gen., for respondents.

SIMONTON, District Judge. This is a petition filed in a cause pending in this court. In effect it is an ancillary bill filed by the receivers, praying relief against the action of the board of railroad commissioners. The act complained of is the change of rates for transportation of liquors in glass, and the establishment of a new rate, which is charged to be neither just nor reasonable, nor a proper remuneration for the service rendered. The defense set up is in the nature of a demurrer or plea sustained by an answer. The demurrer or plea sets up several grounds of objection to the jurisdiction of the court. The first alleges want of jurisdiction because of the character of the parties; the others because of the subject-matter. It is maintained that this proceeding is in reality against the state of South Carolina, and cannot be maintained under the eleventh amendment. Two reasons are assigned. The one is that "under the operation of the dispensary law the state has a real material value to itself in this question;" the other is that the railroad law, which authorizes the commission to fix rates, provides that the action for the penalties for disregarding them shall be in the name of the state, and for her benefit. This last objection may be disposed of at once. Whatever course may be followed on an application for an injunction against a suit instituted in the name of the state for penalties, its discussion now would be premature. This case presents no question of penalties. The state is in no sense a party to the record, or privy to the record. The constitutionality of the statute under which respondents act is not in issue. The learned counsel for the state admit that the declaration of this statute, that the rates fixed by the commission shall be sufficient evidence that they are just and reasonable, does not preclude the courts from examining into the fact whether they are just and reasonable. The sole issue in this case is this: Under the statute the respondents are authorized and directed to make just and reasonable rates for the transportation of freight. The petition alleges that certain rates made by them are neither just nor reasonable. In this issue the sovereignty of the state is in no way involved. See Railway Co. v. Dey, 35 Fed. Rep. 873.

The other reason—that under the operation of the dispensary act the state has a material interest in this question, and is therefore a party to this cause—is equally untenable. This assumes that the state is engaged in the business of distributing and selling liquors, and that it is a large, perhaps the only, shipper. Without discussing the question whether in engaging in a business the state does not as to that business strip herself of her sovereign character, the fact that she is a shipper of liquors does not make

her a party to a suit testing the validity of rates fixed by the commission. Were this so, then in every proceeding to obtain a review of the action of railroad commissions in fixing rates every shipper has the right to be a party. The petition had alleged that the sole reason for the reduction of the rate of liquors was the passage of the dispensary law, and the desire to increase the profits made by the state in the sale of liquor thereunder. The second paragraph of the second subdivision of the answer emphatically denies this charge. It denies that there was any consideration of this character moving to the change, or any other consideration than that the rates last fixed by them were reasonable and just. This declaration, made by gentlemen of character and position, settles this question.

The other objections are to the jurisdiction of this court over the subject-matter. These objections are met by the language of Mr. Justice Miller in his concurring opinion in Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702:

"The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by bill in chancery, asserting its unreasonable character, and its conflict with the constitution of the United States."

In the same opinion he says:

"There is an ultimate remedy by parties aggrieved [by the acts of a railroad commission] in the courts for relief, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law."

This brings us to the merits of the case. In determining and affixing rates for transportation of freight by railroad the several articles subjects of transfer are arranged under a classification based apparently upon their relative value, destructibility, combustibility, bulk, ease or difficulty in handling, and such like considerations. Under this classification the classes are designated by numerals, numbers, and letters, thus: IIII, III, II, I, 1½, 1, 2, 3, 4, 5, 6, A, B, C, D, E, F, G, H, J, K, L, M, N, O, P, T. This mode of classification is of almost universal use in this country and Canada, and it largely promotes interstate commerce. The several articles are arranged in these classes, and rates affixed to them, the highest rate being for the class IIII, and so on, growing less. Anterior to 26th May, 1893, the railroad commission, predecessors of the present board, had either fixed or approved on the class of goods now in question the following rates:

	Class.	Class if Released
Liquors, whisky, domestic brandies, and domestic wines, in wood, at actual weight, O. R. L., value limited to 75 cents per gallon, and so indorsed on B/L, and quantity..		H
Liquors, whisky in wood, N. O. S., at actual weight....	2	3
Liquors, whisky in boxes or baskets.....	1	2
Liquors, in glass, boxes, or baskets, N. O. S.....	1½	1
Liquors, in wood, N. O. S., actual weight.....	1	2

On 26th May, 1893, the present board made a change whereby liquors, whisky, domestic brandies, and domestic wines in glass, packed, if at carrier's risk, were placed in class 2; if released, in class H. And on 23d June, 1893, the board adopted the following additional classification: "Liquors, whisky, domestic brandies, domestic wines, in glass, securely packed in barrels, value limited to 75 cents per gallon, and so indorsed on B/L, H."

It is said that under this last classification the reduction of rate amounts to 26⅔ per cent. It is charged to be not just nor reasonable. Any private person in the conduct of his business can place any price he pleases upon his property or his service, and those who choose to deal with him have no right to complain. But persons or corporations exercising a franchise—a right given them by the sovereign authority—cannot charge any price for service rendered under the franchise which is not just and reasonable. To secure the enforcement of this rule so far as railroads are concerned, railroad commissioners are appointed, whose duty it is to see that rates for the transportation of freight, and sometimes of passengers, are just and reasonable. The establishment of such commission is clearly within the constitutional rights of the states. Munn v. Illinois, 94 U. S. 113; Water Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191. But the power of these commissioners, and, indeed, of that of the states appointing them, is not unlimited. Corporations are, as it is said, the creatures of statute, and owe the breath of their life to the state creating them. But corporations are only an aggregation of persons acting as a unit. So long as they exist they come under the protection of the constitutions of their state and of the United States. Not only is it the right of the public that the rates be just and reasonable, and the duty of the commissioners to see that they are just and reasonable; there is a correlative right in the railroads that the rates imposed on them be just and reasonable, and if they be just and reasonable it is their right that they remain unchanged.

If for the benefit of any part of the people, of the whole people, rates of transportation by railroad are changed and lowered so as to injure the vested rights of the carrier in his property, the provision embodied in every state constitution forbidding the use of private property for public purposes without just compensation, and the provision of the federal constitution forbidding the states to deprive a person of his property without due process of law, present an impassable barrier to such action. Mr. Justice Miller, in Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468; Railroad Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. Rep. 400, quoting Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191. The enforcement of these constitutional rights under our system of government belongs to the courts. They can always institute the inquiry whether the rates imposed by a commission are just and reasonable, and on the determination of this question

depends their right to interfere. The measure of what is, in this sense, just and reasonable, is not the value of the service to the person to whom it is rendered. The true measure is the proper return to the individual or corporation rendering the service. The value of a service rendered to a consignee by a carrier depends upon fluctuating circumstances, the condition of the market for goods and for money, the present demand for the goods by the public, his own present supply. The value of the service to the consignee must constantly vary, and can never be easily reached, and as between several consignees at the same point of delivery must also greatly vary. No commission could fix a rate on this basis. On the other hand, the remuneration to the carrier—the remuneration which he should reasonably expect—depends on certain fixed and almost unchangeable facts, the reasonable return for the investment, due regard being had to the public interest.

The question in the case under discussion is, is this rate recently imposed by the respondents, be it a change of rate or a new classification, just and reasonable? Mr. Justice Brewer, while on the circuit bench, defines what are just and reasonable rates, or rather states what rates are not just and reasonable. "A schedule of rates, when the rates prescribed do not pay the costs of service, cannot be enforced." Railroad Co. v. Becker, 35 Fed. Rep. 885. In another case—Railway Co. v. Dey, 35 Fed. Rep. 879—he enters into an elaborate illustration of these terms. "When the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates." He defines "compensation" to mean enough to pay costs of service, fixed charges of interest, and a dividend, however small.

One of the difficulties in this case is that the complaint is of the reduction of one kind of shipment only,—liquors, whisky, domestic brandies, domestic wines, in glass, securely packed in barrels, limited to 75 cents per gallon, and so indorsed on B/L. The respondents deny that this is any reduction at all. These liquors, whiskies, etc., have never before this been transported in that way, packed in barrels. It is a new classification.

It was faintly suggested at the hearing that, as all these shipments are distinctly "released," the liability of the carrier is reduced to a minimum, and, taking into consideration the ease of handling this character of goods, should be in H. But "released" only means that in case of damage the liquor can only be valued at 75 cents per gallon. This explodes the idea of the absence of responsibility, which is magnified by the fact that the fragile packages are concealed in a barrel, and if broken the carrier cannot possibly show when the breakage occurred.

Another and a very strong ground is that by the operation of the dispensary law the shipments are largely increased, and so counterbalance the low rate. This act requires all liquors to be carried to Columbia, and from thence to be distributed to the several dispensaries. This distribution is for the most part in small packages,

packed in barrels, and under the short-haul rates. The emptied barrels, sometimes with the emptied packages, are returned to Columbia, and this process is repeated several times during the year. But the question always remains, does this rate pay the cost of transportation? Is it remunerative? If it be not, then the increase of business increases the loss. On the other hand, reduction of rates on one article does not necessarily reduce income. Railroad Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. Rep. 400. Nor is there anything stated and admitted in the record from which the court could say that this change or reduction or new classification, call it as we may, reduces the income of the petitioners below the remunerative point. In this preliminary proceeding this may have been impossible.

It is ordered, that for this case R. W. Shand, Esq., be appointed special master. That he take testimony as to whether the charge complained of in this record is just and reasonable in the sense indicated in this opinion; that is to say, is it a just and reasonable reward to the petitioners for the service rendered? Does the rate proposed affect the income of the petitioners? In what way, and to what extent?—with leave to report any special matter.

CENTRAL TRUST CO. OF NEW YORK v. WABASH, ST. L. & P. RY. CO., (HANES et al., Interveners.)

(Circuit Court, D. Indiana. September 15, 1893.)

No. 7,935.

1. WATER COURSES—OBSTRUCTION BY RAILROAD EMBANKMENT—VIS MAJOR.
   In 1855 or 1856 a railway company constructed an embankment, with a substantial stone culvert, over a stream dry at times in summer, but at times of heavy rains discharging a large quantity of water. In 1876 the railway was sold under foreclosure to another company, which in 1877, consolidating, formed the defendant company. Subsequently one of the intervening petitioners erected a mill above, and the other placed a lumber yard below, the embankment. On several occasions the capacity of the culvert was overtaxed for a short time, but in May, 1886, in consequence of a heavy rain storm following a cyclone, the water backed up and flooded the mill, and in July, 1888, as the result of unusual, extraordinary, and unprecedented rainfalls, the embankment broke, the mill was again flooded, and the lumber and lumber yard destroyed. *Held* that, as the causes of the injuries complained of were such as could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill, the defendant was not liable.
2. SAME—CONTRIBUTORY NEGLIGENCE.
   The conduct of the petitioners in constructing the mill, and placing the lumber yard where, if the culvert and embankment were insufficient, injury would certainly result, should be considered in determining the responsibility of defendant.
3. SAME—CONTINUING NUISANCE.
   The mere continuance of the culvert and embankment was insufficient to charge the defendant with liability, in the absence of knowledge or notice that they constituted a nuisance.

4. APPEAL—REVIEW OF FINDING ON CONFLICTING EVIDENCE.
The court refused to disturb the master's finding on conflicting evidence that the rainfalls and floods were unprecedented, as a careful study of the testimony failed to create such a clear and abiding conviction as would justify a modification or setting aside the report.

5. SAME—SUFFICIENCY OF EXCEPTIONS.
Exceptions to a master's report, which distinctly point out the findings of fact and conclusions of law excepted to, are sufficient to present such findings and conclusions for review, where the evidence accompanies the report, though such exceptions may be inartistically drawn. Story v. Livingston, 13 Pet. 359, followed.

6. SAME—AWARDING JUDGMENT WITHOUT REGARD TO EXCEPTIONS.
If upon facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions may be disregarded or overruled, and judgment awarded upon the undisputed findings of fact.

In Equity. Petitions by Hanes & Porch and by A. R. Colburn, interveners, against John McNulta, receiver of the Wabash, St. Louis & Pacific Railway Company, appointed in an action by the Central Trust Company of New York against said railway company, claiming damages for injuries sustained by a flood caused by an alleged insufficient culvert.

J. McCabe & Son, for petitioners.
Stuart Bros., for defendant.

BAKER, District Judge. The intervening petitioners Hanes & Porch claim that they were damaged by a flood which, by reason of an insufficient culvert, caused such an accumulation of water as to submerge and injure their flour mill and property situated on the up-stream side of the railway. The intervening petitioner A. R. Colburn claims to have been damaged by the insufficiency of a culvert under the railway, which caused such an accumulation of water as to wash away the embankment, and to damage and destroy his lumber and lumber yard situated on the down-stream side of the railway. These petitions were referred to the master to hear the evidence, and to report his findings of fact and conclusions of law thereon. The master, after hearing the evidence and the arguments of counsel, filed his report containing his findings of fact and conclusions of law thereon, and recommending that both claims be disallowed.

The facts found and reported are, in substance, as follows: The embankment and culvert were built by the Toledo, Wabash & Western Railway Company in 1855 or 1856, where the railway crosses a small stream called the "Fall Branch," which runs through the town of Williamsport, Ind. The embankment is about 20 feet high above the bed of the stream. The culvert is arched, and built of stone, in a substantial manner. The stream is dry during the summer, when there are no rains. In times of heavy rains it discharges a good deal of water, draining several square miles of rolling land. Hanes & Porch are the owners of a mill on the west side of the railway. Colburn owned a lumber yard, which was on the west branch of Fall branch, east of the railway, and under its

embankment. Fall branch passed under the embankment, through a large culvert, a short distance southwest of the mill and lumber yard. The top of the arch of the culvert was 8¾ inches lower than the engine room floor in Hanes & Porch's mill. In May, 1886, there was a heavy rainfall. The water of Fall branch, not finding a sufficient outlet through the culvert, backed up, and flooded the mill of Hanes & Porch. The backwater damaged the mill, machinery, engine, boiler, and other property of Hanes & Porch to the extent of $600. In July, 1888, there was another flood, and the backwater again damaged the mill and personal property of Hanes & Porch to the extent of $700. This last flood broke the railway embankment opposite the lumber yard of the intervener Colburn, and swept away a large quantity of lumber. Colburn was thereby damaged to the extent of $5,000. The mill of Hanes & Porch was erected in 1879. The culvert is what is called by engineers a "full center-arched culvert," of 9½ feet diameter, with walls 4 feet high under it, making an effective water way of about 73 feet. The culvert and embankment were built by the Toledo, Wabash & Western Railway, which was sold under foreclosure of a mortgage in 1876, by decrees of the United States circuit courts of Illinois, Indiana, and Ohio. The purchasers organized as the Wabash Railway Company in 1877, and that company was consolidated with the St. Louis, Kansas City & Northern Railway Company, and formed the Wabash, St. Louis & Pacific Railway Company, and the receiver here is the receiver of that company.

During 36 years that have elapsed since the building of the embankment and culvert in question, the waters of Fall branch have been backed up by the embankment on two occasions in such a way as to inflict serious damage. On several occasions the capacity of the culvert has been overtaxed for a short time, but, with the exceptions of the floods in May, 1886, and in July, 1888, no serious damage was done. While there is some conflict in the evidence, the receiver has shown by a clear preponderance of the evidence that the flood of May, 1886, following in the path of a cyclone of the day previous, and the flood of July, 1888, resulted from unusual, extraordinary, and unprecedented rainfalls. The fact that the interveners located the mill where they did 30 years after the railway embankment and culvert were built, with full knowledge, or with abundant opportunities for knowing, the extent of country drained by Fall branch, and the effect of ordinarily heavy rains upon it, shows that they at least supposed then, as the builders of the railway supposed, that the culvert was sufficient. Upon these facts the master found and reported that the receiver was not liable for the damages suffered by the interveners Hanes & Porch in May, 1886, and in July, 1888, nor for the damages sustained by the intervener Colburn in July, 1888.

To this report and finding, the interveners Hanes & Porch filed exceptions as follows: (1) The master has not correctly recited in his report the facts established by the evidence he reports, wherein he says that "during 36 years since the building of the em-

bankment and culvert in question the waters of Fall branch have been backed up on two occasions." The evidence reported by him shows, on the contrary, that it was backed up very many times more than "two occasions" during such period, and this without any conflict in the evidence. (2) For that what the master terms in said report "the floods of 1886 and 1888," and which he reports resulted from unusual, extraordinary, and unprecedented rainfalls, is not sustained by, and is contrary to, the evidence which he reports. Said rains were not unprecedented, as said evidence shows. (3) For that the finding upon the foregoing ground that the receiver is not liable for the damages, to wit, $1,300, which he correctly finds Hanes & Porch sustained by the flooding of their mill on said two occasions, is contrary to equity, and contrary to law and the evidence. (4) For that the master very erroneously finds by way of recital at the conclusion of said report that Hanes & Porch located their mill 30 years after the embankment and culvert were built, with full knowledge, or abundant opportunities for knowing, the extent of country drained, and the effect of ordinarily heavy rains. It shows, says said report, that they supposed then, as the builders of the railway supposed 30 years before, that the culvert was sufficient. (5) They except to the finding of the master that the flood which occasioned the injuries to petitioners was extraordinary, and the act of God. (6) They except to the conclusion that the injuries to petitioners were caused by the act of God. (7) They except to the finding that the petitioners were guilty of contributory negligence. (8) They except to the conclusion that the claims of petitioners be disallowed. The exceptions filed by the intervener Colburn are substantially a duplicate of the above.

Counsel for the receiver insist that the exceptions are not sufficiently formal and specific to authorize or require the court to review the findings of fact and conclusions of law reported by the master.

In my opinion, the exceptions are sufficient in form and substance to present for review the findings of fact and conclusions of law contained in the master's report. The report is accompanied by all the evidence on which the findings of the master are based for the very purpose of enabling the court to re-examine the questions of fact, as well as of law, involved in the case. In Foster v. Goddard, 1 Black, 506, where the exceptions were certainly no more formal and precise than those filed in this case, the court held them sufficient to bring up for examination all questions of fact and law arising upon the report of the master. The court says:

"All that is necessary is that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and law arising from the report of the master relative to that subject. The exceptions in this case are sufficiently full. They are in accordance with the experience of each member of the court in the administration of equity jurisprudence elsewhere."

While the exceptions are not artistically drawn, I think they are sufficient to raise the questions of law and fact argued by counsel for the exceptants. Story v. Livingston, 13 Pet. 359; 14 Amer. & Eng. Enc. Law, 947.

It is contended by counsel for the exceptants that the finding of the master that the injuries complained of resulted from unusual, extraordinary, and unprecedented rainfalls, without negligence on the part of the railway company or its receiver, is contrary to the evidence. This contention is met by counsel for the receiver with the assertion that the evidence touching the character of the rainfalls is conflicting, and in case of such conflict that the court cannot, or rather ought not to, review the evidence, and find the fact otherwise than reported by the master, even if the court should be of the opinion that the master's finding was contrary to the clear weight of the evidence. The conclusions of the master, depending on the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. Rep. 177; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. Rep. 894; Paddock v. Insurance Co., 104 Mass. 521; Richards v. Todd, 127 Mass. 167. The finding of facts by the master will be regarded as prima facie correct, and will not be set aside or modified unless it clearly appears from the evidence reported that there has been a material error or mistake made by him. Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. Rep. 351. The finding need not be wholly unsupported by the evidence to justify the court in modifying or setting aside his report. If the great preponderance of the evidence is in conflict with his finding, it ought not to be accepted by the court as binding upon it. His report, however, ought not to be modified or set aside for light or trivial reasons, nor unless, upon a careful review of the testimony, the court feels a clear and abiding conviction that some prejudicial error or mistake has been committed. After a careful study of the testimony, I am in doubt whether the master ought to have found that the rainfalls and floods in question were unprecedented, yet I do not feel such a clear and abiding conviction that he has fallen into error as would justify me in modifying or setting aside his report. He saw the witnesses face to face, he heard them testify, and he had an opportunity to form a more accurate judgment than I can from the testimony reported of their intelligence and candor, and their knowledge of the matters about which they testified. The master's finding that the rainfalls and floods resulting in the damages complained of were unusual and extraordinary is unquestioned.

It is, however, insisted that the receiver is responsible for damages from floods occasioned by unusual and extraordinary rainfalls, because they might have been foreseen and guarded against by the exercise of ordinary and reasonable foresight, care, and skill in the construction of a sufficient culvert and embankment.

A railroad company, acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its bridges and embankments, and is entitled to select a safe and massive structure, in preference to a lighter one, which would less obstruct the water. It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods. Bellinger v. Railroad Co., 23 N. Y. 42; McCleneghan v. Railroad Co., 25 Neb. 523, 41 N. W. Rep. 350; Railway Co. v. Gilleland, 56 Pa. St. 445; Baltimore & O. R. Co. v. Sulphur Spring Independent School-Dist., 96 Pa. St. 65; Sullens v. Railway Co., 74 Iowa, 659, 38 N. W. Rep. 545; Moore v. Railway Co., 75 Iowa, 263, 39 N. W. Rep. 390; Noe v. Railway Co., 76 Iowa, 360, 41 N. W. Rep. 42; Railway Co. v. Schaffer, 26 Ill. App. 280; Banking Co. v. Kent, 84 Ga. 351, 10 S. E. Rep. 965; Railway Co. v. Holliday, 65 Tex. 512; Railway Co. v. Pomeroy, 67 Tex. 498, 3 S. W. Rep. 722; Mills v. Railway Co., 13 S. C. 97; Railway Co. v. Adamson, 114 Ind. 282, 15 N. E. Rep. 5; Gray v. Harris, 107 Mass. 492; Mayor, etc., v. Bailey, 2 Denio, 433; Bailey v. New York, 3 Hill, 531. If, after all precautions have been made, excluding the idea of negligence, the overwhelming power which is technically called the "act of God" intervenes and works injury, the party is not responsible. It was so held where, after one had collected large pools of water on his land, a sudden and extraordinary rainfall, amounting to vis major, swelled the feeding stream, and swept away the embankments, resulting in damage to another. Bish. Non-Cont. Law, § 841; Nichols v. Marsland, L. R. 10 Exch. 255; Railway Co. v. Carvatenagarum, 9 Moak, Eng. R. 289. In Railway Co v. Carvatenagarum, 9 Moak, Eng. R. 289, it was held by the judges of the privy council that where it is the duty of the zemindar to maintain the tanks on his zemindary, which are a part of a national system of irrigation, recognized by the laws of India as essential to the welfare of the inhabitants, and the banks of a tank are washed away by an extraordinary flood without negligence on his part, he is not responsible for any damage occasioned by the overflow of the water. The court, distinguishing this case from Rylands v. Fletcher, infra, were of the opinion that the storing of the water in tanks for the purposes of irrigation was a lawful use, and, in such case, that the law only imposed upon the zemindar the duty of reasonable care and diligence in the construction and maintenance of the tanks; and, if the banks of a tank were washed away by an extraordinary flood, without concurring negligence, no right of action accrued to another who suffered damages occasioned thereby. The character of the storm causing the accumulation of water which breached the banks of the tank is thus described in the findings of the trial court:

"It is clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and for seventeen or eighteen hours before the accident there was a tremendous downpour of rain. Some of the witnesses said that they had not known such a fall of rain in twenty

years, and the plaintiff's third witness admitted from the time the breaches occurred until the Sunday before his examination, he had never seen such a downpour for a period of nearly five years."

On this state of facts it was held to have been such an extraordinary flood that the law would not charge the zemindar with negligence in failing to foresee and guard against it.

In the case of Rylands v. Fletcher, L. R. 3 H. L. 330, referred to, supra, the plaintiffs, owners of a mine, sued for damages the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through disused mining works into the plaintiffs' mine, and flooded it. It was held by the exchequer chamber and by the house of lords that the plaintiffs were entitled to damages against the defendant. The principle on which the judgment was rested is thus stated by Lord Cranworth:

"If a person brings and accumulates on his land anything, which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precaution he may have taken to prevent the damage; and the doctrine is founded in good sense, for when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound 'sic uti suo ut non laedat alienum.'"

As applied to water, the doctrine of this case has not passed unchallenged. Cooley, J., in Upjohn v. Board, 46 Mich. 542, 549, 9 N. W. Rep. 845, pointedly observes:

"If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases."

But, in any event, the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for an injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in Vaughan v. Railway Co., 5 Hurl. & N. 679, where it was held by the exchequer chamber that a railway company was not responsible for damage from fire kindled by sparks from its locomotive engine, in the absence of negligence, because it was authorized to use locomotive engines by statute. Chief Justice Cockburn observes:

"Where the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damages result from the use of such a thing, independently of negligence, the person using it is not responsible."

On the same principle, in the case of Blyth v. Water Works Co., 25 Law J. Exch. 212, it was decided that a waterworks company laying down pipes by a statutory power was not liable for damages occasioned by water escaping in consequence of a fire plug being forced out of its place by a frost of unusual severity. On the other hand, in Jones v. Railway Co., L. R. 3 Q. B. 733, it was held that a

railway company which had not express statutory power to use locomotive engines was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived. The culvert and embankment in question were built by virtue of statutory power, so that the doctrine of Rylands v. Fletcher, and other cases following, is inapplicable to the present case.

The rule is perfectly well settled in this country that the owner of a dam or embankment must use ordinary and reasonable foresight, care, and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods; but his liability extends no further, and he is not held responsible for inevitable accidents, nor for injuries occasioned by extraordinary floods, which could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill. Lapham v. Curtis, 5 Vt. 371; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle, 9; Bell v. McClintock, 9 Watts, 119; Navigation Co. v. Coon, 6 Pa. St. 379; Lacy v. Arnett, 33 Pa. St. 169; Casebeer v. Mowry, 55 Pa. St. 419; Knoll v. Light, 76 Pa. St. 268; Mayor, etc., v. Bailey, 2 Denio, 433; Inhabitants of Shrewsbury v. Smith, 12 Cush. 177; Inhabitants of Wendell v. Pratt, 12 Allen, 464; Smith v. Canal Co., 2 Allen, 355; Gray v. Harris, 107 Mass. 492; Inhabitants of China v. Southwick, 12 Me. 238; Hoffman v. Water Co., 10 Cal. 413; Everett v. Tunnel Co., 23 Cal. 225; Proctor v. Jennings, 6 Nev. 83; Ames v. Manufacturing Co., 27 Minn. 245, 6 N. W. Rep. 787; Hydraulic Co. v. Boyer, 67 Ind. 236.

There is no liability when a suitable culvert or embankment, which has been properly constructed and kept in repair, breaks, or proves otherwise insufficient, and causes injury to lands above or below, because of an extraordinary flood or other act of God, or when, in consequence of great and exceptional floods, without concurring negligence, it injures a landowner above or below, unless liability may arise from the terms of a statute by which the work is expressly authorized. Livingston v. Adams, 8 Cow. 175; Noyes v. Shepherd, 30 Me. 173; Pollett v. Long, 56 N. Y. 200; Tenney v. Ditch Co., 7 Cal. 335; Campbell v. Mining Co., 35 Cal. 683; Wolf v. Water Co., 10 Cal. 541; Frye v. Moor, 53 Me. 583; Fraler v. Water Co., 12 Cal. 555; Weiderkind v. Water Co., 65 Cal. 431, 4 Pac. Rep. 415; Wright v. Holbrook, 52 N. H. 120; Washburn v. Gilman, 64 Me. 163; McArthur v. Canal Co., 34 Wis. 139. The owner of a culvert or embankment erected on his own land is responsible for all injury done by it to the land or property of his neighbor arising from the usual and ordinary and expected freshets occurring in the stream; but he is not responsible for damage occasioned by those great and sudden visitations of wind or water or other convulsions of nature, whose occurrence cannot be anticipated, and whose devastating force cannot be guarded against by the exercise of ordinary foresight, care, and skill. McCoy v. Danley, 20 Pa. St. 85, 57 Amer. Dec. 680, and note; Rodgers v. Railroad Co., 67 Cal. 607, 8 Pac.

Rep. 377; Young v. Leedom, 67 Pa. St. 351; Moore v. City of Los Angeles, 72 Cal. 287, 13 Pac. Rep. 855; Brown v. Atlanta, 66 Ga. 71; Verran v. Baird, 150 Mass. 141, 22 N. E. Rep. 630; Rich v. Improvement Co., 56 Wis. 287, 14 N. W. Rep. 191; Railroad Co. v. Reeves, 10 Wall. 176. The measure of diligence required by the law is that the character and size of the stream, the extent and situation of the adjoining country drained by it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them. Ordinary care and skill does not require the occurrence of cyclones, cloud-bursts, or earthquakes to be foreseen or guarded against, though it is known that they have many times happened, and that they will certainly recur. In every case of injury by floods it is not so much the question whether like floods have occurred, as it is whether the particular flood was so sudden and overwhelming as to sweep away such structures as prudent and skillful men exercising ordinary care and foresight have found by experience to be sufficient to resist all such floods as are liable to occur. The culvert and embankment in question had stood for more than 30 years, without causing serious injury, or causing complaint. The conduct of these claimants, the one in building his mill above, and the other in placing his lumber yard below, the embankment, when, if the culvert and embankment were insufficient, they were certain to suffer damage, is entitled to some weight in determining the responsibility of the receiver.

But it is said if the embankment had not been raised, or if the culvert had been constructed of the same width as the low land through which the stream flowed, the rainfall and consequent flood might not have occasioned the damage complained of. The embankment and culvert may have been one of a series of causes to which the injury may have been indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rainfall nor the cyclone nor the cloud-burst was caused by the embankment or culvert. These had continued unimpaired without causing serious injury for more than 30 years preceding the accident. Such tremendous and extraordinary downpours of rain as resulted in the washing away of the embankment, with the consequent damage, could not have been foreseen or guarded against by the exercise of ordinary foresight, care, and skill. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, and where that which is attempted to be charged was in itself innocent and lawful. The law affords no encouragement to speculations of this sort. It rests upon the maxim, "causa proxima non remota spectatur."

Another reason is urged why judgment ought to be entered for the receiver, as recommended by the master, even if his finding should be held to be erroneous on the question hereinbefore dis-

cussed. The master finds and reports that the embankment and culvert were built by the Toledo, Wabash & Western Railway in 1855 or 1856; that this railway was sold by decree and order of the United States circuit courts of Illinois, Indiana, and Ohio to certain purchasers, who organized the railway so purchased as the Wabash Railway, and that that company consolidated with the St. Louis, Kansas City & Northern Railway Company, and formed the Wabash, St. Louis & Pacific Railway Company, of which last-named company the respondent herein is the receiver. Notwithstanding exceptions have been filed to portions of the master's report, still if, upon the facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions ought to be disregarded or overruled, and judgment awarded on the undisputed findings of fact. Is the receiver of the Wabash, St. Louis & Pacific Railway Company liable to respond to the claimants for damages resulting from the construction of an insufficient culvert and embankment by the Toledo, Wabash & Western Railway Company, a remote owner of the railway? Assuming, without deciding, that the receiver is answerable for whatever damages the Wabash, St. Louis & Pacific Railway Company would have been liable if there had been no receivership, the question still recurs, can the railway be held responsible for damages resulting from the failure of its remote grantor to construct a sufficient embankment and culvert over Fall branch? The nuisance, if there was one, had been erected before the conveyance of the railway to its present owners, by a previous owner, and all that the receiver or the railway he represents has done is merely to continue the culvert and embankment as they were at the time the title was acquired. The subject has been fully considered by the courts both in England and in this country, and, while there is not entire harmony in the views expressed by them, the rule to be deduced from their decisions is that an action on the case for a nuisance lies both against the person who originally committed it and against the person in the occupation or possession of the premises, who suffers it to continue, for the reason that the continuance of that which was originally a nuisance is a new nuisance; but, as the purchaser of land might be subject to great injustice if made responsible for the consequences of a nuisance of which he was ignorant, and for damages which he never intended to occasion or continue, it has been held ever since Penruddock's Case, 5 Coke, 101, that where a party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought. McDonough v. Gilman, 3 Allen, 264; Woodman v. Tufts, 9 N. H. 88; Noyes v. Stillman, 24 Conn. 15; Conhocton Stone Road v. Railroad Co., 51 N. Y. 573; Pinney v. Berry, 61 Mo. 359; Dickson v. Railroad Co., 71 Mo. 575; Pillsbury v. Moore, 44 Me. 154; Pierson v. Glean, 14 N. J. Law, 36; Carleton v. Redington, 21 N. H. 291; Add. Torts, § 280, p. 242; Wood, Nuis. § 822; Ror. R. R., p. 707; Nichols v.

City of Boston, 98 Mass. 43; West v. Railway Co., 8 Bush, 404, 408; Cooley, Torts, p. 611; Walter v. Commissioners, 35 Md. 385; Dodge v. Stacey, 39 Vt. 558; Thornton v. Smith, 11 Minn. 15, (Gil. 1;) Slight v. Gutzlaff, 35 Wis. 675; Groff v. Ankenbrandt, 124 Ill. 52, 15 N. E. Rep. 40; Ray v. Sellers, 1 Duv. 254; Grigsby v. Water Co., 40 Cal. 396. It therefore follows that the mere continuance of the alleged nuisance on the railway company's land, without any finding of such knowledge or notice of its existence as to charge the company or its receiver with fault for its continuance, is not sufficient to create any right of action against the company or its receiver.

The exceptions will therefore be overruled, and judgment will be entered on the master's report in favor of the receiver and against the exceptants for costs.

ENGLISH et al. v. SPOKANE COM. CO.

(Circuit Court of Appeals, Ninth Circuit. July 24, 1893.)

No. 82.

1. SALE—WARRANTY—EVIDENCE.
   Defendant, in Spokane Falls, telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." *Held*, that plaintiffs warranted the eggs to be strictly fresh at Omaha, and was not liable for deterioration naturally resulting during transportation.
2. SAME.
   Defendant, in Spokane Falls, telegraphed plaintiffs, in Omaha, inquiring the price of five car loads of "good potatoes," and, after some disagreement as to price, the sale was made, and the potatoes shipped to defendant. *Held*, that plaintiffs gave an implied warranty that the potatoes were of good, merchantable quality when shipped.
3. SAME—WAIVER OF WARRANTY.
   Plaintiffs shipped potatoes from Omaha to defendant at Spokane, with an implied warranty of their quality when shipped. When they arrived, defendant, at its own request, was allowed to inspect them before acceptance. *Held*, that the inspection was not a waiver of the warranty.
4. SAME—REMEDY OF BUYER UNDER WARRANTY.
   Defendant, on finding the potatoes damaged, could return them, and rely on the warranty, or keep them, and dispose of them in good faith, and hold plaintiffs responsible for his damages; but it was his duty to notify plaintiffs promptly of the defect.
5. DAMAGES—MEASURE OF—PROFITS.
   In such a case the profits defendant would have made on a resale are not recoverable as damages.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

At Law. Action by Paul A. English and Arthur F. English, copartners, against the Spokane Commission Company, for payments alleged to be due upon a contract of sale. Defendant alleged a breach of warranty, and set up a counterclaim. Judgment was

given for plaintiffs, but a motion for a new trial was granted, (48 Fed. Rep. 196,) and judgment thereafter given for defendant. Plaintiffs bring error. Reversed.

Aylett R. Cotton, (H. C. Brome, on the brief,) for plaintiffs in error.

George Turner, (Turner, Graves & McKinstry, on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The plaintiffs in error brought this action to recover of and from the defendant in error the sum of (1) $2,180.20 for goods, wares, and merchandise sold and delivered to defendant, consisting of potatoes and cheese; (2) $121.49 expenses incurred in preparing the cars in which the potatoes and cheese were shipped; (3) $6.80 advanced for defendant; making a total of $2,308.49.

The defendant admits the correctness of these amounts, and pleads as a counterclaim thereto (1) damages in the sum of $995.25 for breach of contract in delivering a car load of strictly fresh eggs at the price of 14 cents per dozen; (2) damages for breach of contract in delivering potatoes, in the sum of $2,325.41; and prayed judgment for $3,300.66.

A jury trial resulted in a verdict in favor of the defendant for the sum of $992.17.

The plaintiffs are commission merchants, residing at Omaha, Neb. The defendant is a corporation engaged in business as a produce and commission merchant at Spokane Falls, Wash.

The contracts between the parties in relation to the eggs and potatoes, which are the only articles in dispute, were made by telegrams, as follows, viz.: On January 24, 1890, the defendant sent a telegram from Spokane Falls to the plaintiffs at Omaha: "Wire price on five cars good potatoes in burlap sacks. Car strictly fresh eggs, new cases." On January 25, 1890, plaintiffs sent a reply telegram: "Five cars good potatoes, burlap sacks, twenty-eight. Car fresh eggs, new cases, sixteen. Track here for immediate acceptance. Answer." On January 30, 1890, the defendant answered: "If eggs strictly fresh, fourteen cents; potatoes twenty-five cents. Answer if accepted." January 31, 1890, plaintiffs answered: "Offer eggs accepted. Will ship same route. Will consider offer potatoes." The price of potatoes was subsequently agreed upon. The car load of eggs was consigned to the plaintiffs at Spokane Falls, the shipping bill reading: "English Bros. Notify Spokane Com Co.;" and the eggs were paid for upon delivery. When the potatoes arrived at Spokane Falls the defendant telegraphed plaintiffs: "Wire bank Spokane to deliver us bills of lading. Must inspect potatoes before paying drafts." The bills of lading, in pursuance with this request, were delivered by plaintiffs' order to the defendant, and the potatoes were

inspected by the defendant when taken off the cars at Spokane. The testimony upon the part of the plaintiffs tended to show that the eggs were strictly fresh, and the potatoes sound and good, when placed in the cars at Omaha, and that the eggs were liable to be injured while being transported on the railroad. The testimony offered upon the part of the defendant tended to show that the eggs were rotten and unmerchantable when delivered at Spokane, and that the potatoes were of poor quality when shipped, were poorly packed and were frozen and unmerchantable when they arrived at Spokane.

The assignments of error, which are quite numerous, relate principally to alleged errors of the court in instructing the jury in relation to the warranty of the goods by plaintiffs, and the rule as to the measure of damages. The instructions in relation to the warranty were to the effect that there was an express warranty upon the part of the plaintiffs that the eggs should be strictly fresh at the place of delivery, to wit, at Spokane Falls, and that there was an implied warranty that the potatoes should be of good, merchantable quality, delivered at Spokane. Upon the question of damages the court instructed the jury (1) as to the eggs, that, "if there was any such negligence in the selection of the eggs to be shipped as amounted to a breach of warranty, so that the per cent. loss was greater than ought to have been if due care had been exercised in shipping the goods, then the plaintiffs are liable to the defendant for the price which they received for the eggs, and, in addition to that, for the expenses that were incurred by the defendant in re-sorting and candling them, and separating the good from the bad, and whatever expense they incurred in the way of hauling to and from their customers, and the loss of profit which they would have made on the eggs if they had been good and according to the contract;" and (2) as to the potatoes: "You will include in whatever damages you may allow the defendant for the potatoes the full contract price, the amount of the freight or expenses incurred by the defendant in hauling, assorting, separating them, and any other expenses incurred in connection with the potatoes by reason of the bad condition of them. Add a loss of profits which they could have made by a resale of the potatoes if they had been good."

1. What was the contract in relation to the eggs? We are of opinion that the warranty expressed in the telegrams related to the condition of the eggs placed on board the cars at Omaha. The plaintiffs would not be liable for any deterioration of quality rendering them unmerchantable at Spokane, where they were delivered to the defendant, if such deterioration resulted necessarily from the transit. Bull v. Robinson, 10 Exch. 342; Mann v. Everston, 32 Ind. 356; Leggat v. Brewing Co., 60 Ill. 158; 2 Schouler, Pers. Prop. § 355; 2 Benj. Sales, (8th Ed.) § 944, note 15; Id. § 991. It was therefore erroneous to instruct the jury that plaintiffs "were obliged by the terms of their contract that the eggs should be strictly fresh at the place of delivery." The telegrams referred

to the price at Omaha by the car load. The eggs were to be strictly fresh. Defendant first asked the price of "car strictly fresh eggs, new cases," wishing, of course, to know at what price the plaintiffs were willing to sell a car load of strictly fresh eggs at Omaha. The answer to this inquiry gave the price at 16 cents per dozen. Then came the offer from the defendant that if the eggs were strictly fresh it would give 14 cents. This offer was accepted. The only controversy was as to the price. The words, "track here for immediate acceptance," found in one of the telegrams, may be considered somewhat obscure and indefinite. They were perhaps intended to imply that the plaintiffs had the goods then on hand in cars on the track at Omaha, for immediate acceptance; but, be that as it may, the words have no special significance as to the meaning of the contract between the parties. It is perfectly clear that the warranty, as expressed by the plaintiffs and as understood by defendant, had reference to the condition of the eggs in the car at Omaha. In the very nature of things, this must have been the intention and understanding of both parties. Eggs transported by rail, however fresh when placed upon the cars, are liable to deteriorate to some extent upon the journey. The plaintiffs contracted to ship a car load of "strictly fresh eggs" from Omaha, the eggs to be properly packed in new cases, and placed in the car so to be safely transported to the defendant at Spokane; and for any breach in this respect, if there was any, they would be liable in damages. They cannot be held liable for any loss in the quality of the eggs except such as arose by a breach of their contract. They are not liable for the ordinary and necessary shrinkage in quality incident to the handling of the eggs, and the deterioration which would naturally occur in their transportation to the place of delivery.

In Bull v. Robinson, supra, the court said:

"A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other; or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission."

In Mann v. Everston, supra, which was an action for breach of warranty in the sale of a quantity of kiln-dried corn meal, for shipment from Indiana to New Orleans, the court sustained an instruction given to the jury, that, if the meal was sold for shipment to a southern market, a warranty would be implied that it was properly packed and fit for such shipment, and such as was contemplated by the purchase, but not that it would continue sound for any particular or definite length of time.

2. We are of opinion that there was an implied warranty that the potatoes should be of good, merchantable quality when shipped from Omaha. Benj. Sales, (8th Ed.) §§ 988, 989, 993; Schouler, Pers. Prop. § 354 et seq.; Bridge Co. v. Hamilton, 110 U. S. 114, 3

Sup. Ct. Rep. 537, and authorities there cited; Pease v. Sabin, 38 Vt. 432. The court properly instructed the jury that:

"The circumstances under which the contract was made placed upon the plaintiffs the obligation to use due care in the selection of merchantable potatoes, and to ship to defendant only sound, merchantable articles. There was no express warranty that the potatoes were of any particular quality, but the manner in which the contract was made placed the obligation upon the plaintiffs to ship only such potatoes as were sound, and fit for sale, and not frozen. The potatoes being shipped and tendered to the defendant at Spokane Falls, or at Walla Walla, which is about the same thing, under the circumstances of this case, will be considered as a tender on the part of the plaintiffs of performance on their part of the contract; and that tender, made under the circumstances shown, entitled the defendant, in case the potatoes were not really good, to an option either to reject the tender entirely, and rescind the contract, or the right to take the potatoes, and make the best they could out of them, by sorting them, the good from the bad, and accept the part that were good and claim damages for the loss sustained for the breach of the contract as to those that were bad. In accepting or receiving the potatoes, after learning that part of them were frozen or unfit for sale, if they were, the defendant was obliged to act fairly with the plaintiffs, to have the goods sorted with the least amount of expense for which it could reasonably be done, have them fairly sorted, and allow the plaintiffs credit for all that were good. They were also obligated to act fairly in the matter of notifying the plaintiffs promptly of the condition in which they found them. And in this connection there is a dispute between the parties as to whether the potatoes were bad or not. The conduct of the defendant in giving full information, and giving it promptly or otherwise, is a circumstance to be taken into account along with the other question in determining the quality of the potatoes. If the defendant received the potatoes, and remained silent as to the frozen ones, that would be a strong circumstance against their pretense that they were bad. If, in giving plaintiffs notice, they failed to give as full information as they should have done, or delayed in giving the information, that would be a circumstance to be taken into account in determining what the fact is as to whether it is a breach of warranty by reason of the potatoes being frozen."

The contention of plaintiffs that because defendant, upon the arrival of the potatoes at Spokane, was, at its own request, permitted to inspect the potatoes before paying for them, there was no implied warranty; that the inspection was a waiver of the warranty; that under the facts of this case the defendant must be held to have accepted the potatoes at Spokane in fulfillment of the plaintiffs' contract; and that the rule of caveat emptor applies,—cannot be sustained. The general rule of law is that, where a buyer of personal property, goods, wares, and merchandise has an opportunity to inspect the same at the time of purchase, caveat emptor applies. "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies." Barnard v. Kellogg, 10 Wall. 388; Bridge Co. v. Hamilton, 110 U. S. 113, 3 Sup. Ct. Rep. 537. But wherever the seller has given an express warranty, or the law implies a warranty from the circumstances, or the buyer can bring fraud home to the party from whom he purchased, the doctrine of

caveat emptor fails of application. Schouler, Pers. Prop. 322. The contract for the potatoes was made by telegrams. The defendant had no opportunity to inspect them at the time of the purchase. The contract was executory. The secretary of the defendant testified, among other things, in answer to questions, as follows:

"Question. What was the purpose of your sending that telegram asking the right to inspect? Answer. We wished to know whether we were getting what we were buying. Q. Did you send that telegram with a view of rejecting the entire car load if they were not what you ordered? A. No, sir; because we had four or five hundred dollars invested in each car."

There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods. 2 Schouler, Pers. Prop. §§ 581–583; 2 Benj. Sales, § 977, note 29 et seq.; Id. §§ 1353, 1354, 1356, note 11; Babcock v. Trice, 18 Ill. 420; Best v. Flint, 58 Vt. 543, 5 Atl. Rep. 192; Polhemus v. Heiman, 45 Cal. 573; Hege v. Newsom, 96 Ind. 431; Lewis v. Rountree, 78 N. C. 323; English v. Commission Co., 48 Fed. Rep. 197, and authorities there cited.

3. This brings us to the question of damages as set forth in the last clause of the instructions of the court, that the jury had the right to add a "loss of profits" which the defendant could have made by a resale of the eggs and potatoes if they had been good. We are of opinion that the court erred in adding this clause to the instructions, that the error was prejudicial to the plaintiffs, and that for this error a new trial should be granted. The general rule of damages for breach of warranty as to quantity or quality applicable to the facts of this case is the difference between the actual value of the goods at the time of the sale and what the value would have been if the goods had conformed to the warranty. The authorities in support of this rule are very numerous, and many of them are cited in 2 Suth. Dam. § 670; 2 Sedg. Dam. (8th Ed.) § 762; 2 Schouler, Pers. Prop. § 585. As the sale was made at Omaha, and the goods were to be delivered at Spokane, the defendant was entitled to recover the difference between the contract price and the value of the goods in the market at Spokane at the

time of the delivery. The object of the law in awarding damages is to make the injured party whole. The damages must be shown with certainty, and not left to speculation or conjecture. The law excludes uncertain and contingent profits. "The measure of damages recoverable for breach of warranty of quality is, in general," as stated in Schouler's Personal Property, supra, "the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon. * * * The rule of damages for breach of warranty is the difference between the sound value of the thing as warranted and its actual value. Such reasonable expenses as the buyer has incurred in consequence of the breach may be added in making up the estimate. * * * The buyer may recover not only for the direct and natural consequence of the seller's failure to perform according to agreement, but for such damages besides as both parties might reasonably be supposed to have foreseen, at the time of the contract, would flow from such breach. * * * The price at which the goods were sold at the place of delivery may be evidence tending to show the amount of damages, but it does not furnish the decisive test." The authorities cited in support of the instructions of the court are cases where the vendor of the goods knows at the time of sale that the purchaser has a contract for a resale at an advanced price, and that the purchase of the goods is made to fill such contract, and the sale is made by the vendor to enable the purchaser to comply with his contract. In such cases it is held that the profits which would accrue to the purchaser upon a resale may fairly be said to have entered into the contemplation of the parties in making the contract. Messmore v. Lead Co., 40 N. Y. 422; Thorne v. McVeagh, 75 Ill. 81; Carpenter v. Bank, 119 Ill. 352, 10 N. E. Rep. 18.

4. The objections urged as to the ruling of the court in admitting certain exhibits in evidence are of such a character as are not liable to arise upon a retrial, and will not, therefore, be considered.

The judgment of the circuit court is reversed, and cause remanded for a new trial.

JONES et al. v. SHAPERA.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 110.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—SUIT BY ASSIGNEE OF NOTE.
Under the provision of the judiciary act of 1887–88, that the circuit courts shall not have jurisdiction of any action on a promissory note or other chose in action in favor of an assignee, unless such suit might have been maintained if no assignment had been made, the jurisdiction is to be determined according to the status at the time the suit is brought; and hence an assignee of a promissory note may sue on the same in the federal courts if the payee or first holder is then a resident of a different state from defendant, although he was a resident of the same state when the assignment was made.

2. SAME—ALLEGATION OF DIVERSE CITIZENSHIP.
To show jurisdiction on the record where the suit is on a note payable to an individual or order, the plaintiff, if an assignee of the payee, must allege a proper citizenship on the part of his assignor. But where the suit is by a subsequent holder on a note payable to bearer the plaintiff may disregard the original holder, leaving the citizenship of the latter, if affecting the jurisdiction, to be pleaded by defendant.

3. EVIDENCE—PLEADING—DEFENSE BY INDORSER OF PROMISSORY NOTE—AFFIDAVIT.
Rev. St. Tex. art. 1265, requires that where a suit shall be instituted by an assignee or indorsee of a written instrument the indorsement shall be regarded as fully proved, unless defendant deny in his plea that the same is genuine, and file therewith an affidavit stating that he believes, or has reason to believe, that such indorsement is forged. *Held*, that in a suit upon a promissory note alleged to have been made by J. and "J. & Brother," and indorsed in the same manner, when the answer admitted the signing and indorsement as laid, and defendant failed to file an affidavit as required, an offer by defendant to prove that the note had been originally indorsed "J. & Brandon" was properly excluded.

4. NEGOTIABLE INSTRUMENTS—INDORSEMENT—NOTE PAYABLE TO BEARER.
A promissory note payable to the maker's order, and indorsed by him in blank, is, in legal effect, a note payable to bearer, and is transferable by delivery.

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

Suit by Charles Shapera against Travis F. Jones and W. H. Jones upon a promissory note. Judgment for plaintiff. Defendants bring error. Affirmed.

At the trial below, defendants offered to show by T. F. Jones, one of the defendants, sworn as a witness, that he signed and indorsed said note "Jones & Brandon," and not "Jones and Brother;" that there was when said note was executed a firm of Jones & Brandon, of which witness and J. H. Brandon were members, and of which W. H. Jones was not a member; and that there was not, and never had been, a firm of Jones & Brother,—to all of which evidence plaintiff objected, and it was not allowed.

The Revised Statutes of Texas provide as follows:

"Art. 1265. An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit: * * * (8) A denial of the execution by himself [defendant] or by his authority of any instrument of writing upon which any pleading is founded in whole or in part and charged to have been executed by him or by his authority, and not alleged to have been lost or destroyed. (9) A plea denying the genuineness of the indorsement or assignment of a written instrument as required by article 271."

"Art. 271. When a suit shall be instituted by an assignee or indorsee of any written instrument the assignment or indorsement thereof shall be regarded as fully proved unless the defendant shall deny in his plea that the same is genuine, and moreover, shall file with the papers in the cause an affidavit stating that he has good cause to believe and verily does believe that such assignment or indorsement is forged."

Statement by PARDEE, Circuit Judge:

The defendant in error, Charles Shapera, an alien residing in Quebec, Canada, brought suit in the circuit court against W. H. Jones and Travis F. Jones, as partners composing the firm of Jones & Bro., and against Travis F. Jones individually, citizens of the state of Texas, and in his petition alleged "that on or about March 9, 1892, defendants, for a valuable consideration, executed and delivered to plaintiff their certain promissory note as follows, to wit:

"'Waco, Texas, March 9, 1892.

"'Ninety days after date, without grace, $3,000, for value received, we promise to pay to the order of ourselves at the Provident National Bank, at Waco, Texas, three thousand and no-100 dollars, with interest at the rate of ten per cent. per annum from date until paid, and ten per cent. additional on amount of principal and interest unpaid for attorneys' fees if placed in the hands of an attorney for collection. This note is secured by pledge of the securities mentioned on the reverse hereof; and in case of its nonpayment, or should the drawer hereof, when called on, refuse or fail to keep the margin hereon good, the holder is hereby authorized to sell the said securities at public or private sale, without recourse of legal proceedings, and to make any transfers that may be required, applying proceeds of sale towards the payment of within note.

[Signed] "'Travis Jones.
"'Jones & Brother.'

"Said note before said delivery was indorsed as follows:

"'Certificate Nos. 16, 26, and 33, of ten shares each, of the capital stock of the Provident Investment Company, of Waco, Texas.

"'Travis F. Jones.
"'Jones & Brother.'

"And by the execution and delivery of said note defendant became liable and promised to pay plaintiff the sum of $3,000 on June 7, 1892, with ten per cent. interest per annum from March 9, 1892, at the place mentioned in said note, and 10 per cent. additional on amount of principal and interest unpaid for attorneys' fees if placed in the hands of an attorney for collection, whereby said attorneys' fees have also become due, yet, though often requested, defendants refuse to pay the same, to plaintiff's damage four thousand dollars."

To which petition the plaintiffs in error, defendants below, filed the following original answer: "Now, at this time come the defendants for the purpose of this demurrer, and plead to the jurisdiction of this court over them, and for that purpose only, and demur to the jurisdiction of this court because the plaintiff's petition shows that this court hath no jurisdiction over these defendants, nor of the subject-matter of this suit; and, especially demurring to the jurisdiction of this court, these defendants show that the bill of exchange or promissory note sued on herein is payable to bearer, and payable in the state of Texas, and in the city of Waco, was made, indorsed, and delivered in said city of Waco, and is to all intents and purposes domestic paper, payable to bearer, and this court hath no jurisdiction to enforce the collection of such paper. But, not waiving said general and special demurrer, these defendants come and further show that the note sued on herein was made, executed, and delivered in the city of Waco, in the state of Texas: that the consideration for the execution thereof was received in the city of Waco, in the state of Texas, and the money borrowed thereon was borrowed from M. N. Rosenthal, and said note was delivered to said M. N. Rosenthal in said city of Waco, after it had been indorsed in blank on the back thereof by these defendants. That they are informed and believe, and now here so charge, that said note is the property of the said M. N. Rosenthal, and was his property when delivered by these defendants, who was at said time a resident citizen of the state of Texas, having his home and domicile in Waco, McLennan county. And these defendants further allege, and so charge, and they are informed and believe, that the note sued on herein is now the property of the said M. N. Rosenthal, and that this suit is brought in the name of said Charles Shapera, plaintiff, who claims to be an alien, and subject to the kingdom of Great Britain and Ireland, and sues for the purpose of attempting to improperly confer jurisdiction on this court; and that said allegations that said Charles Shapera is the owner of said note are false and fraudulent, and made for the purpose of attempting to confer jurisdiction herein."

The case was tried on the issues thus made, and from an adverse verdict and judgment the plaintiffs in error have brought the case to this court for

review, assigning errors as follows: "(1) The court erred in instructing the jury to find for the plaintiff the amount of note, interest, and attorneys' fees, and no further, because there was a sufficient plea showing that the court had no jurisdiction, and that the same was supported by the evidence, as manifest from bill of exceptions No. 1; it appearing therefrom that Rosenthal took and transferred the note while a citizen of Texas. (2) The court erred in the admission of the note in evidence over defendants' objection, because there was a fatal variance between plaintiff's pleadings and the note, as shown by inspection of the same, as shown by bill of exceptions. (3) The court erred in excluding the testimony of the defendant and witness T. F. Jones that said note so introduced was not made and indorsed 'Jones & Brother,' but by Jones & Brandon, and that there was at the time said note was made a firm of Jones & Brandon, composed of witness and W. H. Brandon, of which W. H. Jones was not a member, and that there was no firm of Jones & Brother, and had not been, as shown by bill of exceptions. (4) The court erred in the refusal of the special charges requested by defendants as to the jurisdiction set out in defendants' bill of exceptions, in substance that, if Rosenthal acquired the paper while a citizen of Texas, the jury would find for defendants on their plea to the jurisdiction."

L. C. Alexander, for plaintiffs in error.
S. L. Samuels, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) The so-called "original answer" is made up of a demurrer to the jurisdiction on the ground that the paper sued on is payable to bearer and payable in the state of Texas, and was made and indorsed and delivered in Texas, and is to all intents and purposes domestic paper, and a plea to the jurisdiction on the ground that the plaintiff was not the real owner of the note sued on, but the same belonged to a citizen of Texas, the transfer being wholly fraudulent and collusive for the purpose of conferring jurisdiction. The demurrer seems to have been abandoned. The record shows no ruling upon it, and no question about it is made in this court. Evidence seems to have been taken on the plea; and, as recited in the first bill of exceptions, it was shown that the note sued on was made and delivered to M. N. Rosenthal for value on its date shown by the pleadings; that at the time said Rosenthal was a citizen of the state of Texas, and while still a citizen of said state transferred said note by delivery to plaintiff for value; and it was further shown that in July, 1892, thereafter, said Rosenthal became a citizen of the state of Illinois, and has ever since been a citizen and resident of that state; and thereupon the defendants requested the court to instruct the jury:

"(1) If you believe from the evidence that M. N. Rosenthal loaned to T. F. Jones money as his own in the state of Texas, for which the note in evidence was given, and said Rosenthal was at the time a citizen of the state of Texas, you will find for the defendants on their plea to the jurisdiction.

"(2) If you believe that at some time before the date of the note sued on another note was executed and delivered to said Rosenthal by defendants for money loaned, and that he was a citizen of Texas, and that thereafter the present note sued on was so executed and delivered by defendants to said

Rosenthal in lieu of said first note in part, and that said Rosenthal was a citizen of Texas at the time, you will find for the defendants on their plea to the jurisdiction."

—Which instructions were refused by the court.

There can be no question that these instructions were properly refused. The second one does not seem to be at all applicable to the case, so far as any evidence was before the court and jury to support it. The first, if applicable to the evidence, is not sufficiently definite and specific to be adopted as a proposition of law. The real question presented by the evidence offered in support of the plea is whether, as the note sued on was originally executed and delivered by the makers and indorsers to Rosenthal, then a citizen of Texas, who afterwards, and while a citizen of Texas, transferred and delivered the same for value to the plaintiff, the said Rosenthal thereafter and before the institution of this suit removing to and becoming a citizen of the state of Illinois, the court had jurisdiction on the ground of adverse citizenship to entertain the plaintiff's suit. The judiciary act of 1887 and 1888 provides as follows:

"Nor shall any circuit court nor district court have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless said suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

In this present case, if no transfer of the note sued on had been made, Rosenthal would have been the owner and holder of the same; and as he was a citizen of the state of Illinois on December 2, 1892, (the date of suit,) he could have brought suit in the court below. Kirkman v. Hamilton, 6 Pet. 20.

The contention of the plaintiff in error is that, as at the time when the transfer was actually made, Rosenthal was a citizen of Texas, the jurisdiction is to be determined by the state of facts then existing, and that Rosenthal's subsequent change of citizenship cannot confer jurisdiction on the court in behalf of the transferee. In White v. Leahy, 3 Dill. 378, a citizen of Missouri, and assignee of a note, brought suit thereon against the maker, a citizen of Kansas. The payee, when the note was made, and when he indorsed it to plaintiff, was also a citizen of Kansas, but when the suit was brought he (the payee) was a citizen of Texas; and the court held:

"If no assignment of this note had been made, the assignor might, being at the time when the suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignor does not exist at the time the suit is commenced the court has jurisdiction if the case involves the requisite amount, and is between a citizen of the state where suit is brought and a citizen of another state."

Chamberlain v. Eckert, 2 Biss. 126, and Thaxter v. Hatch, 6 McLean, 68, are to the same effect.

In the case of Mollan v. Torrance, 9 Wheat. 537, which was a case involving the jurisdiction under section 11 of the judiciary act of 1789, in a suit brought by an indorsee of a promissory note

against the indorser, a resident of the same state as the maker of the note, Chief Justice Marshall says:

"It is quite clear the jurisdiction of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events."

See, also, Bradley v. Rhines' Adm'r, 8 Wall. 393.

It seems to be recognized in all the decisions of the supreme court to which our attention had been called that, where in any suit brought by an assignee of a chose in action the citizenship of the assignor was material, it has always been considered with reference to the time when the action was commenced, and this whether the case arose under the eleventh section of the act of 1789, the judiciary act of 1875, or the judiciary act of 1887 and 1888. See Morgan v. Gay, 19 Wall. 82; Metcalf v. Watertown, 128 U. S. 588, 9 Sup. Ct. Rep. 173; Parker v. Ormsby, 141 U. S. 85, 11 Sup. Ct. Rep. 912.

The note sued on in this case, being payable to the makers' order, and indorsed by them in blank, is, in legal effect, a note payable to bearer. Daniel, Neg. Inst. § 130; Bank v. Barling, 46 Fed. Rep. 357; Steel v. Rathbun, 42 Fed. Rep. 390. In Bullard v. Bell, 1 Mason, 247, Mr. Justice Story said:

"A note payable to bearer is often said to be assignable by delivery, but in correct language there is no assignment in the case. It passes by mere delivery, and the holder never takes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer. It is therefore payable to any person who successively holds the note bona fide; not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer."

This doctrine is indorsed by the supreme court in Thompson v. Perrine, 106 U. S. 589–593, 1 Sup. Ct. Rep. 564, 568.

In the matter of showing jurisdiction on the record between the cases where one sues on a note payable to an individual or order and where one sues on a note payable to bearer, the difference is that in the former the plaintiff, if an assignee of the payee, must allege a proper citizenship on the part of his assignor, but in the latter the plaintiff, if a subsequent holder, may disregard the original holder, leaving the citizenship of the latter, if affecting the jurisdiction, to be pleaded by the defendant.

It follows that the first and fourth assignments of error in this case, relating to the jurisdiction of the court, and to the necessity of the same appearing affirmatively on the record, are not well taken.

The plaintiff sued Travis F. Jones and Jones & Bro. as the makers and indorsers of the promissory note set forth in the petition. The answer admits the making of the said note as alleged. The note offered in evidence, and which, by order of the circuit court, has been sent up with the transcript, purports to be a note made and indorsed by Travis F. Jones and Jones & Bro. It is true that in the signature of Jones & Bro. two kinds of ink appear to have been used, but we cannot say, upon inspection, that there is any

variance between the note sued on and the one offered in evidence.

The evidence of Travis F. Jones, as set forth in the bill of exceptions, was not admissible under any issue made in the case. See article 1265, Rev. St. Tex. The authorities cited by the learned counsel for plaintiff in error—Park v. Glover, 23 Tex. 470; Collins v. Ball, 82 Tex. 259, 17 S. W. Rep. 614—do not apply.

On the whole case we find no reversible error, but we are not prepared to say that the case of the plaintiffs in error is frivolous, or was brought to this court for delay. The judgment of the circuit court is affirmed, with costs.

DARROW et al. v. H. R. HORNE PRODUCE CO.

(Circuit Court, D. Indiana. September 16, 1893.)

No. 8,880.

1. PRINCIPAL AND AGENT—ACTION BY UNDISCLOSED PRINCIPAL.
An undisclosed principal may maintain an action upon a written contract made by his agent with the agent of another, in their own names, as against the latter's undisclosed principal, where the contract itself does not contain recitals or description inconsistent with the existence of the relation of principal and agent. Humble v. Hunter, 12 Q. B. 310; Schmaltz v. Avery, 16 Q. B. 655, distinguished.

2. EVIDENCE—VARYING WRITTEN INSTRUMENT.
Parol evidence that such undisclosed principals were the real parties in interest does not vary or contradict the writing, and is therefore admissible.

3. PLEADING—WHAT MAY BE RAISED BY DEMURRER.
Whether the charter and by-laws of a defendant corporation prevent it from contracting except under seal will not be considered upon demurrer to a complaint, where by the complaint it does not appear but that defendant might contract by parol.

At Law. Action by Marcus H. Darrow and others against the H. R. Horne Produce Company upon a contract for a sale of butter. Defendant's demurrer to the complaint overruled.

Baker & Daniels, for plaintiffs.
Theodore Shockney, for defendant.

BAKER, District Judge. The question of the sufficiency of the complaint is raised by demurrer. The complaint, so far as material to the decision of the question involved, is as follows: That heretofore, the 21st day of January, 1893, the plaintiffs, at Chicago, Ill., sold to the defendant, through its agent and general manager, William Harris, a quantity of butter, as mentioned in the contract of sale and purchase thereof, which contract was and is in writing; that said contract, although made for and on account of these plaintiffs on the one hand, and for and on account of the defendant upon the other hand, was executed only in the names of the said respective agents, A. A. Kennard & Co., for these plaintiffs, and in the name of the said William Harris, by the style of Wm. Harris, for the defendant, but as matter of fact each of said

agents thereby intended to bind his said principal thereby, and each of said agents was thereunto duly authorized by his said principal. The contract of sale and purchase reads as follows:

"Chicago, Ill., Jan. 21, '93.

"We have this day sold to Wm. Harris the following lots of butter, [describing 14 lots. The contract then proceeds:] It being understood that these figures are an approximation only, and there may be a few packages, more or less, of each mark. The price for the 1,771 tubs is to be 19¼ cents; 300 firkins, 20 cents. Also about 200 tubs of creamery butter, marked Ⓐ, at 22¾ cents, and 200 tubs of ladle butter, marked Ⓘ, at 16¼ cents. One car load out of the above-mentioned butter is to be moved and paid for on Tuesday, the 24th inst., and the balance of the lot is to be moved and paid for within thirty days from this date; payment to be made when the butter is shipped. Goods to be kept insured by A. A. Kennard & Co.

[Signed] "Wm. Harris.
"A. A. Kennard & Co."

In argument, two objections are pointed out:

(1) "That, if said agency existed as alleged, it does not appear by said contract that either the plaintiffs or the defendant were made parties thereto; and by reason of the fact that said contract between A. A. Kennard & Co. and William Harris does not disclose that the plaintiffs were principals, nor was said fact disclosed by said A. A. Kennard & Co., the plaintiffs are not proper parties to bring this action, and A. A. Kennard & Co. are the only parties who can maintain an action on said contract."

(2) "That the defendant is a corporation incorporated under and by virtue of the laws of the state of Indiana, and by the provisions of her charter and by-laws cannot contract except under her seal."

In support of the first proposition counsel cite and rely upon Story on Contracts, (section 267,) as follows:

"Ordinarily the right of the agent to sue is subordinated to that of the principal, and may be superseded or extinguished at any time by his intervention. Any defense which would be sufficient to defeat a suit, if brought by the principal, will also be competent against the agent; but if a written contract be made exclusively with the agent, who expressly states himself to be principal, the real principal would not be entitled to maintain an action thereupon by showing that the professed principal was merely his agent."

The cases cited by the author in support of the last proposition which alone can be claimed to have any application here are Humble v. Hunter, 12 Q. B. 310, 64 E. C. L. 309, and Schmaltz v. Avery, 16 Q. B. 655, 3 Eng. Law & Eq. 391.

The first case is based on a charter party of affreightment alleged to have been made between the "plaintiff, then and still the owner of the good ship," etc., and the defendant. On the trial, when the charter party was read in evidence, it appeared upon its face that it was not made by or in the name of the plaintiff, but was made by and in the name of her son, as "owner of the good ship," etc., and the defendant. It was claimed that, as the plaintiff's name was not mentioned in the contract, and as it did not show that there was any principal, it could be shown by parol who the undisclosed principal was. But as the contract in terms recited that the party signing was "the owner of the good ship," etc., it was held that it recited a fact which made the existence of an undisclosed principal inconsistent with the truth of the fact so recited, and that, therefore, the son could not be heard to testify that in making the con-

tract he acted as agent for the plaintiff, his mother, who was the real owner of the ship. In affirming the ruling of the trial court in excluding the offered testimony, Patteson, J., observed:

"The question in this case turns on the form of the contract. If the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and the plaintiff was the principal. * * * In this case I was at first in the plaintiff's favor on account of the general principle referred to by my lord, but the form of the contract takes the case out of that principle."

Wightman, J., thought at the trial that the case was governed by Skinner v. Stocks, 4 Barn. & Ald. 437. He further said:

"But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. Here the agent describes himself expressly as 'owner' of the subject-matter. This brings the case within the principle of Lucas v. De La Cour, 1 Maule & S. 249, and the American authorities cited."

In the case of Schmaltz v. Avery, supra, a similar contract was involved. In it, it was expressed to be made between the "defendant, as owner of the ship, of the one part, and Schmaltz & Co., agents of the affreighter, of the other part." At the end of the charter party there was this memorandum: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." In the declaration no notice was taken of this memorandum. In other respects the agreement set out corresponded with that proved. Oral evidence was given that the plaintiff was in truth the principal. The court remarked that:

"The question raised on the plea of nonassumpsit is whether the action will lie at the suit of the present plaintiff. The charter party in terms states that it is made by G. Schmaltz & Co. as agents for the plaintiff. It then states the terms of the contract, and concludes with these words: 'This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of Schmaltz & Co. shall cease as soon as the cargo is shipped.' The declaration treats the charter party as made between the plaintiff and defendant, without mentioning the character of the plaintiff as agent, and without any reference to the concluding clause, thereby treating the plaintiff as principal in the contract. At the trial it was proved that the plaintiff was in point of fact the real freighter. * * * It was objected that the proof that the plaintiff was the real freighter or principal, and not, as stated in the contract, only the agent, was a departure; and a verdict was found for the defendant, with liberty to enter a verdict for the plaintiff if the court should be of opinion that he was entitled to sue as principal notwithstanding the terms of the charter party; and a rule nisi was obtained so to enter it. The court held that the rule should be made absolute."

In so holding it was said:

"It is conceded that if there had been a third party, who was the real freighter, such party might have sued although his name was not disclosed in the charter party. But the question is whether the plaintiff can fill both characters of agent and principal, or whether he can repudiate that of agent and adopt that of principal,"

—And it was held that he could not do so, as that would be to contradict an express recital of the charter party. It is thus apparent that neither the text of Story nor the cases cited support

the defendant's contention, but, on the contrary, each is an authority against him. The other cases cited and relied upon by him do not justify review, as they yield no support to his argument. It is undoubtedly true that parol testimony will not be permitted to control or contradict a contract in writing; but, in the absence of any recital appearing therein, it in no just sense contradicts the written contract to show by oral testimony, aliunde the writing, that the names signed to the contract are those of agents, and that undisclosed principals are the real parties in interest. Counsel has cited cases touching the rule applicable to sealed instruments. It is unnecessary to examine those cases, because the writing here declared on is a simple contract, not under seal.

A further review of the adjudged cases is unnecessary, as the true doctrine is found accurately stated in the elementary books. Story, Ag. (4th Ed.) § 1600, states the doctrine in these words:

"Indeed, the doctrine maintained in the more recent authorities is of a far more comprehensive extent. It is that, if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be agent or not, and whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it. The doctrine thus asserted has this title to commendation and support: that it not only furnishes a sound rule for the exposition of contracts, but that it proceeds upon a principle of reciprocity, and gives to the other contracting party the same rights and remedies against the agent and principal which they possess against him."

Nor does this doctrine contradict or vary the written instrument. The same writer observes:

"It does not deny that it is binding on those whom on the face of it it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal."

Higgins v. Senoir, 8 Mees. & W. 834, 845, and other cases cited under the above section.

Whart. Ag. § 298, states the doctrine thus:

"On nonnegotiable instruments, where the agent is prima facie the contracting party, unless it should appear that the agent is the person exclusively privileged or bound, the principal can sue or be sued, and in the latter case the contracting party can sue either principal or agent."

Mechem, Ag. §§ 695–700, discusses the subject of the liability of undisclosed principals, and of principals known, but not mentioned in contracts executed on their account, but signed by the agent alone, and he shows that in such cases, unless the principal in the mean time has in good faith paid the agent supposing he was the principal, the other party may overpass the agent, and sue the principal in the first instance. In section 701 he says:

"This rule applies to all simple contracts, whether written or unwritten, entered into by an agent in his own name and within the scope of his authority, although the name of the principal does not appear in the instrument,

and was not disclosed, and although the party dealing with the agent supposed that the latter was acting for himself. And this rule obtains as well in respect to contracts which are required to be in writing as those to whose validity writing is not essential. It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligation of his written contract. The writing is not contradicted, nor is the agent discharged; the result is merely that an additional party is made liable."

"Whatever the original merits of the rule," says the court in Byington v. Simpson, 134 Mass. 169, "that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even when the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."

These authorities demonstrate that the first contention of the defendant is untenable.

The second objection urged by him is not at present in the record. Whether the charter and by-laws of the defendant prevent it from contracting except under seal nowhere appears except in the demurrer. For aught appearing in the complaint, the defendant has ample power to contract by parol. It will be time enough to consider the question when properly raised upon the record. It follows that the demurrer must be overruled, and it is so ordered.

SUTHERLAND v. ROUND et al.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1893.)

No. 54.

1. DAMAGES—PLEADING AND PROOF.
   In an action for breach of warranty in the sale of a chain, evidence of damage to the business of a vendee of the original purchaser, incurred by the loss of trade by reason of the breaking of the chain, is inadmissible where the petition claims damages for the cost of substituting a new chain for the old one only, and the testimony fails to show that the contract or circumstances of the sale by the original purchaser made him liable for consequential damages, or that defendants were informed in selling the chain that such purchaser had contracted to incur such liability.
2. EVIDENCE—HEARSAY.
   Evidence of statements by agents of the purchaser's vendee, made to the purchaser, that a new chain must be furnished, is hearsay, and inadmissible.
3. WITNESS—RE-EXAMINATION—DISCRETION OF COURT.
   The refusal of the trial court to allow a re-examination of a witness as to the kind of tests now made of iron where life and limb are dependent on its tensile strength being a collateral issue, and its allowance largely within the discretion of the court, was not erroneous where no prejudice arose from the exclusion of the particular question.
4. APPEAL—BILL OF EXCEPTIONS.
   An assignment of error based on the court's instructions to the jury cannot be considered when the original bill of exceptions does not show that exceptions were taken when the charge was given.
5. SAME—FAILURE TO NOTE EXCEPTIONS—AMENDMENT.
   The negligence or omission of counsel to note exceptions to an original bill of exceptions is not such an extraordinary circumstance as will warrant the court below in amending the bill long after it has been allowed

and signed, and long after the term of the trial has passed, and the parties have been dismissed from court.

6. SAME.

The oversight and omission of counsel preparing the bill was a waiver of the exceptions, and the court below was powerless to amend.

Error to the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

At Law. Action by Adam T. Sutherland, assignee of Van Winkle & Co., against David Round and Louis Round, to recover damages for breach of warranty in the sale of a chain. Judgment for defendants. Plaintiff brings error. Affirmed.

Statement by TAFT, Circuit Judge:

This was a writ of error to reverse a judgment for defendant in the circuit court of the United States for the northern district of Ohio, eastern division. The action below was by Sutherland, a citizen of California, against David and Louis Round, partners as Round & Son, citizens of Ohio, for damages for breach of warranty in the sale of a chain used to haul vessels out of the water on to a dry dock. The sale was made by Round & Son to Van Winkle & Co., a firm of San Francisco, and the petition alleged that the claim for damages had been assigned to plaintiff. The answer admitted the sale, averred full compliance with the terms thereof, and denied that plaintiff was the owner of the claim sued on. The evidence shows that the contract sued on was made in the summer of 1887, and that the defendant warranted that the chain should have a tensile or admiralty test of 109 gross tons and 149⅝ tons breaking strain; that the chain was sent to Van Winkle & Co., and they turned it over to a company known as the San Diego Marine Railway. While in use by that company the chain broke. It was repaired, and was used thereafter for about two years. It then broke again, and a new chain was supplied by Van Winkle & Co. to the Marine Railway. Evidence was put in to show the cost of a new chain and of transporting it from San Francisco to San Diego, and the other incidental expenses connected with the substitution. The jury returned a verdict for the defendants. On the hearing before this court it appeared from the record that certain parts of the trial judge's charge upon which assignments of error were based had not been excepted to. Thereupon counsel for the plaintiff applied to the court to issue a writ of certiorari to the clerk of the circuit court for the northern district of Ohio, directing him to send up a full and complete record. The application was granted, and the writ went down. The bill of exceptions contained in the transcript originally filed in this court showed that the trial took place in the October term, 1891, and that the motion for a new trial was continued to the 4th day of March, 1892, when the court overruled it. The bill concluded as follows:

"And the court entered on the day last named, in connection with such decision, the overruling of a motion for a new trial, a finding of judgment for the defendant, and ordered that plaintiff should have sixty days from the date last named for the preparation, allowance, and filing of his bill of exceptions, and the record be kept open for this purpose. And now, within the time so fixed, the plaintiff presents this, his bill of exceptions, taken at the trial of said cause, and asks the court to sign, seal, and allow the same to be made a part of the record of this cause, which is by the court accordingly done, this 3d day of March, 1892.

"Augustus J. Ricks, U. S. District Judge.

"Indorsed: Filed May 3, 1892."

A journal entry was made upon the minutes to the same effect.

The return to the writ of certiorari by the clerk of the circuit court certified that the transcript of the record of the proceedings of the circuit court theretofore certified by him was correct and complete as the same then appeared in the circuit court. He further certified that on the 16th day of February, 1893,—that is, some days after the hearing in the court of ap-

peals,—the Honorable A. J. Ricks, the judge who tried the above-named action, signed and approved a journal entry, and ordered the same to be entered as part of the record of said cause. The amendment read as follows: "And now, upon the 16th day of February, A. D. 1893, on motion by plaintiff and notice to the defendant, this cause comes before this court, the Hon. A. J. Ricks presiding, who is the judge who presided at the trial of this cause at the October term, 1891, and also allowed and signed the bill of exceptions for the plaintiff, upon plaintiff's motion for an order nunc pro tunc, and its being made to appear to the satisfaction of the court that 'at the time of said trial, and immediately after the court had charged the jury, the plaintiff's attorney excepted to certain portions of the charge in the language following: "(1) To what the court said in connection with the testimony, that referred to the links being stretched by a force greater than 149 tons, because there is no pretense that there is any evidence in the case, as counsel claimed, making that applicable before the first break occurred, and therefore that the jury should not have had that given to them; but that it was only referring to such breaks as might have occurred after the first break had occurred. (2) To what the court said as to the measure of damages,—that the difference between the actual value of the chain at the time it was delivered to plaintiff and what its value would have been if it had been as represented is not the rule. (3) To what the court said as to the jury looking to subsequent use, to see if it was subjected to a greater strain."' And also that on making up the bill of exceptions from the minutes of the stenographer said exceptions were left out of said bill of exceptions. Counsel claim that said omission was through oversight and mistake on his part, which the court believes to be true. It is now ordered—so far as jurisdiction and authority lies in this court—that the above-specified objections be, and the same are hereby, inserted in said bill of exceptions at the point indicated at the close of the charge of the court, as appears in the printed record filed in the circuit court of appeals, page 45, at the end of the second line, as part of said bill of exceptions. To which order the said David and Louis D. Round objected, but the court overruled said objection, to which ruling in overruling said objection, as well as to the entry of said order, they then and there, by their counsel, duly excepted."

J. E. Ingersoll, for plaintiff in error.

Henderson, Kline & Tolles, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, (after stating the facts as above.) The assignments of error are based—First, on the improper rejection and admission of evidence; and, second, on misdirection by the court to the jury.

The plaintiff offered evidence of the employes of the San Diego Marine Railway Company—first, to show how the chain broke, which was admitted; and, second, to show the extent of the damage caused the San Diego Marine Railway, and the amount of money that had been expended in repairing the damage, as well as the consequential damages incurred by the railway company in the loss of its trade. This evidence was rejected, and we think rightly. The damages sought to be proved were damages to the business, not of the vendee under the contract and the assignor of the plaintiff, but damages to the vendee of the vendee. The petition claimed damages only for the cost of substituting a new chain for an old one, and evidence as to that was admitted. The plaintiff was limited to that. He could not go on to show conse-

quential damages in the absence of a specific averment in his petition. Moreover, there was no evidence that the contract or circumstances of the sale by Van Winkle & Co. to the Marine Railway Company made the former liable for consequential damages, or that defendants were informed in selling the chain that Van Winkle & Co. had contracted to incur such liability. In no aspect of the case, therefore, could the plaintiff, as the assignee of Van Winkle & Co., recover consequential damages, and evidence tending to show them was wholly inadmissible.

Evidence was offered of statements by agents of the Marine Railway, made to Van Winkle & Co., that a new chain must be furnished. These statements were hearsay, and were properly excluded. The fact which the plaintiff, as the assignee of Van Winkle & Co., had to prove was that the chain was defective, and so defective that a new chain ought to have been furnished; or, if not that, how much it would have taken to make the chain satisfy the warranty. It was not a question of the bona fides of Van Winkle & Co. in furnishing the Marine Railway with a new chain.

Another exception was based on the refusal of the court to allow the plaintiff's attorney to re-examine his witness with reference to the kind of tests that are now made of iron to be used in machinery where life and limb are dependent on its tensile strength. This subject was collateral to the main issue, and largely within the discretion of the court. The question in the case was not whether the defendant had been guilty of negligence in not properly testing the iron. It was whether the chain was up to the warranty. It might incidentally have aided the jury, in weighing the evidence as to the strength of the chain in question, to know the kinds of tests used in the trade, because there was evidence tending to show the kind of tests applied to this chain. The plaintiff's counsel had gone into the question of tests on direct examination. In re-examination he sought to elaborate, and the court restricted him. We think this was in the discretion of the court. Certainly no prejudice arose from the exclusion of the particular question. There are other exceptions based on the admission and rejection of evidence, which are even less material, and require no mention.

The chief argument for plaintiff in error is based on the instructions of the court to the jury. These we cannot consider, because the original bill of exceptions does not show that any exceptions were noted by counsel for plaintiff at the time the charge was given. It is true that since the hearing the return to the certiorari sent to the circuit court clerk shows an order of the trial judge amending the bill of exceptions, if he now has authority. The amendment to the bill was made long after the term to which the preparation of the bill was postponed. It appears on the face of the amendment that the only reason why the exceptions were not noted in the original bill of exceptions was because of the oversight and omission of the counsel preparing the bill. We think this must be held to be a waiver of the exceptions, and that the

court was without power to amend the bill under such circumstances. In the case of Muller v. Ehlers, 91 U. S. 249, Chief Justice Waite, speaking for the supreme court, said:

"As early as Walton v. U. S., 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of the parties, after the parties in the due course of proceeding have both in law and in fact been dismissed from the court."

We do not think that the negligence or omission of counsel is such an extraordinary circumstance as to warrant the act of the court below in amending the bill of exceptions, long after the term of the trial had passed, long after the parties had been dismissed from the court, and long after a bill of exceptions had been allowed and signed.

The judgment of the court below is affirmed.

WESTERN UNION TEL. CO. v. WOOD.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1893.)

No. 56.

1. TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—RIGHTS OF SENDER.
   A person to whom a telegraphic message is directed cannot recover against the company for failure to deliver the same, when he is no party to the contract under which it is sent, and when the company is not informed, either by the terms of the message or otherwise, that the contract is for his benefit.
2. SAME—DAMAGES—MENTAL SUFFERING.
   Damages cannot be recovered from a telegraph company for mental suffering resulting from simple negligence in the prompt delivery of a message announcing the dangerous illness of a relative, as such damages are too uncertain, remote, and speculative.
3. FEDERAL COURTS—EFFECT OF STATE DECISIONS.
   The question of the liability of a telegraph company for a failure to promptly deliver a message is one of general law, as to which, in the absence of statutory provisions, the decisions of the state courts are not controlling upon the federal courts. Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914, applied.

In Error to the Circuit Court of the United States for the Northern District of Texas. Reversed.

Statement by PARDEE, Circuit Judge:

The defendant in error brought his action against the plaintiff in error in the district court of Coryell county, state of Texas, and caused summons to be issued, returnable to the January term, 1892, of said court. On the petition of the plaintiff in error the case was duly removed to the circuit court of the United States for the northern district of Texas. After such removal the plaintiff, defendant in error here, filed his first amended original petition, in lieu of all other petitions, upon which the case was tried, and which

reads as follows: "Now comes A. Wood, plaintiff in above-styled cause, complaining of defendant, the Western Union Telegraph Company, and files this, his first amended original petition, in lieu of his original petition herein, and for amendment shows the court that plaintiff resides in Coryell county, Tex.; that the defendant is a body corporate, duly incorporated, and has an office and agent, A. W. Lyman, in Gatesville, Coryell county, Tex.; that said defendant is doing business in the state of Texas, and engaged in transmitting messages for hire; that the said defendant corporation now owns and operates, and did so own and operate, a telegraph line, on the 22d day of October, 1891, from the town of McGregor, in the county of McLennan, state of Texas, to the town of Gatesville, in Coryell county, Tex.; that a brother of the plaintiff, G. W. Wood, resided in Jefferson, Marion county, Tex., at which point the defendant was also operating its said line of telegraph; that about said date the said brother, G. W. Wood, became very ill, and desiring the presence of plaintiff, to comfort him in his last illness, and to settle important business matters, he procured a telegram to be sent to his son, John A. Wood, who resided in McGregor, McLennan county, Tex., requesting the presence of his said son and plaintiff's nephew, and requesting said son to notify plaintiff of his said illness; that on the 22d day of October, 1891, the said John A. Wood, in response to said telegram sent him by his father's request, and as the agent and acting for plaintiff, delivered to the agent of defendant, in McGregor, Tex., a telegram substantially as follows: 'To A. Wood, Gatesville, Texas: Received telegram. Pa is very low. Asked to wire you. John A. Wood.' Plaintiff shows that the person referred to as 'Pa', in said telegram, was the said G. W. Wood, and that said G. W. Wood died at his home in Marion county, Tex., on the —— day of October, 1891; that, at the time said message was delivered to defendant's agent in McGregor, the same was paid for by John A. Wood; that the price paid for said telegram was the amount demanded therefor by the agent of defendant, the same being the usual and customary charges for such services, viz. twenty-five cents; that said message was correctly transmitted and received at the office of defendant in Gatesville, Tex., at twenty-two minutes past eleven o'clock A. M. on the day same was sent; that the plaintiff then, and for a long time prior to the date of said message, resided within the corporate limits of the town of Gatesville; that his residence is within a half mile of defendant's office, and that he and his residence are well known to defendant in Gatesville, and to almost every inhabitant of said town; that plaintiff was in said town, and about home, all said day, and plaintiff shows that notwithstanding he was well known, and had his place of residence in said town, and that defendant knew the importance and contents, and that the words and contents of said message to plaintiff apprised defendant of the importance thereof, and that the importance of same was made known to defendant at McGregor, by the message received by John A. Wood, and by John A. Wood apprising defendant's agent thereof when sending same, the said defendant not only failed to deliver same promptly, but did not deliver same at all; that defendant's failure to deliver said telegram as it had contracted to do was occasioned by its own willful and careless conduct and negligence. Plaintiff shows that had defendant promptly delivered said telegram, or had they delivered same at any time before the hour of 2 o'clock P. M. on the day it was received, plaintiff could and would have started on his way to see his brother by the train which left Gatesville at half past two o'clock, and would have reached his brother's residence, and been with him, two days before his death; that, had said telegram been delivered at any time before said hour on the day after it was received, he could and would have been with his said brother at least one day before his death. Plaintiff further shows that at the time of the death of said G. W. Wood there existed certain business transactions, of great importance and value, between him and plaintiff, which were in an unsettled condition, and by his death the same remains to be settled with his heirs, which will occasion much expense, time, and trouble, to plaintiff's great damage, and which have caused plaintiff distress and worry of mind; that by reason of defendant's willful and careless negligence this plaintiff was deprived of the

privilege of being at the bedside of his brother in his last illness, and comforting him in his death, and from attending his funeral and burial, and by his presence comforting and consoling the bereaved family of his deceased brother, to his great distress and mental agony and pain. And plaintiff says, by reason of all of said allegations herein set out, he has been damaged by said defendant in the full sum of twenty-five hundred dollars actual damages, and on account of defendant's willful conduct and gross negligence, in failing to deliver said telegram, he has been damaged in the further sum of twenty-five hundred dollars as exemplary damages. Wherefore, plaintiff prays for judgment for said sum of twenty-five hundred dollars actual damages, and twenty-five hundred dollars exemplary damages, and costs of suit; and he prays such further relief, both legal and equitable, general and special, as he may be entitled to, and, in duty bound, will ever pray," etc.

To this petition the plaintiff in error, defendant in the court below, filed its first amended original answer in lieu of all other pleas theretofore filed in the case, and therein, as permitted by the practice in the state of Texas, first demurred generally to the plaintiff's petition as insufficient in law, then specially demurred:

(1) That in so far as plaintiff seeks to recover damages for alleged failure to arrange business matters, and for alleged mental suffering and distress, his petition is insufficient, for the reason that such damages are remote, uncertain, and not within contemplation of the parties at the time, and not an element of actual damages in the case, and, under the allegations of the petition, not recoverable at all.

(2) That, in so far as plaintiff seeks a recovery for damages therein for alleged mental distress, said petition is insufficient, in this: that the amount claimed is and was below the jurisdiction of the circuit court.

The defendant also filed a general denial or general traverse of the allegations of the petition, and a special plea setting up the contributory negligence of the plaintiff; also, a special plea setting up the special rules and regulations of the defendant, governing the sending of messages, under which it only undertook to make free delivery, in towns the size of Gatesville, within a radius of half a mile of its office, and averred that the plaintiff did not, at the time said message was received, nor at any time, reside within half a mile of said office, and that no arrangements were made, and no contract entered into, to make delivery of said message outside of said limits, and no extra compensation was ever paid or guarantied for the special delivery of said message outside of said limits.

On the trial of the cause there was a verdict for the plaintiff in the sum of $1,250, and judgment was entered thereon. The plaintiff in error thereupon brought the case to this court for review, assigning errors as follows: "First assignment of error: The court erred in overruling general demurrer of the defendant to plaintiff's petition, because said petition failed to show any cause of action, of which said court could have, hold, and maintain jurisdiction, all of which appears at large by inspection of said petition, and said demurrer thereto. Second assignment of error: The court erred in overruling the first special exception and demurrer of defendant to plaintiff's said petition. Third assignment of error: The court erred in overruling the second special exception of defendant to plaintiff's said petition. Fourth assignment of error: The court erred in overruling the third special exception of defendant to plaintiff's said petition. Fifth assignment of error: The court erred in overruling the fourth special exception of defendant to plaintiff's petition."

George Denegre, Walter D. Denegre, T. L. Bayne, Gaylord B. & Frank B. Clark, Jr., and M. A. Spoonts, (George H. Fearons, Stanley, Spoonts & Meek, and E. R. Meek, on the brief,) for plaintiff in error.

S. B. Hawkins, John Clegg, and E. A. McDonald, (McDowell, Milker & Hawkins, White & Taylor, and Clegg & Thorpe, on the brief,) for defendant in error, among other authorities, cited the

following line of Texas cases, which are referred to, but not cited, in the opinion:

Telegraph Co. v. Nations, 82 Tex. 539, 18 S. W. Rep. 709; Stuart v. Telegraph Co., 66 Tex. 580–586, 18 S. W. Rep. 351; Railway Co. v. Levy, 59 Tex. 542; Telegraph Co. v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734; Telegraph Co. v. Simpson, 73 Tex. 422, 11 S. W. Rep. 385; Telephone Co. v. Grimes, 82 Tex. 89, 17 S. W. Rep. 831; Reliance Lumber Co. v. W. U. Tel. Co., 58 Tex. 394; Loper v. Telegraph Co., 70 Tex. 693, 8 S. W. Rep. 600; Telegraph Co. v. Sheffield, 71 Tex. 576, 10 S. W. Rep. 752; Telegraph Co. v. Adams, 75 Tex. 536, 12 S. W. Rep. 857; Anderson v. Telegraph Co., (Tex. Sup.) 19 S. W. Rep. 285; Martin v. Telegraph Co., (Tex. Civ. App.) 20 S. W. Rep. 861; Telegraph Co. v. Beringer, 84 Tex. 38, 19 S. W. Rep. 336; Telegraph Co. v. Jones, 81 Tex. 271, 16 S. W. Rep. 1006; Telegraph Co. v. Moore, 76 Tex. 67, 12 S. W. Rep. 949; Telegraph Co. v. Edsall, 74 Tex. 333, 12 S. W. Rep. 41; Telegraph Co. v. Feegles, 75 Tex. 537, 12 S. W. Rep. 860; Potts v. Telegraph Co., 82 Tex. 545, 18 S. W. Rep. 604; Telegraph Co. v. Ward, (Tex. App.) 19 S. W. Rep. 898; Telegraph Co. v. Rosentreter, 80 Tex. 406, 16 S. W. Rep. 29; Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. Rep. 598; Hays v. Railroad Co., 46 Tex. 279; So Relle v. Telegraph Co., 55 Tex. 310; Telegraph Co., v. Carter, (Tex. Civ. App.) 21 S. W. Rep. 689; Hale v. Bonner, 82 Tex. 33, 17 S. W. Rep. 605; Telegraph Co. v. Richardson, 79 Tex. 649, 15 S. W. Rep. 689.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts as above.) The right of the defendant in error, plaintiff in the court below, to recover damages in this action must be based upon the contract entered into with the Western Union Telegraph Company to transmit and deliver the message in question; and this whether the action is one technically for damages for breach of contract, or is an action sounding in tort. The facts, as narrated in the first original amended petition, show that one G. W. Wood, a brother of defendant in error, residing in Jefferson, Marion county, Tex., became very ill, and desiring the presence of the defendant in error, to comfort him in his last illness, and to settle important business matters, procured a telegram to be sent to his son, John A. Wood, who resided in McGregor, McLennan county, Tex., therein requesting the presence of his said son, and requesting said son to notify his brother, defendant in error, of his said illness. John A. Wood thereupon delivered to the agent of the telegraph company, for transmission and delivery, the following message: "To A. Wood, Gatesville, Texas. Received telegram. Pa is very low. Asked to wire you. [Signed] John A. Wood." The person referred to as "Pa," in said telegram, was the said G. W. Wood. At the time the said message was delivered to the telegraph company's agent for transmission and delivery, the price demanded for sending the same was paid by said John A. Wood. It is not shown that the defendant in error was a party to, or privy to, the contract thus entered into, nor does it even appear that the contract was entered into for the benefit of the defendant in error. On the contrary, so far as the telegraph company had notice, it was for the benefit of G. W. Wood. We notice in the petition the statement, "the said John A. Wood, in re-

sponse to his father's telegram, and as the agent and acting for plaintiff, delivered to the agent of defendant," etc., but we consider all that is said with reference to John A. Wood's being the agent and acting for the defendant in error as a statement of a conclusion of law, rather than of fact, and as entirely refuted by the detailed facts set forth in the petition itself. The action being founded upon a contract, the elementary rule is that no one can sue for damages thereon who is not a party to the contract.

"This rule is often expressed in the maxim that no one can sue on a contract 'who is a stranger to the contract, or who is not privy to it.' In whatever words expressed, it embodies the principle that 'Rights founded on contract belong to the person who has stipulated for them,' and no other, and, therefore, that no one can sue for the nonperformance of an agreement to which he was not, either directly or through his agent, a party. * * * It is, in short, 'clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of the contract.' No one, therefore, can bring an action for a breach of contract merely because he thereby suffers loss or damage, since a person may be damaged by the breach of a contract to which he is not a party, and under which, therefore, he has no rights. The loss he suffers, in so far, of course, as it arises merely from the breach of the contract, is damnum absque injuria, and affords no cause of action." Dicey, Parties, marg. pp. 77, 79; 3 Bouv. Inst. p. 134.

We can see no reason why suits brought on contract for the transmission of messages by telegraph, and where the damages claimed are wholly based on nonfeasance, should be excepted from the general rule. There seems to be still less reason to make an exception where the case further shows that the damages claimed for nonfeasance are unaccompanied by injury to the person or purse.

In Playford v. Telegraph Co., L. R. 4 Q. B. 706, where the plaintiff sued for damages for the erroneous transmission of a message by telegraph, sent to him by merchants from whom he had asked an offer for ice, it was held that the defendant's liability arose only from contract. As Sir Robert Lush, delivering the opinion of the court, said:

"The only question, therefore, is, with whom was the contract made? and to this there can be but one answer: It was made with Messrs. Rice & Hellyer. The offer was sent by them on their own behalf, and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agents, or as representing him. * * * It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it."

In the case of Railway Co. v. Levy, 59 Tex. 563, a father sued a railway company, which owned and operated a telegraph line, for negligence in failing to transmit a message sent to him by his son, informing him of the sudden death of the son's wife and child. It was held that the contract between the son and the company could not be made a basis of recovery by the father. In delivering the opinion of the court, Mr. Justice Stayton said:

"The English cases hold, substantially, that a person to whom a message is sent cannot maintain an action, notwithstanding pecuniary injury may result to him by the failure of a telegraph company correctly, or within a reasonable time, to transmit it, unless the sender sustains to the person to whom the message is sent the relation of agent, through which privity of

contract is established. Playford v. Telegraph Co., L. R. 4 Q. B. 706. This doctrine has not been accepted by the courts of this country, but none of them have gone to the extent of holding that the person to whom the message is sent may maintain an action for the negligence of a telegraph company in transmitting, without averment and proof of some actual pecuniary injury sustained thereby."

In Elliott v. Telegraph Co., 75 Tex. 18, 12 S. W. Rep. 954, the plaintiffs were operating a sawmill, and, having broken their saw, one of the firm went to a neighboring village, and engaged Stewart, a member of the mercantile firm, to telegraph to St. Louis to parties to ship at once another saw for use in the mill. A dispatch was prepared, but was handed to a traveling agent of the hardware firm to whom it was addressed. The agent did not send the dispatch, but sent another, in terms, "Express Galloway and Stewart one Disston circular ripsaw, fifty-six inches, terms regular," signing it himself. It was not made known to the agent of the telegraph company that the order was in behalf of plaintiffs, and the court held that no recovery could be had by plaintiffs against the telegraph company for damages for want of the saw, or for the failure to deliver the dispatch. In delivering the opinion of the court, Mr. Justice Gaines said:

"It appears that, in delivering the dispatch written by himself, McAllen was not acting under the authority given him by Stewart, which was to cause to be transmitted the message written by the latter. Being the agent of the company who was addressed, he probably deemed it best to make the order himself. * * * At all events, he was not authorized to send that dispatch for Stewart, and it was not, therefore, the dispatch of plaintiff, though intended for his benefit. In the case of Telegraph Co. v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734, the person who delivered the message for transmission was authorized to do so by the plaintiff, who was immediately present when it was delivered. The damages claimed were for the losses accruing by reason of plaintiff's mill lying idle for want of the saw. The face of the message did not advise the defendant that it was intended for the benefit of plaintiffs, or that such persons existed, and there was no evidence that defendant's agent knew the fact that the mill was idle for want of the saw. Therefore, plaintiffs could not have recovered damages for the lose resulting from this source. If they had proved that the message written by Stewart was delivered to the agent, they could, under the evidence, have recovered only the money paid for its transmission."

Again, in Telegraph Co. v. Young, 77 Tex. 245, 13 S. W. Rep. 985, it was held that "the liability of a telegraph company regarding the delivery of a message must be determined by the character of its contract."

We have examined the Texas cases cited by the appellee, where the person to whom a telegraphic message was directed has been permitted to maintain an action for the recovery of damages against a telegraph company for negligence in the transmission or delivery of the message; but we do not find in any of them that the Case of Levy, 59 Tex. 563, has been overruled, or even doubted, but that in each case, in the opinion of the court, the circumstances showed the party suing had either himself procured the sending of the message, and, therefore, was privy to the contract, or was, to the knowledge of the telegraph company, the party for whose benefit the message was intended.

In the present case, as we have seen, the plaintiff himself neither procured the dispatch to be sent, paid the consideration, nor was the telegraph company informed, either in terms, or by the tenor of the dispatch, that it was for his benefit, but was informed, so far as the message itself read, that it was sent at the request, and for the benefit, of another party. In our opinion the general exception and demurrer to the first amended original petition should have been sustained. Besides demurring generally, the defendant in the court below, plaintiff in error here, specially excepted and demurred to so much of the first amended original petition as sets forth a right to recover damages for alleged mental suffering and distress, upon the ground that such damages are remote, uncertain, and not within the contemplation of the parties at the time, and not an element of actual damages in the case, and, under the allegations of the petition, are not recoverable. The overruling of this special demurrer is assigned as error, and it presents the question which has been mainly considered in the argument of this case.

Defendant in error contends "that mental anguish, unaccompanied by injury to person or purse, is actual damage, and may be recovered as such." He supports his contention with a line of decisions rendered in the supreme court of the state of Texas, with decisions of the supreme courts of Kentucky, Tennessee, Alabama, North Carolina, Indiana, generally following the Texas decisions, and with quotations as to the law on the subject from several text writers of reputation. Telegraph Co. v. Adams, 75 Tex. 536, 12 S. W. Rep. 857; Anderson v. Telegraph Co., (Tex. Sup.) 19 S. W. Rep. 285; Martin v. Telegraph Co., (Tex. Civ. App.) 20 S. W. Rep. 861; Telegraph Co. v. Longwill, (N. M.) 21 Pac. Rep. 339; Telegraph Co. v. Allen, 66 Miss. 549, 6 South. Rep. 461; Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. Rep. 4; Young v. Telegraph Co., 107 N. C. 370, 11 S. E. Rep. 1044; Chapman v. Telegraph Co., (Ky.) 13 S. W. Rep. 880; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574; Telegraph Co. v. Dryburg, 35 Pa. St. 298; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. Rep. 163; Shear. & R. Neg. § 560; Gray, Com. Tel. 65 et seq.; Thomp. Elect. § 424 et seq.; 3 Suth. Dam. 314; 2 Thomp. Neg. 847, § 11; 5 Lawson, Rights, Rem. & Pr. § 1972; Telegraph Co. v. Beringer, 84 Tex. 38, 19 S. W. Rep. 336; Telegraph Co. v. Jones, 81 Tex. 271, 16 S. W. Rep. 1006; Telegraph Co. v. Moore, 76 Tex. 67, 12 S. W. Rep. 949; Telegraph Co. v. Edsall, 74 Tex. 333, 12 S. W. Rep. 41; Telegraph Co. v. Feegles, 75 Tex. 537, 12 S. W. Rep. 860; Potts v. Telegraph Co., 82 Tex. 545, 18 S. W. Rep. 604; Telegraph Co. v. Ward, (Tex. App.) 19 S. W. Rep. 898; Telegraph Co. v. Rosentreter, 80 Tex. 406, 16 S. W. Rep. 29; Telegraph Co. v. Nations, 82 Tex. 89, 18 S. W. Rep. 709.

A careful reading of the cases cited will show that, in the main, they do not declare the general proposition applicable to all cases, that mental anguish resulting from the breach of a contract, or even from the neglect of a duty, unaccompanied with actual injury to the person or purse, will support an action for damages; but they rather make an exception as against corporations and quasi public agencies,

which, from the character of their business as common carriers, or in the nature thereof, and from the public privileges enjoyed, are said to be charged with a public duty, as well as obligated to particular individuals under special contracts. The logic seems to be that, as they are charged with duties to the public, they may be held liable for mental anguish, unaccompanied with other injury, resulting from the breach of the contract; and this, not exactly as punitive damages or smart money, but rather as a case where damages should be allowed to the aggrieved individual in order to impress upon the defendant the great importance of faithfully performing his duty to the public. We do not refer to this for the purpose of criticising the argument, but rather to suggest that telegraph companies, and other quasi public agencies referred to, are engaged in commerce, (W. U. Tel. Co. v. Texas, 105 U. S. 460;) that their rights, duties, and obligations under contracts in the line of their business are matters arising under the general law; and that in the courts of the United States the questions arising thereunder, in the absence of controlling statutes, are not controlled by the decisions of the courts of last resort of any particular state in reference to like matters, although the cause of action originated in said state. (Railway Co. v. Prentice, 147 U. S. 105, 13 Sup. Ct. Rep. 261; Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914, recently decided, not yet officially reported.)

The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the So Relle Case, 55 Tex. 308, (in 1881,) and by the uniform decision of the federal courts, and decisions of the supreme courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text writers of unquestioned standing as expounders of the law. Lynch v. Knight, 9 H. L. Cas. 577; Flemington v. Smithers, 2 Car. & P. 292; Railway Co. v. Coultas, 13 App. Cas. 222; Johnson v. Wells, 6 Nev. 224; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. Rep. 408; Salina v. Trosper, 27 Kan. 564; West v. Telegraph Co., 39 Kan. 95, 17 Pac. Rep. 807; Wyman v. Leavitt, 71 Me. 227; Telegraph Co. v. Rogers, (Miss.) 9 South. Rep. 823; Chase v. Telegraph Co., 44 Fed. Rep. 554; Crawson v. Telegraph Co., 47 Fed. Rep. 544; Chapman v. Telegraph Co., (Ga.) 15 S. E. Rep. 901; Canning v. Williamstown, 1 Cush. 451; Wilcox v. Railroad Co., 52 Fed. Rep. 264, 3 C. C. A. 73; Tyler v. Telegraph Co., 54 Fed. Rep. 634; Wood's Mayne, Dam. p. 74, note; Wood, Ry. Law, p. 1238; 5 Amer. & Eng. Enc. Law, p. 42, note 2; Pierce, R. R. 302; Railroad Co. v. Stables, 62 Ill. 320; City of Chicago v. McLean, 133 Ill. 148, 24 N. E. Rep. 527; Trigg v. Railroad Co., 74 Mo. 147; Walsh v. Railroad Co., 42 Wis. 23. See, also, Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696; Terwilliger v. Wands, 17 N. Y. 54; Railroad Co. v. Packer, 9 Bush, 455; Joch v. Dunkwardt, 85 Ill. 331; Paine v. Railroad Co., 45

Iowa, 570; Railroad Co. v. Stevens, 9 Heisk. 12; Mulford v. Clewell, 21 Ohio St. 191; Freese v. Tripp, 70 Ill. 497; Clinton v. Laning, 61 Mich. 355, 28 N. W. Rep. 125; Meidel v. Anthis, 71 Ill. 241; Masters v. Warren, 27 Conn. 293; Stewart v. Ripon, 38 Wis. 584.

We have carefully considered the question presented, having been aided by able counsel orally and with elaborate briefs, and our conclusion is that upon principle, and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message, as the same are too uncertain, remote, and speculative.

In the case of Wadsworth v. Telegraph Co., supra, Judge Lurton, dissenting, said:

"The reason why an independent action for such injuries cannot and ought not to be sustained is found in the remoteness of such damages. * * * Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of Mr. Wood, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing to the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life; and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff, in consequence of the death for which the suit lies. This is the rule, regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, or parent or child, the rule is the same. The damages are for the pecuniary loss sustained. * * * The principles upon which this suit is maintained seem to me so radical a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law, upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved."

In the well-considered case of Telegraph Co. v. Rogers, supra, Mr. Justice Cooper, after ably reviewing the adjudged cases, said, for the supreme court of Mississippi.

"We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has

sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. Lynch v. Knight, 9 H. L. Cas. 577. The rapid multiplication of cases of this character in the state of Texas since the Case of So Relle indicates to some extent the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In So Relle's Case it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its nondelivery. In Railroad Co. v. Levy, 59 Tex. 564, that case was overruled in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. Rep. 593, where the husband had sent the dispatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental sufferings, caused by the negligence of the company in failing to deliver the message, but that, suing in right of his wife, (who was not a party to the contract with the company,) he might recover for her mental suffering. It is held in that state that the telegraph company must be informed, either by the face of the message, or by extraneous notice, of the relationship of the parties, and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate these facts: 'Willie died yesterday at six o'clock. Will be buried at Marshall Sunday evening.' (Telegraph Co. v. Brown, 71 Tex. 723, 10 S. W. Rep. 323.) while the following one did: 'Billie is very low. Come at once,' (Telegraph Co. v. Moore, 76 Tex. 66, 12 S. W. Rep. 949.) And a distinction seems to be drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering, and failing to deliver one which, if delivered, would relieve such suffering. In Rowell v. Telegraph Co., 75 Tex. 26, 12 S. W. Rep. 534, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently, a dispatch was sent, containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: 'The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract, in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injury to feelings, in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation.' The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of 'intolerable litigation' flowing from the decisions following the So Relle Case. Kentucky, Tennessee, Indiana, and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The 'intolerable litigation' invited and appearing in Texas has not yet fairly commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservation of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had, under the circumstances of this case."

With the reasoning and conclusions of these two eminent judges, we fully concur. The judgment of the circuit court should therefore be reversed, and the case remanded, with instructions to enter judgment for the defendant, sustaining the general demurrer and the first special demurrer to the plaintiff's first amended original petition, and dismissing plaintiff's suit, with costs, and it is so ordered.

TEXAS & P. RY. CO. v. LUDLAM.

(Circuit Court of Appeals, Fifth Circuit. June 27, 1893.)

No. 121.

1. CARRIERS—RAILROADS—DUTY OF PASSENGERS.
It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can stop, under the regulations of the railroad company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences. Beauchamp v. Railway Co., 56 Tex. 239, followed.

2. SAME—DUTY OF CONDUCTOR.
Where a train not scheduled to stop at a certain station is boarded by a person holding a ticket for such station, without informing himself as to whether he can stop there or not, the mere failure of the conductor to inform him, at the first opportunity, that the train cannot stop there, so that he can exercise the right to leave at any station he chooses, before reaching his destination, is not a breach of the company's obligation, so as to render it liable for damages caused to the passenger by being put off at the last preceding station, where he is subjected to great inconvenience and exposure. Locke, District Judge, dissenting.

3. SAME—FAILURE TO STOP AT STATION.
A person who boards a train, with a ticket to a given station, is entitled to be put off at that station, if the train usually stops there to receive or discharge passengers.

4. SAME—RIGHT OF COMPANY TO STOP TRAINS ONLY AT CERTAIN STATIONS.
In the absence of statutory regulations, a railroad company may adopt regulations that certain passenger trains, running regularly on its road, shall stop only at designated places, and it is the duty of an intending passenger to inform himself of such regulations.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Reversed.

Statement by PARDEE, Circuit Judge:

On the 24th of February, 1890, one Emma Ludlam bought a ticket at Texarkana for Stalls, a station on the Texas & Pacific Railway 58 miles south of Texarkana. She boarded the night train, which was passenger train No. 3, and which was a through train. She had with her four children; three of them being the children of her brother, James A. Ludlam, the defendant in error herein. She purchased no tickets for the children, nor did she pay any fare for them. Soon after leaving Texarkana, the conductor took up her ticket, and when the train arrived at Kildare, a station 45 miles south of Texarkana, and before it arrived at Stalls, he told her his train did not stop at Stalls, and that she would have to get off at Kildare. She asked to be put off at Lodi, a station between Kildare and Stalls, and the conductor told her the train did not stop at Lodi, either. When the train arrived at Kildare, Emma Ludlam, together with the children, were put off by the conductor, and they remained in the depot until the next morning at 9 o'clock, when they took the morning train to Stalls, paying 25 cents fare from Kildare to Stalls. This suit was brought by James A. Ludlam, father of three of the children who were with Emma Ludlam; and he sues, as next friend of said children, for damages for breach of contract to carry said children to Stalls that night, and for damages sustained by them for being compelled to remain at Kildare all night, in the cold, instead of being carried to Stalls. The defendant answered by a general denial; and, further, that the said children were passengers to Kildare, and not to Stalls, and did not offer to pay their way to Stalls, and therefore they had no right to be carried to Stalls, and, further, that said children were on the night train known as "No. 3," which passes Stalls about 11 o'clock at night, and

that said train did not stop at Stalls station, and that by a regular rule of the company, published, said train No. 3 was a through train, and did not stop at Stalls or Lodi, Lodi being the only station between Kildare and Stalls, and that the conductor of said train informed said children, and the person in charge of them, that the train would not and could not stop at Lodi or Stalls.

The evidence showed that, by a rule of the company, the night train (train No. 3) was not allowed to stop at Stalls, and it was for this reason that the conductor refused to stop at that station. Train No. 1, coming from Texarkana, stopped at Stalls about 10 A. M. Train No. 5, from Texarkana, stopped at Stalls at 5:43 P. M. Train No. 3, which passed Stalls at 10:50 P. M., was a through train from Texarkana to El Paso, and carried through sleepers, and it was the rule and regulation of the company that train No. 3 should not stop at Stalls at all. This rule was set out in the time cards, and by folders issued to the public. The case was tried on January 23, 1890, and resulted in a judgment for defendant in error for $500, from which judgment the plaintiff in error sued out and perfected this writ of error.

Plaintiff in error filed the following assignments of error: "(1) The circuit court erred in charging the jury as follows: 'If you believe the lady, Emma Ludlam, was on the train as passenger, and had a ticket from Texarkana to Stalls, and the conductor had allowed the children to travel with her without tickets, then it was the duty of the conductor, as soon as he found that she had a ticket to Stalls, to promptly inform her that the train did not stop at Stalls, so she could exercise the right to leave the train at any station she chose before reaching Kildare, her destination.' This was error, because the law does not impose upon the conductor the duty to inform a passenger that the train on which he is riding does not stop at a place named in a passenger's ticket, unless asked for. The charge was also error because there was no complaint in the pleading of his not telling her, and there was no evidence of any injury sustained by reason of his not telling her. (2) The court erred in charging the jury as follows: 'If you believe the lady had a ticket to Stalls, and the train upon which she was riding usually stopped at Stalls to take on or let off passengers, then it was the duty of the company to have carried her to Stalls that night, and they would be liable if they did not do so.' This charge was error, because it was proved that there was a rule of the company which forbade that train stopping at Stalls, and the custom of other trains stopping there could not vary the rule, or justify the conductor in violating said rule, and because the custom of other trains had not misled plaintiff. (3) The court erred in refusing the following charges asked by defendant: 'In this case, there being no improper treatment of the children, but only a refusal to carry them to Stalls, then, they having no tickets themselves, the only right to sue is in Miss Emma Ludlum, who had the ticket, and these plaintiffs cannot recover.' (4) The court erred in refusing the following charge asked by defendant: 'The evidence shows that the plaintiffs took passage on the train in question without making any inquiry as to whether the train stopped at Stalls, and the evidence shows that, by a rule of the company, that train was not allowed to stop at Stalls, and the conductor did right in not stopping that train at Stalls.' (5) The court erred in refusing the following charge asked by defendant: 'The jury are charged that a railway company may make rules governing their business, by which one of their trains may be a through train, and not stop at small way stations, and it is the duty of a person about to take passage on said train to ascertain if the train she is about to take will stop at the place of her destination; and, if a person boards a train that does not stop at the station of his destination, then the company may put the person off at the last station before they do stop before reaching the passenger's destination, and for such act the company would not be liable.'"

T. J. Freeman, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts as above.) It is well-settled railway law that "it is the duty of the person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the railroad company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences." See Beauchamp v. Railway Co., 56 Tex. 239–249, and the authorities there collated.

The first assignment of error raises the question, when a person has taken passage on a railroad train not scheduled to stop at his destination, without previously informing himself when, where, and how he can go or stop, according to the regulations of the railroad company, and is therefore wrongfully on the train, whether it is the duty of the conductor to promptly inform him that the train does not stop at the station to which he is destined, so that he can exercise the right to leave the train at any station he chooses, before reaching the destination named in his ticket. In short, the question is, where a person is wrongfully on a train, will the silence of the conductor, until he is officially called to act, reverse the position,—put the passenger in the right, and the railroad company in the wrong? The conductor on a train has many and varied duties to perform, all under the regulations of the company which he is serving, and we are clearly of the opinion that, without proof to show that the conductor was authorized to vary the rules of the company in regard to the stopping of his train at a station not permitted under the rules, his mere silence, under the circumstances mentioned, cannot vary the obligation of the company in respect to the contract of carriage. In relation to this assignment, it is to be further noticed that the charge complained of is based upon an issue not made by the pleadings, relates to the recovery of damages not sued for, and is objectionable as conjectural. See U. S. v. Breitling, 20 How. 252–254.

The second error complained of is the charge to the jury, as follows:

"If you believe the lady had a ticket to Stalls, and the train upon which she was riding usually stopped at Stalls to take on or let off passengers, then it was the duty of the company to have carried her to Stalls that night, and they would be liable if they did not do so."

The evidence shows that the defendant in error's children were traveling upon a ticket sold by the company from Texarkana to Stalls. If the train, under the rules of the company, stopped at Stalls, the said children were properly on the train, and were improperly put off at Kildare. The rules of the company become known to the public by proper publications, advertisements, and custom. In the charge complained of, the word "usually" is to be taken and understood as meaning habitually or customarily, and we are not prepared to say the charge was erroneous. On the contrary, if a certain train usually, habitually, or customarily

stops at a certain station to take on or let off passengers, we are of opinion that the public may govern itself accordingly.

The third assignment of error, complaining of the refusal to charge the jury as follows: "In this case, there being no improper treatment of the children, but only refusal to carry them to Stalls, then, they having no tickets themselves, the only right to sue is in Miss Emma Ludlam, who had the ticket, and these complainants cannot recover,"—is not well taken, because, as we understand the suit, it is one to recover damages for improper treatment, as well as for violation of the contract of carriage.

The fourth and fifth assignments of error present the question as to whether a railroad company, in the absence of statutory regulation or prohibition, may adopt regulations that a certain passenger train or trains, running regularly on its road, shall stop at only designated places or stations, and that it is the duty of the person about to take passage on the railroad train to inform himself when he can go, and where he can stop, according to the regulations of the company. We think the law on this question is well settled in favor of the right of the company to make the regulations, and as to the duty of the passenger to take notice of them. See Beauchamp v. Railway Co., supra; 2 Wood, Ry. Law, § 356; Railway Co. v. Pierce, 47 Mich. 277, 11 N. W. Rep. 157. Regulations as to the running and stopping of trains are in fact absolutely necessary for the transaction of the company's business, and for the safety of the employes and passengers; and their violation, at the will of the employe, or for the convenience of the passenger, ought not to be tolerated. In the state of Texas there is no statutory provision, prohibiting railway companies from making such regulations; and the proof in this case is that, at the time of the matters complained of in this suit, there were three daily trains from Texarkana passing through Stalls. Train No. 1, passing Stalls about 10 o'clock A. M.; train No. 5, passing Stalls at 5:43 P. M.,—both stopping at Stalls; and No. 3, passing Stalls at 10:50 P. M.,—this latter being a through train from Texarkana to El Paso, carrying through sleepers, and, by the rules and regulations of the company, prohibited from stopping at Stalls. The proof further showed that this rule was shown by the time cards, and that circulars were issued to the public, advising them of the fact. Under the testimony, this was not only a reasonable regulation for train No. 3, on the part of the company, but was reasonable for the public, as Stalls is only a side track, with no houses, (the nearest house to the station being about a half mile,) and two trains stop there daily.

Under the law, and in this state of the proof, the trial judge erred in refusing the charges requested. The judgment of the circuit court is reversed, with costs, and this cause is remanded, with instructions to award a new trial.

LOCKE, District Judge, (dissenting.) I dissent from the view herein expressed, that it was not the legal duty of the conductor

to inform the passenger of the mistake she had made in taking a train not scheduled to stop at the station to which she had purchased a ticket, upon his first discovery of such a mistake, by taking up the ticket.

BOUND v. SOUTH CAROLINA RY. CO. et al.

CHAMBERLAIN v. SWAN.

(Circuit Court, D. South Carolina. August 31, 1893.)

1. INTOXICATING LIQUORS—SOUTH CAROLINA "DISPENSARY ACT"—SEIZURE WITHOUT WARRANT.
   The South Carolina "dispensary act," approved December 24, 1892, (section 25,) providing that intoxicating "liquor intended for unlawful sale in this state may be seized in transit and proceeded against as if it were unlawfully kept and deposited in any place," does not authorize a constable to seize without warrant a package of liquor shipped from without the state, and stored within the state, prior to the statute taking effect, in the warehouse of a railway company, in the charge of a receiver appointed by a United States court, and kept therein without concealment.
2. SAME.
   To authorize a seizure under this section, it was essential that it should appear that the goods were in transit, and were intended for unlawful use within the state; the determination of these facts by the officer, upon his own suspicion, being insufficient.
3. SAME—LIQUORS INTENDED FOR UNLAWFUL SALE.
   Section 2 of the act, providing that any package containing intoxicating liquors, without having attached thereto the certificate of a county dispenser, and which shall be brought into the state, or shipped out of the state, or from place to place within the state, by any common carrier, shall be regarded as intended for unlawful sale, is a rule of evidence prescribed only in proceedings against carriers violating the section, and had no application to the package in question, which was brought into the state prior to the time the act took effect, and thereafter, to the time of seizure, kept in the warehouse.
4. SAME—CONSTRUCTION OF ACT.
   Nothing contained in the act expressly authorizes search and seizure without warrant, and the court is not disposed to so enlarge the tenor of the act as to construe it as authorizing such search and seizure.
5. SAME—CONSTITUTIONAL LAW.
   An express authorization in the act to make search and seizure without warrant would be unconstitutional, as in violation of the state bill of rights, art. 1, § 22, prohibiting unreasonable searches or seizures, and prescribing the formalities requisite to the issue of warrants.

Petition by D. H. Chamberlain, receiver of the South Carolina Railway Company, appointed in the suit of Frederick W. Bound against said company and others, and rule thereon to show cause why C. B. Swan, a constable, should not be attached for contempt, in taking a package of liquor from the custody of the petitioner. Upon demurrer to the petition, supported by answer, the rule was made absolute, and the respondent adjudged guilty of contempt.

Jos. W. Barnwell, for South Carolina Ry. Co.
D. A. Townsend, Atty. Gen., for respondent.

SIMONTON, District Judge. This case comes up on a petition and the rule thereon to show cause why the respondent be not attached for contempt of this court and upon demurrer to the petition, supported by an answer. The facts of the case, as shown by the papers, are these: On the 12th April, 1893, the South Carolina Railway Company, a corporation in the charge of a receiver appointed by this court, and a common carrier, received from a connecting road a barrel of liquor marked "B," shipped by Lowenstein Bros., citizens of North Carolina, from Statesville, in that state, and consigned to Charleston, S. C. The barrel, after its arrival, was stored in the warehouse of the railway company, awaiting the ascertainment of the person to whom it was consigned. Owing to some confusion, arising from the obscurity of the bill of lading, or from the marks on the barrel, there was much difficulty in discovering this fact, and the matter was thoroughly investigated. It now appears that the real consignee was Justin P. O'Neill, of Charleston, agent for the shippers. Pending this investigation, and while the goods were thus in the warehouse of the receiver, freight thereon being unpaid, and before any conclusion had been reached as to the disposition to be made of the goods, C. B. Swan, the respondent, entered the warehouse, seized the goods, took them out of the custody of the receiver, and deposited them in the jail of Charleston county, in the care of the sheriff. This seizure was on 1st August, 1893. The respondent showed no authority from either the consignee or consignor of the goods, nor did he produce any warrant, by virtue of which the search and seizure were made. When questioned as to his authority, he produced his commission as a constable of the state. His suspicions had been excited respecting this barrel,—it having been, presumably from necessity, removed from one part of the floor of the warehouse to another,—and he acted on his suspicions. At the hearing it was admitted that his course was of his own motion, without instructions, certainly, from any one in the legal department of the state, and in all probability he was without instructions from any other person. After seizure the goods remained in the place of deposit selected by Swan, without any proceeding or application whatever, until the issuance and service of this rule; that is to say, from August 1st to August 8th.

Were this a simple case of interference with property in the hands and custody of this court, without notice to it, and without action on its part, its settlement would be easy. Were it even based upon a charge of violation of the law on the part of the receiver, and sustained by a mandate issuing from any proper authority, the court would not be slow to believe that the manner of the execution of the mandate arose from inadvertence, and would lend its aid to an investigation of the charge, and a due execution of the law. As a common carrier, the receiver is bound to respect and obey the laws of the state. He and the court from whom he holds his appointment are servants of the law, exceptionably bound to pay it the utmost deference and respect. But the

real issue in this case is vastly more important than an interference with property in the hands of the court. It is far-reaching in its consequences, and concerns, not only the receiver, but every other citizen.

Has any constable the right, without warrant, to search premises, and to seize property, when he suspects that a violation of the law is intended? The learned attorney general, in an argument characterized by ability and great fairness, admitted that, unless express authority was given him in the statute, he could not have acted legally without a warrant. He relies upon cases in Massachusetts and Vermont in which this point is clearly stated. Upon examining these cases,—and no other reference to them is necessary,—it was found that the statute, in so many words, gave express authority to act without a warrant in certain exceptional cases. When he sought this authority in the statute of South Carolina, he relies on the words of the twenty-fifth section:

"All such liquors intended for unlawful sale in this state may be seized in transit and proceeded against as if it were unlawfully kept and deposited in any place."

This language certainly does not expressly authorize seizure without warrant; and before they can be seized, even under this section, it must appear that the goods were in transit, and that they were intended for unlawful sale in this state,—two facts, essential to the seizure, surely not determinable by a constable in his own mind, upon his own suspicion. The dispensary act itself creates the presumption against a package of intoxicating liquor that it is intended for unlawful sale in but one place only. The second section says:

"Any package containing intoxicating liquors without such certificate [the certificate of a county dispenser] which shall be brought into this state or shipped out of the state or shipped from place to place within the state by any railroad, express company, or other common carrier, shall be regarded as intended for unlawful sale"

This is a rule of evidence prescribed only in civil or criminal proceedings against the common carrier transporting liquors without such certificate and the language can be extended to no other case. It must be remembered that this section applies only to intoxicating liquors which shall be brought into the state, etc., after the act went into operation, 1st July, 1893, and has no application to this package, which was brought into the state 12th April, 1893, and thereafter was neither being shipped out of the state nor from place to place within the state, but was kept in the warehouse, and held there. The twenty-second section of this act is the key of it. It says:

"All places where intoxicating liquors are sold, bartered, or given away in violation of this act or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act are hereby declared common nuisances."

The draughtsman of this section, with great care, adds:

"And if the existence of such nuisance be established either in a civil or a criminal action upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or any constable of the proper county or city where the same is located, shall be directed to shut up and abate such place by taking possession thereof if he has not already done so under the provisions of this act and by taking possession of the intoxicating liquors found therein."

If this act dealt with intoxicating liquors as if they were a deadly poison, whose presence is noxious, if the danger from them was treated as of the immediate character attending a ferocious animal at large, or the seeds of a pestilence, then the language of the statute might receive the most enlarged construction in seeking to abate such a fearful nuisance. But it must be borne in mind that from the whole tenor of this act the use of intoxicating liquors as a beverage by the mass of the community is recognized, and its use for this purpose is not discouraged. The sale of it is to be conducted openly, and in public places. The whole purport, meaning, intent of the act is to place such sale in the hands of certain persons, recognized and appointed by the highest functionaries in this state, and to bring it within reach of the people. Even upon general principles, it would be impossible to enlarge the tenor of the act, and to give enormous power to the most subordinate class of officials known to the law, and to authorize such search and seizure by them without warrant. Deep down in the heart of the Anglo-Saxon race is the abhorrence of every such exercise of power almost absolute, and such exercise is never tolerated except in the most extreme and urgent cases, when the safety of the people becomes the supreme law. But if the statute did, in so many words, expressly authorize the search and seizure without warrant, will this justify the respondent in this case?

The constitution of South Carolina, in its bill of rights, (article 1, § 22,) declares:

"All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers or possessions. All warrants shall be supported by oath or affirmation and the order of the warrant to a civil officer to make search or seizure in suspected places or to arrest one or more suspected persons or to seize their property shall be accompanied with a special designation of the persons and the objects of search, arrest or seizure. And no warrant shall be issued but in the cases and with the formalities prescribed by the laws."

This is the limit of the power of the legislature in searches and seizures.

In the case now before us there is not even the excuse for haste. The goods were stored and kept in a warehouse, not at a place for sale. No concealment whatever was practiced. In his answer the respondent says that for several days he saw the package, and watched it. Any notification to this court would have absolutely secured him from any removal of it. Within his reach, at any hour of the day, he could have gone before any justice or judge, and could have obtained, or at least could have sought, a warrant. The process of law was within his reach. Even when he searched and

seized the package, he openly disregarded the law. For eight days he remained inactive, taking no steps whatever to justify, support, or legalize his action. It does not appear even that he reported it to any one. His contempt of private rights went far beyond his disregard of the existence and authority of this court.

It is ordered that the rule be made absolute, and that the respondent, C. B. Swan, be adjudged guilty of a contempt of this court.

It is further ordered that the marshal of this district take him in custody, and that he be imprisoned in the jail of Charleston county until he returns to the custody of the receiver the barrel taken by him from the warehouse without warrant of law, and, when that has been surrendered, that he suffer a further imprisonment thereafter in said county jail for three months, and until he pay the costs of these proceedings.

WAITE v. ROBINSON et al.

(Circuit Court of Appeals, First Circuit. August 1, 1893.)

No. 46.

PATENTS FOR INVENTIONS—ADJUSTABLE CHAIRS—INFRINGEMENT.

Letters patent No. 329,805, issued November 5, 1885, to William Boscawen, for an improvement in chairs, consisting of a sliding supplemental foot, which may be used as a bracket to support the seat, is not infringed by a device which substitutes the feet of a chair for its secondary frame feet, and for which letters patent No. 416,324 were issued to William G. Cross, December 3, 1889. 52 Fed. Rep. 295, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by Gilman Waite against Charles H. Robinson and others for infringement of letters patent No. 329,805, for an improvement in chairs, issued November 5, 1885, to William Boscawen, and by him assigned to Daniel L. Thompson, Charles A. Perley, and Gilman Waite, for an improvement in chairs. From a decree dismissing the bill, (52 Fed. Rep. 295,) complainant appeals. Affirmed.

James E. Maynadier, for appellant.

George W. Hey and Alfred Wilkinson, for appellees.

Before COLT, Circuit Judge, and WEBB and CARPENTER, District Judges.

CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of letters patent No. 329,805, issued November 3, 1885, to William Boscawen, for chair. The bill was dismissed by the circuit court, and the complainant appealed. 52 Fed. Rep. 295. The alleged infringing device is that shown in letters patent No. 416,324, issued December 3, 1889, to William G. Cross. The circuit court held that the patent in suit shows no patentable novelty; and, while we are of opinion that the decree

should be affirmed, we do not find it necessary to go so far as to find that the patent is invalid, but rather rest our finding on the proposition that the patent must be so construed as to relieve the respondents of the charge of infringement.

Adjustable chairs have been made in many forms and for various uses, as the record fully shows; and there remains, indeed, very little room for invention. The "distinct idea," says the appellant, which is involved in his patent, is "a chair frame with four feet, two of which are always on duty as feet, combined with a seat with but two feet, which are always idle while two feet of the frame are on duty, and vice versa." This may fairly be said to be the idea of the patent, if it be taken in connection with, and to be modified by, certain structures already known. In the first place, the device of six feet operating as above described is shown in the patent No. 282,154, of July 31, 1883, to Edward H. Bolgiano. In that device the third or supplementary pair of feet are hinged to the front feet of the supporting framework. The device of using the front feet of the seat as supplementary feet is shown in the patent No. 202,788, of April 23, 1878, to Frederick Caulier; the device of using all four feet of the seat for the same purpose appears in the patent, No. 259,368, of June 13, 1882, to Lemuel A. Chichester; and the device of using the rear feet of the seat for the same purpose appears in the patents No. 191,294, of May 29, 1877, to Luther I. Adams, and No. 202,046, of April 2, 1878, to Charles A. Perley.

There remains nothing for this patentee, as it seems to us, except his specific device, which essentially consists in substituting for the swinging or rotating supplementary foot of the Bolgiano chair a sliding supplementary foot, and giving to this sliding supplementary foot the additional function of a bracket to support the seat. Neither of these functions appears to be performed by the mechanism of the Cross chair. In the chair of Boscawen, as in that of Bolgiano, there is a triangular supporting framework whose front feet are made double or divided into two parts, which two parts come into action alternately, while Cross has reached the same result by substituting the feet of the chair for the secondary frame feet, after the general method of construction suggested by the device shown in the Caulier patent.

The decree will therefore be affirmed, with costs.

MOLLER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 115.

1. IMMIGRATION — CONTRACT LABOR LAW — PRIOR CONTRACT ESSENTIAL TO OFFENSE.

Neither the prepaying of transportation, nor the assisting or encouraging, in any wise, the importation, of an alien, is a violation of the contract labor act of February 26, 1885, (23 Stat. 332, c. 164,) without a contract

or agreement, made previous to the importation or migration, binding the alien to perform labor or service in the United States, its territories, or the District of Columbia.

2. SAME—PROCEEDING NOT OF CRIMINAL NATURE—EVIDENCE—DEPOSITIONS.
A suit by the United States under the contract labor act of February 26, 1885, (23 Stat. 332, c. 164,) although brought to recover a penalty, is a civil suit, and a deposition is admissible in evidence therein against defendant.

3. DEPOSITIONS—MANNER OF TAKING—MUST BE READ TO DEPONENT.
A deposition taken down stenographically, in questions and answers, and not reduced to writing in the presence of the witness, nor read over to or by him, is not properly taken, under Rev. St. §§ 863, 864, and is not admissible in evidence against the objections of either party.

4. EXCEPTIONS, BILL OF—FINDINGS OF FACTS.
A bill of exceptions, which purports to be a finding of facts, but is neither a statement of facts by the parties, nor a finding of facts by the court, but merely a recapitulation of conflicting evidence, is insufficient.

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

Suit by the United States against Jens Moller and B. Adoue for violation of the act prohibiting the importation of laborers under contract. Judgment was given for plaintiff, as against defendant Moller, who now brings error. Reversed.

Statement by PARDEE, Circuit Judge:

This suit was instituted in the court below by filing petition as follows:

"Your petitioner, the United States of America, hereinafter styled plaintiff, by and through Robert E. Hannay, United States attorney for the eastern district of Texas, duly qualified as such, complaining of J. Moller and B. Adoue, both of whom reside in Galveston county, Tex., under the jurisdiction of this court, and hereinafter styled defendants, respectfully represents and shows to the court:

"That the defendants were stockholders in Galveston Bagging & Cordage Factory, situated in Galveston county, Tex., in July, A. D. 1890, which is now and has been in operation for some months, making bagging and twine with machinery and a number of laborers, etc. At the same time the said J. Moller was an agent for certain ships, known as the 'Black Star Line of Steamers.' That during the month of July, A. D. 1890, the defendant, J. Moller, was in the city of Dundee, in Scotland, and, after receiving a letter from B. Adoue, president of the Galveston Bagging & Cordage Company Factory, as aforesaid, stating that they needed labor for said factory, and to get same, saw one James A. Russel, who resided in the city of Dundee, in Scotland, and was then and there employed in a jute and flax factory, the said James A. Russel being then and there a subject of Great Britain. That the said defendant Moller then and there encouraged, solicited, persuaded, and induced the said James A. Russel to consent and agree to come to Galveston county, Tex., to work in said bagging and cordage factory, and that on the 23d day of July, 1890, for a certain consideration specified in a verbal contract and agreement made by and between the defendant Moller and the said James A. Russel, he, the said Russel, did leave the city of Dundee, in Scotland, and went, at the special instance and request of said defendant Moller, to Liverpool, in England, where he remained until the 31st day of July, 1890, at which time he sailed on the steamship Empress, one of the Black Star Line steamers, for Galveston, Tex., where he arrived on the 22d day of August, 1890. That the defendant Moller, through his agent, provided the said Russel with money, and paid or caused his passage paid from Liverpool to Galveston, Tex. That before the said Russel left Scotland the said Moller promised him, and agreed that he should receive, fifty-two shillings for each week's work performed in the said bagging and cordage factory in Galveston, Tex. That when the said Russel arrived in

Galveston, Tex., he reported for duty at the Galveston Bagging & Cordage Factory, and was assigned work, where he has continued in the employment of said Bagging & Cordage Factory Company ever since.

"The said James A. Russel was on the 10th day of July, A. D. 1890, and is now, a foreigner and alien, being then and there a citizen of Scotland, and subject of Great Britain, he never having taken the oath of allegiance to the United States, all of which was well known to the defendants at the time he was induced and employed by said defendants to come to Galveston county, Tex. That the defendants did, by acts and words, on the 10th day of July, A. D. 1890, and on divers days thereafter, solicit, encourage, persuade, and knowingly assist to migrate and import said James A. Russel, a foreigner and alien as aforesaid, into the United States of America, to wit, Galveston county, Tex., previous to said Russel becoming a resident and citizen of the United States, to perform labor as aforesaid in said bagging and cordage factory.

"That the encouraging, assisting, and bringing of said Russel to the United States, and to Galveston, Tex., was at the special instance and request of the said B. Adoue, who was president of said bagging and cordage factory, and that the same was done with full knowledge on the part of these defendants that the laws of the United States prohibited the importation of foreign laborers to work as aforesaid. Their acts were done willfully and knowingly, to evade, and in violation of, said law. The said contract and agreement made and entered into by and between the said James A. Russel and defendant Moller in Scotland, as aforesaid, was agreed to by said Russel, whereupon he consented and came to the United States, as aforesaid, in pursuance of said contract and agreement. Said agreement was ratified by said J. Moller on the 31st day of July, A. D. 1890, by his acts, through his agent, and subsequently again after said J. Moller returned to the United States, to wit, Galveston county, Tex. That for the violation of the United States laws, by knowingly assisting, encouraging, soliciting, migrating, and importing said alien, James A. Russel, as aforesaid, by the defendants into the United States of America to perform labor and service under said contract and agreement with said Russel, this suit is brought for the recovery of the forfeit and penalty of one thousand dollars, in behalf of the United States of America.

"Premises considered, plaintiff prays that the defendants be cited, as provided by law, to answer this petition, and that, upon final hearing of this cause, plaintiff have judgment for the sum of one thousand dollars and all the costs of this suit, and for general relief, and, as in duty bound, will ever pray."

The defendants in the court below appeared and filed an original answer, wherein they first demurred generally to the aforesaid petition, and then specially excepted to said petition, because:

"(1) It does not charge any violation of the provisions of an act of congress entitled 'An act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia,' approved February 26, 1885, and the acts amendatory thereof.

"(2) It does not allege that the defendants, or either of them, prepaid the transportation of the aliens named in the petition into the United States. And

"(3) It does not state how, or by what means, defendants assisted, solicited, or encouraged the alleged importation of said aliens into the United States. And

"(4) It does not declare or set forth any contract or agreement to perform labor in the United States, made previous to the importation of said aliens.

"(5) The charges of persuasion, encouragement, etc., are conclusions of the pleader, rather than averments of fact.

"(6) The promise or agreement attempted to be declared on lacks mutuality, an essential element of a contract.

"(7) The averments of the petition are vague, uncertain, and indefinite, and not such as the law requires.

"(8) It does not allege that the said aliens were not skilled workmen brought to the United States, engaged under contract in a foreign country to perform labor in the United States in and upon a new industry, not at present established in the United States, nor that such labor could not be otherwise obtained.

"(9) It does not show any contract or agreement, wherefore defendants pray judgment that said petition be dismissed," etc.

And, further answering, the defendants denied, all and singular, the averments of the petition. The cause being called for trial, both parties, in writing, waived a jury, and submitted the questions of law and of fact to the court. The court overruled the general demurrer and special exceptions to the plaintiff's petition, and thereupon, after hearing evidence, found "that the defendant B. Adoue is not liable as charged in the petition, but that the defendant Jens Moller is liable as charged, and is subject to a penalty in the statutory sum of one thousand dollars, and that judgment should be entered accordingly."

Judgment was thereupon entered in favor of the United States against the defendant Jens Moller in the sum of $1,000, with interest thereon from date at the rate of 6 per cent. per annum.

During the trial of the case the defendants objected to the introduction of a deposition of one James Russel, and moved to suppress the same, upon the following grounds:

"First. This proceeding being penal in its nature, defendants have the right to be confronted in open court, upon the trial of this cause, with the witnesses against them, and it is not competent, against their objection now here made, to hear and determine this cause upon evidence contained in, or taken by, depositions.

"Second. Defendants, should the foregoing be overruled, move to suppress and strike out all the following part of said depositions, to wit: All those parts that relate conversations and transactions affecting the rights or liabilities of J. Moller and B. Adoue, in their absence, or in the absence of either of them. All those parts relating to letters or other documentary evidence, in the absence of the originals, their nonproduction not being accounted for. All those parts that refer to any inducement held out, or promises made, to the witness, to influence him to come to the United States, as it is not shown that he was under contract or agreement made previous to the importation of witness to perform labor or service of any kind in the United States, the alleged agreement not containing the requisites of a valid contract, lacking in mutuality, specification as to time, and, in brief, as showing nothing more than a recommendation.

"For the foregoing and other grounds manifest of record, defendants say that said questions to, and answers of, said James Russel, purporting to be his deposition, are incompetent, immaterial, irrelevant, and inadmissible, and should therefore have been stricken out. The objection based upon the fact that the deposition was not subscribed by deponent was waived."

The court overruled the objections, and admitted the deposition in evidence, to which ruling counsel for defendants duly excepted. All the evidence admitted on the trial of the case was set forth in a bill of exceptions entitled "Findings of Fact," and the counsel closed the same with the stipulation "that the foregoing findings of fact by the court are a substantially true statement of the material facts in the case, and that the same is hereby considered and treated, upon writ of error, as facts found by the court, within the meaning of the statute, and within the general rule upon that subject, in manner and form stated."

The plaintiff in error assigns errors for review in this court as follows:

"(1) The court erred in overruling defendants' demurrer and exceptions to plaintiff's petition, which are, in effect, as follows:

"(a) The petition does not charge any violation of law.

"(b) It does not state how, or by what means, aside from prepayment of transportation, defendants assisted or encouraged the immigration of the alien, Russel, and the charges in that behalf are mere conclusions of the pleader, and not averments of facts.

"(c) It does not set forth the essential elements of a contract or an agreement to perform labor in the United States, made previous to immigration.

"(d) The averments are vague, uncertain, and indefinite.

"(e) It is not alleged that the said alien was not a skilled workman brought to the United States to work in a new industry, not at present established in the United States, nor that such labor could not be otherwise obtained.

"(2) The court erred in overruling defendants' objections to, and motion to suppress, the deposition of James Russel, and certain parts thereof, for the reasons stated in said motion, which is set forth in the bill of exceptions No. 2, and is hereby referred to for greater particularity, and the substance of which is that, as this suit was in the nature of a criminal proceeding, it was defendant's right to be confronted with the witnesses against him, and evidence by deposition was not competent or admissible; also, that evidence as to conversations and transactions not had in the presence of defendants should not be heard, being res inter alios acta; also, those parts relating to letters and documents, the nonproduction of the originals not being accounted for, should be excluded, as well as those parts relating to mere promises or inducements to the witness to come to the United States, it not being shown that witness was under contract made previous to migration to perform labor in this country, the facts testified to by him not establishing any agreement valid as to mutuality, or specification as to time, nor showing anything more than a recommendation, which is not equivalent to the assistance or encouragement referred to by the statute, and there being no evidence that defendant prepaid the passage of witness, and said deposition was incompetent and insufficient to establish the issues presented by the petition, and was immaterial and irrelevant, and should therefore have been excluded."

F. D. Minor, (James B. and Charles J. Stubbs, on the brief,) for plaintiff in error.

F. B. Earhart, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) This action was brought by the United States to recover from the defendants a penalty of $1,000, as prescribed by the act of congress entitled "An act to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."

A careful reading of the said act will show that every violation must be based upon the existence of a contract or agreement, parol or special, express or implied, made previous to the importation or migration, to perform labor or service in the United States, its territories, or the District of Columbia. Without such contract, there can be no violation of the act by prepaying transportation, or by assisting or encouraging in any wise the importation of aliens. U. S. v. Edgar, 48 Fed. Rep. 91, 1 C. C. A. 49; U. S. v. Borneman, 41 Fed. Rep. 751; U. S. v. Craig, 28 Fed. Rep. 795. See, also, Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. Rep. 511.

The petition in this case, which has been fully set out in the statement of facts, fails to sufficiently set forth that the defendants assisted and encouraged the importation of any alien, who, previous to his migration or importation into the United States, (or thereafter, for that matter,) was under any contract or agreement, parol

or special, express or implied, to perform labor or service of any kind in the United States. The petition seems to have been drawn with a view not to assert such a contract, but rather to suggest the same by vague allegations and inferences. The general demurrer and the special exceptions are well taken.

The record shows that the alleged deposition of the witness James Russel was taken pursuant to notice before a commissioner of the circuit court, under the following circumstances: The counsel for the United States, the defendants, and their counsel, and the witness James Russel, all appeared before the commissioner, whereupon the witness was duly sworn, examined, cross-examined, re-examined, recross-examined, and re-examined, by questions and answers taken down by a stenographer in stenographic writing. The deposition was not read over to the witness, but an adjournment was had for four days for the purpose of enabling the stenographer to write out the testimony so taken down by him, when the same was to be read over to the witness, and corrected, and signed by him; but thereafter the said witness did not appear, nor was the deposition ever read to him, or examined by him. It appears that, so far as the deposition was not signed by the witness, the objection was waived.

We do not think the objection that, the proceeding being penal in its nature, the defendants have the right to be confronted in open court, on the trial of the cause, with the witness against them, and that it is not competent, against their objection, to hear and determine this cause upon evidence contained in, or taken by, depositions, is well taken. The suit, while for a penalty, is a civil suit, and it was so treated by the parties, as may be noticed by the waiver of trial by jury. We are, however, of the opinion that a deposition, which is taken down in questions and answers by a stenographer, and is not reduced to writing in the presence of the witness, nor read over to or by him, is not a deposition properly taken, under the statute, and is not admissible in evidence against the objections of either party. Rev. St. §§ 863, 864; Cook v. Burnley, 11 Wall. 659.

The bill of exceptions, which purports to be a finding of facts, is nothing more than a recapitulation of conflicting evidence, where, as recited therein, some witnesses testified one way, and others testified directly to the contrary. It is neither a statement of facts by the parties, nor a finding of facts by the court. Raimond v. Terrebonne Parish, 132 U. S. 192, 10 Sup. Ct. Rep. 57; Glenn v. Fant, 134 U. S. 398, 10 Sup. Ct. Rep. 583; Davenport v. Paris, 136 U. S. 580, 10 Sup. Ct. Rep. 1064; British Queen Mining Co. v. Baker Silver Mining Co., 139 U. S. 222, 11 Sup. Ct. Rep. 523. We suggest to the members of the bar in this circuit that an examination of these last-cited cases will be advantageous, if, hereafter, in common-law cases, they shall desire to bring facts to this court for review.

The views herein expressed require that the judgment of the circuit court be reversed, and the case remanded, with instructions to enter an order granting a new trial, and judgment sustaining

the general demurrer and special exceptions to the original petition, and thereafter to proceed in the cause in accordance with the views herein expressed, and as justice may require; and it is so ordered.

In re FLINN.

(Circuit Court, W. D. North Carolina. August 21, 1893.)

1. HABEAS CORPUS—FEDERAL COURTS—REMEDY IN STATE COURT.
The power of the United States circuit court to grant writs of habeas corpus should not be exercised where petitioner is in custody under a warrant issued to recover a penalty of $50 imposed for failure to pay a license tax as peddler, and unnecessary delay in the proceeding, injustice, oppression, or inability to give the small bail required are not alleged, and he contends that the act—a recent one—by which such tax and penalty are prescribed, is violative of the exclusive constitutional authority of the United States to regulate commerce among the states; but, acting in a spirit of comity, the court should leave the question of the constitutionality of the act to the state courts, and require the petitioner to seek his remedy therein.

2. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.
A state statute which authorizes legal process to be issued for the collection of a penalty for the nonpayment of taxes on sale by sample of goods not then within the state is repugnant to the United States constitution, as being a regulation of interstate commerce.

3. HAWKERS AND PEDDLERS—WHAT ARE SALES BY—LICENSE TAX.
The North Carolina statute, ratified March 6, 1893, entitled "An act to raise revenue," (section 23,) requiring peddlers of merchandise to pay a license tax, etc., and prescribing by section 35 a penalty for nonpayment of such tax, does not apply to sales by sample of goods not at the time of sale within the state, and ready for immediate delivery, but applies only where goods are actually exposed and offered for sale, and ready for delivery at once to the purchaser.

At Law. Petition by R. J. Flinn for a writ of habeas corpus. Pending final hearing, the petitioner was discharged from custody, and, that fact being shown to the court, the petition was dismissed.

Statement by DICK, District Judge:

Petition of R. J. Flinn for a writ of habeas corpus to be released from arrest and custody of the coroner under proceedings at law, entitled "J. G. Grant, Sheriff, vs. R. J. Flinn and D. C. Lunceford," now pending before a justice of the peace in the county of Henderson, and state of North Carolina, for the collection of a penalty of $50, alleged to have been incurred as a peddler, under section 35 of "An act to raise revenue," (chapter 294 of the Laws of North Carolina,) for the nonpayment of taxes imposed in section 23 of said act.

H. G. Ewart, for petitioner,

Cited Welton v. State, 91 U. S. 275; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. Rep. 725; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; Bowman v. Railroad Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681; Range Co. v. Johnson, 84 Ga. 754, 11 S. E. Rep. 233.

DICK, District Judge, (after stating the facts.) This petition for a writ of habeas corpus, with the accompanying exhibits of pro-

ceedings at law instituted and pending before a justice of the peace of Henderson county, and state of North Carolina, were presented to me at chambers, and were ordered to be filed for hearing in the United States circuit court at Greensboro, such court having concurrent original jurisdiction in such cases. The petitioner, in substance, alleges that he is a citizen and resident of the state of Kentucky, and that he has been arrested and is now in the custody of the coroner of Henderson county by virtue of a warrant issued by a justice of the peace of said county for the recovery of a penalty alleged to have been incurred by him as a peddler, under sections 23 and 35 of a revenue law of this state, enacted March 6, 1893, (chapter 294, p. 243, Laws N. C.;) that he is now, and for many years has been, a duly appointed and authorized agent of L. Cahill & Co., a firm engaged in the business of manufacturing and selling sulky plow carriages at Kalamazoo, in the state of Michigan; that the nature and extent of his employment as such agent is the making of contracts of sale for sulky plow carriages, by exhibiting a sample, and engaging that the commodities sold shall correspond with the sample, and be delivered in unbroken packages to purchasers by his said employers, who are the manufacturers. The petitioner insists in his petition that such employment and business comes within the scope of interstate commerce, and as such can only be regulated by the congress of the United States, and that he is not liable to the taxes and penalty alleged to be imposed by the revenue laws of this state, and that his imprisonment for failing to pay such taxes and penalty is illegal, as being in disregard of the constitution of the United States. The petitioner, in his petition, further insists that upon a fair and reasonable construction of the said sections of the revenue law he is not liable to the taxes and penalty sought to be recovered, as he never at any time or place exposed sulky plow carriages for sale and immediate delivery to purchasers, but only exhibited a sulky plow carriage as a sample to inform persons of the nature and quality of the articles which he proposed to sell as agent of the manufacturers; that he accepted notes executed by purchasers, made payable to the firm of L. Cahill & Co., and on his part made covenants in behalf of the firm as to the quality of the article sold by sample, and as to safe and prompt delivery. Petitioner further insists that under a provision of said section he is not liable to taxes and penalty, as the goods were manufactured by his said employers, and as such were offered for sale by samples in this state by him as agent.

The counsel of petitioner, in his argument and brief, insisted upon the following legal propositions as being applicable to this case: That the constitution of the United States (art. 1, § 8) confers upon congress the power to regulate commerce with foreign nations and among the several states; that such power is necessarily exclusive, and the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by

the states, except in certain local matters within the scope of their police power, is in disregard of the constitution; that the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce; that a tax or charge for a license to sell goods is in effect a tax upon the goods themselves; that interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state; that a state cannot levy a tax or impose any other restrictions upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein, as such a tax or restriction would be a burden on interstate commerce. He conceded the law to be well settled that if such goods, when sold, were in the state, and part of the general mass of property, they would be liable to taxation, for a state, in the discretion of its legislature, may levy a tax upon every species of property within its jurisdiction, and may also require a license tax from any peddler or itinerant salesman making sale of goods within the state at time of sale if no discrimination is made as to such occupations against nonresident citizens. The counsel of petitioner further insisted that upon a fair and reasonable construction of section 23 of the state revenue act his client was not liable to pay taxes and obtain a license to sell goods as a peddler, as he did not carry with him any goods for sale and delivery to purchasers. Neither was he required to procure a license as an "itinerant salesman," as his occupation was not within the terms of the law; he did not "expose for sale, either on the street or in houses rented temporarily for that purpose, goods, wares, and merchandise;" and, moreover, his occupation comes within the exemption of the act, as the goods which he proposed to sell by sample belonged to and were of the manufacture of his employers, L. Cahill & Co. That in construing the language of the act of assembly to find out its intent and purpose this court should assume that the legislature of the state, at the time when such revenue act was enacted, was well aware of the decisions of the supreme court of the United States as to the exclusive power of congress to regulate commerce among the several states, and desired to frame a revenue act in conformity with the supreme law of the land, declared by the highest judicial tribunal of the nation. Any other construction would be unjust to the law-abiding reputation of the people of this state, and not in accordance with the ordinary meaning of the words used by the legislature to express its lawful intent and purpose.

The matters of fact alleged in this petition bring this proceeding clearly within the jurisdiction of this court, and the principles of law and rules of statutory construction insisted upon by counsel seem to be well sustained by his argument and the adjudged cases cited; but, under the facts and circumstances disclosed in the petition, I am not ready to grant the writ of habeas corpus as prayed for. The power given to federal courts to arrest the arm of

state authorities and to discharge persons held by them for alleged violations of their local law is one of great delicacy, and should only be exercised when it clearly appears that their proceeding is repugnant to the constitution of the United States, and urgent justice demands prompt action. Federal courts should certainly assume that a state legislature will not willfully disregard the constitution, and that a state court will perform an obligatory duty and administer justice in conformity with the national constitution and laws. In former years the prompt and frequent exercise of paramount power by federal courts produced much popular dissatisfaction, angry political discussion, and some conflict of judicial opinion and authority, which disturbed the good feeling and harmony which ought always to prevail among the people of a common country, and diminished the comity that should ever exist between courts legally designed and established to administer justice in the same territorial limits, and equally bound to guard, protect, and enforce the rights of all citizens under the national constitution and laws. The supreme court of the United States in recent decisions has in clear and positive terms announced the liberal and conservative doctrines of comity towards the state courts which should be applied by inferior federal courts in the exercise of judicial discretion on applications for writs of habeas corpus where the petition shows that the applicant is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of the state, and it is claimed that he is restrained of his liberty in violation of the constitution of the United States. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. Rep. 40. I will not make quotations at length from these opinions so carefullly considered, so well expressed, and so easily accessible. In the recent case, In re Frederich, 149 U. S. 70–77, 13 Sup. Ct. Rep. 793, the court says:

"We adhere to the views expressed in that case, [Ex parte Royall.] It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of habeas corpus; for under proceedings by writ of error the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged. In some instances, as in Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. Rep. 384, the proceeding by habeas corpus has been entertained, although a writ of error could be prosecuted; but the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the constitution or laws of the United States to seek a review thereof by writ of error, instead of resorting to the writ of habeas corpus."

I fully recognize the justice, propriety, expediency, and wisdom of such general rule and practice, and believe that it will be more satisfactory to public sentiment and judicial opinion, and better subserve the ends of justice, to have questions of such a character

authoritatively decided by the supreme court of the United States, than to leave them as open subjects of political discussion, forensic debate, and disagreement of judicial action in subordinate state and national courts. Such a course of procedure tends to preserve the dignity of both state and national courts, to prevent unseemly conflict of judicial authority, and to secure the peace, harmony, and stability of the Union under our peculiar system of government.

The counsel for petitioner admitted that such general rule of practice was well established, but insisted that it should not be applied in cases affecting interstate commerce, as the delay, vexation, and expense to parties seeking the enforcement of plain constitutional rights through the successive stages of procedure in state courts, and then by writ of error to the supreme court of the United States, would greatly hinder and restrain the freedom and utility of interstate commerce, and deprive nonresident citizens of equality of privilege in the sale of the articles and products of their enterprise and industry. I am aware that such considerations have influenced some federal judges in the exercise of their discretion in cases which had passed to judgment in a state court, or where the questions of law involved had been often determined by courts on a similar state of facts. Ex parte Kieffer, 40 Fed. Rep. 399, and other subsequent cases. I will not express concurrence or dissent as to such discretionary rulings, as judicial action has not been uniform, and they do not apply to the case now before me. In re Spickler, 43 Fed. Rep. 653, and other cases. In this case no hearing has been had in a state court of inferior or superior original jurisdiction, and the constitutionality and construction of a recent state statute are the questions of law involved. The amount of the penalty sued for is small. The petitioner does not allege any unnecessary delay in the proceeding, any facts or circumstance of injustice and oppression, or any inability to give the small amount of bail required.

I am of opinion that when a person goes into a state to carry on business he should be ready and willing to comply with the requirements of local law, and have his rights determined, in the first instance, by the courts of such state, where the rights of resident citizens are determined; and he should not complain unless his case is unnecessarily delayed, or he is in immediate danger of being subjected to manifest and grievous wrong and oppression. I am well satisfied that the legislature of this state intended to enact a revenue law that was not repugnant to the constitution of the United States; and if, through inadvertence, the section of the statute which we are considering was a regulation of interstate commerce, I am confident that the constitutional rights of the petitioner could and would be readily secured and enforced in the courts of this state. Before any court of this state had an opportunity of hearing the parties and determining the rights involved the petitioner applied to this court to arrest the legal proceedings just begun, where no facts or circumstances of wrong or oppression had occurred, and no spirit of unfairness or injustice had been

manifested, and a very small amount of bail had been required to secure his presence before the justice of the peace who issued the warrant. Under such a condition of facts and circumstances I would have dismissed the petitioner if the counsel of the plaintiff in the proceeding in the state court had not entered into a written and filed agreement with the counsel of petitioner that "the petition for the writ of habeas corpus may be heard and the case disposed of by the United States court at Greensboro on any day without notice to the plaintiff." This agreement shows a consent to have the case disposed of on its merits, but, as I have confidence in the ability, integrity, and learning of the counsel of the plaintiff, I desire to hear him in argument or by brief as to his legal views in support of the prosecution in the state court.

For the purpose of affording such opportunity I direct the following entry to be made of record:

The court at this term having heard argument and considered the matters of fact alleged in the petition, and being strongly inclined to the opinion that the matters of fact alleged are sufficient to sustain the propositions of law relied on by the counsel of petitioner.

First. That if the act of assembly of North Carolina bears the construction which was insisted upon by the plaintiff in causing legal process to be issued for the collection of a penalty for the nonpayment of taxes on sales by sample of goods not then within the state, then the act is a regulation of interstate commerce, and repugnant to the constitution of the United States.

Second. That the statute of North Carolina involved in this matter does not apply to sales made by sample of goods not within the state at the time of sale, and ready for immediate delivery, but applies only where goods are actually exposed and offered for sale, and, upon the sale being effected, are ready for delivery at once to the purchaser.

The court, however, in a spirit of comity towards state courts, is desirous of the plaintiff having an opportunity to show cause why a writ of habeas corpus shall not issue, and why he shall not be allowed to enforce his rights in the courts of this state.

Now it is ordered that, unless the plaintiff shall show such cause on or before Monday next, August 14, 1893, or unless he procures the discharge of the petitioner from custody on or before the said date, and so notifies this court, then a writ of habeas corpus as prayed for is hereby directed to be issued by the clerk of this court, returnable to this court on or before Monday, August 21, 1893.

In re R. J. Flinn.

The following order was made in open court, this August 14, 1893:

In this case, J. G. Grant, sheriff, the plaintiff in the case at law in Henderson county, having notified the court in writing, duly

signed, that he had caused the defendant to be discharged from custody.

It is ordered that the petition be dismissed, at the cost of the petitioner.

MERGENTHALER LINOTYPE CO. v. PRESS PUB. CO. et al.

(Circuit Court, S. D. New York. July 21, 1893.)

1. PATENTS FOR INVENTIONS—TYPESETTING MACHINE—INFRINGEMENT.
Letters patent Nos. 313,224 and 317,828, issued, respectively, March 3, 1885, and May 12, 1885, to Ottman Mergenthaler, for "improvements in machines for producing printing bars," consisting in part of a combination of a series of independent matrices representing characters, holders or magazines for said matrices, finger keys representing the respective characters, intermediate mechanism to assemble the matrices, and a casting machine to co-operate with the assembled matrices, are for inventions of unusual merit, and, in view of the prior art, entitled to liberal construction, and are infringed by the Rogers machine, which, while in some respects an improvement, operates on the same principle, contains the same general features, and produces substantially the same results.

2. SAME—FAULT IN ORIGINAL MACHINE.
The fact that the machine, when first produced, failed to justify perfectly, which fault was remedied, and perfect justification produced by improved machines subsequently made, is no reason for denying relief to the original patentee.

In Equity. Action by the Mergenthaler Linotype Company against the Press Publishing Company and others for infringement of letters patent. Decree for plaintiff.

For opinion on motion for preliminary injunction, see 46 Fed. Rep. 114.

Frederic H. Betts, for complainant.

M. B. Philipp, Leonard E. Curtis, and George H. Lothrop, for defendants.

COXE, District Judge. This is an equity action for infringement based upon two letters patent granted to Ottman Mergenthaler for "improvements in machines for producing printing bars." The first of these patents, No. 313,224, is dated March 3, 1885, and the second, No. 317,828, is dated May 12, 1885.

It is insisted by the complainant that the principal invention covered by these patents is fundamental, that it has revolutionized the art of printing and is the first practical advance in the art since the days of Guttenberg. The machine which embodies this invention produces a line of type cast in a solid bar, complete in itself and ready for printing, and, as to its printing face, possessing all the characteristics of a line produced by the hand of the compositor in the old laborious way. The advantages of the new method over the old are so obvious and so numerous that it is unnecessary to attempt their enumeration. They are conceded on all sides; by men of science, and men of labor, by editors, by compositors and by the defendants themselves. A minute and accurate description of the ingenious and complicated machine of the patents would

extend this opinion far beyond appropriate limits. It suffices to say that the operator, by playing upon finger keys, is able to assemble a line of intaglio type as desired. This line is locked in position so as to close the open face of a mold into which type metal is injected. In this way a type bar is cast, of the proper height and length, containing a complete and properly adjusted line of words. The line is then unlocked and the matrices composing it are returned to their original positions. All of these functions are performed automatically. The inventor says regarding the invention of the first patent, No. 313,224, that it—

"Is directed to the rapid and economical production of letterpress printing, and relates to a machine to be driven by power, and controlled by finger keys, adapted to produce printing forms or relief surfaces ready for immediate use, thus avoiding the usual operation of typesetting, and also the more recent plan of preparing by machinery matrices from which to cast the forms. By the use of my machine the operator is enabled to produce with great rapidity printing bars bearing in relief the selected characters in the sequence and arrangement in which they are to be printed. In short, the machine will produce printing forms or surfaces properly justified, and adapted to be used in the same manner and with precisely the same results as the printing forms composed of movable type. My machine embraces two leading groups of mechanism: First, those which form a temporary and changing matrix representing a number of words; and, second, those by which molten or plastic material is delivered to the matrix and discharged therefrom in the form of printing bars."

The claims involved are the forty-seventh and the sixty-third. They are as follows:

"(47) In a machine for producing stereotype bars the combination, substantially as hereinbefore described, of the changeable or convertible matrix, the mold co-operating therewith, and appliances, substantially such as shown, for melting metal and for forcing the same into the mold." "(63) In combination with a mold open on two sides, a series of moveable matrices grouped in line against one side of the mold, a pot or reservoir acting against the opposite side of the mold, and a pump to deliver the molten or plastic material into the mold, as described and shown."

Less than two months after the application for this patent was filed the second patent, No. 317,828, was applied for. The machine of the second patent is an obvious improvement upon that of the first and for this reason it was the machine that found favor with the public. I cannot doubt, however, that the machine of the first patent was operative and able to do the work described by the patentee. The machine of the second patent, though operating upon the same general principle as the first, differs in several important details, the most radical change being the substitution of independent matrices for the connected matrices of the first patent. In the former the matrices were arranged one above the other on the edge of a long bar, in the latter each is independent of every other, and all are stored in appropriate holders from which they are released by the finger keys. If, for instance, the operator desires to form the word "and," he touches the keys bearing, respectively, the letters a-n-d, and corresponding matrices are immediately discharged and carried in proper order to a common assembling point. Regarding the machine of this patent the inventor says:

"My invention relates to a machine in which a series of loose independent matrices or dies each containing one or more characters, and a series of blank dies for spacing purposes, are combined with finger keys and intermediate connecting and driving mechanism in such manner that when power is applied to the machine and the preferred finger keys actuated the matrices will be assembled or composed in line. A mold of suitable form is arranged to be operated in connection with the assembled dies and with means for supplying molten metal or its equivalent, whereby a printing bar may be formed in the mold against the assembled matrices, so as to bear on its edge in relief the characters represented by said matrices."

The first claim only is involved. It is as follows:

"(1) In a machine for producing printing bars, the combination of a series of independent matrices each representing a single character or two or more characters to appear together, holders or magazines for said matrices, a series of finger keys representing the respective characters, intermediate mechanism, substantially as described, to assemble the matrices in line, and a casting mechanism, substantially as described, to co-operate with the assembled matrices."

A broad construction was given this claim when the patent was considered by this court upon a motion for a preliminary injunction. 46 Fed. Rep. 114.

The defenses are the usual ones—lack of novelty and invention and noninfringement.

The two patents will hereafter be considered together as they relate to the same fundamental invention.

The inventor says in the description of No. 313,224:

"I also believe myself to be the first to combine with a changeable or convertible matrix—that is to say, a matrix composed of a series of dies or individual matrices adapted for transposition or rearrangement, a mold and a casting mechanism."

In No. 317,828, he says:

"I believe myself to be the first to combine with independent disconnected matrices each bearing a single character, finger keys, intermediate mechanism for placing the designated matrices in line, and a casting mechanism which co-operates with the line of assembled matrices in such manner as to take a single cast from the entire line; and it is to be distinctly understood that my invention covers such combination in any form the equivalent of that herein detailed."

It is thought that these assertions are well founded—that he was the first to do both of these things. His patents are, therefore, entitled to a liberal construction. Machines operated by finger-keys, the object of which was "to cast, dress, and set up type in a continuous line for solid matter or book or newspaper work, the line being afterwards divided off, justified, and set up in column, as usual," were old. So were machines "by means of which types or dies for printing can be set up in rows in the requisite succession by means of pivoted keys, and on which provision is made for instantly and simultaneously redistributing all the characters to their proper places by a slight movement of the distributing frame." So were machines designed "mechanically to arrange an alphabet or alphabets of dies which dies shall form impressions in the material for a mold corresponding with the composition of matter desired in a stereotype, and, second, in the same or similar mechanism with a substitution of female dies, and other appliances.

changes, and attachments made necessary by such substitution of dies, and the work to be done, as shall enable the operator to produce directly the stereotype instead of the mold." These three machines—those of Wescott, Morgans and Gally—are the nearest approximation to the Mergenthaler machine to be found in the prior art. By means of them single type were cast automatically, impressions from intaglio type were made in soft metal and stereotype molds or plates of soft material were produced. Neither singly nor combined could they do the work of the Mergenthaler machine. The skilled artisan would study them in vain for any suggestion of a "linotype." The idea is not there. The patents, then, are not anticipated. The court has no doubt that it involved invention to construct the patented machine. No one who has seen this wonderful machine, which, in operation seems almost human, can doubt the truth of this proposition. The defendants, evidently, do not doubt it for their main effort is to secure a construction of the claims so narrow that their machine will escape infringement. As already seen the court is of the opinion that nothing in the prior art requires a narrow construction of the claims. Complainant is entitled to liberal treatment at the hands of a court of equity and to a construction broad enough to hold as infringers all who produce "a linotype" by similar or equivalent combinations.

This general statement of opinion as to the scope of the patents eliminates from the discussion many of the minor criticisms urged by the defendants. The proposition upon which they appear to lay the greatest stress is that neither patent describes or claims an operative machine because neither is capable of "perfect justification," viz.: making lines of exactly the same length. Their contention proceeds upon the untenable proposition that the machine which produced the "linotype" was valueless because it did not produce an absolutely perfect "linotype." Such a proposition, if sustained, would condemn to obscurity some of the greatest works of human genius. A great poem may be marred because the meter halts at times, but it is a great poem still. Even the masterpiece of Rubens was improved by the touch of his pupil, Van Dyck. It is true that the first specimens produced by the Mergenthaler machine are wanting in "perfect justification." They did show, however, that a great advance had been made in the art of printing even though the words were not spaced apart so as to be mathematically uniform at the extreme ends. The defect was one that was at once suggested by printers, and the patentee and others immediately set to work to remedy it. This was not a difficult task and was soon accomplished. As was said by the public printer in writing of the invention as early as May, 1884:

"Even in this short time during which I have been familiar with the matter, the progress made has been wonderful, and in my judgment, but little remains, and that merely mechanical, to make the invention perfect."

Concede that the machine when first produced was not perfect and that to Schuckers belongs the credit of producing the spacers

which made it perfect. Cui bono? It would certainly be a novel doctrine to deny to an inventor the fruits of a broad invention because the machine which first embodied it was rudimentary in character and failed to do as good work as improved machines made subsequently. None of the great inventions could survive such a test. Ten years after the invention of Howe, the machine first made by him would hardly have satisfied the least exacting sewing woman. The Dodds and Stephenson locomotive would, only a short time after its construction, have been discarded as behind the age even by the savages of Tasmania. The telephone of Bell is not the perfected telephone of commerce, the Morse telegraph is looked upon to-day as an interesting antique. And yet, it would be an unheard-of proposition to withhold from these illustrious men the credit they deserve because their machines were crude at first and were improved afterwards. The lines in the copy produced by the first Mergenthaler machine were liable to vary by one sixty-fourth of an inch. This was not perfect and printers complained. The defect was remedied by substituting expansible space bars for the old-fashioned unadjustable space bars so that the line of matrices could be pressed out to the end with perfect accuracy and lines of type cast therefrom of exactly the same length. When the third Mergenthaler patent, which claims expansible spacers, was under consideration on the motion for a preliminary injunction the defendants insisted that it required no invention to introduce these spacers, that their use would have been suggested to the skilled mechanic by several references to the prior art. Now, on the other hand, it is argued that the invention begins and ends with the space bars. These space bars are, unquestionably, an important adjunct to the combination. They round out the invention and make it perfect. It may also be conceded that they are ingenious devices requiring invention to produce, and that the credit for them belongs to Schuckers and not to Mergenthaler; but to assert that the former is the pioneer inventor and the latter an unsuccessful bungler seems to the court very far from the truth. Mergenthaler produced the "linotype," Schuckers—if he made the spacers—improved it, but Schuckers was no more its originator than a proof-reader is the author of a book whose errors of spelling and punctuation he has corrected.

Do the defendants infringe? The introduction of the expansible space bars and the natural evolution of the art have produced some obvious changes in the construction of "linotype" machines. The defendants contend that because they have introduced these changes and made improvements they do not infringe. It is plain that if the claims are to be limited to the precise apparatus described and shown the defendants do not infringe. It is equally clear that they do infringe if the claims are liberally construed. For reasons already stated complainant is entitled to the latter construction.

The defendants use the so-called Rogers machine which was first introduced to the public in 1890. One of the expert witnesses for the complainant describes it as follows:

"The Rogers machine is a mechanism for producing the same character of type bar as the Mergenthaler machine, and intended for identically the same use and constructed to reach the same ends. In the machine there are a series of female or intaglio type, each one cut into the side of a bar, and these bars are strung upon rods, which all incline from the point where the matrix bars are stored downward to the point where the matrix bars are to be assembled. By pressing on finger keys these matrix bars can be caused individually to leave the position where they are stored, and can run down upon the incline rod, and it will be seen that the bars are assembled in any desired order in that part of the machine which is adjacent to the casting mold. After the bars, with the requisite matrices upon them, have been assembled in line, the mold, can be made to co-operate with the bar in such a way that the bars close one of the faces of the mold, and so that, when molten metal is cast into the mold, the resulting casting will have on that face adjacent to the bars male characters formed thereon, by reason of the molten metal having been retained in the mold by the matrix bars, which closed one of its faces, and which presented to the metal the intaglio type or matrices arranged in the desired order. A melting pot is shown in which the molten metal is held, and where it is kept fluid, and a pump is represented as in this pot for the purpose of injecting the metal from the reservoir into the mold."

The Rogers machine is smaller, cheaper and simpler than the machine of the patent. It is probably fair to say that it is an improvement, but it is manifest that it operates upon the same principle and contains the same general features as the Mergenthaler machine. It produces the same line of type from the same material for the same purposes and in substantially the same way. It has the changeable or convertible matrix, the mold co-operating therewith and appliances for melting metal and forcing it into the mold. It has also a mold open on two sides, a series of movable matrices grouped in line against one side of the mold, a melting pot against the opposite side of the mold and a pump to force the molten material into the mold. It also has a series of independent matrices, each containing one or more characters, a series of blank spacers, combined with finger keys, a mold and means for supplying molten metal whereby a printing bar may be formed against the assembled matrices. In short, the defendants' machine has all the elements of the three claims in controversy, or their equivalents, and accomplishes all the results of the combinations of the claims in identical or similar manner.

The differences pointed out by the defendants have not been overlooked. There is no doubt that they exist, but for the reasons stated they are not thought to be material. Mergenthaler has made an invention of unusual merit and is entitled to reap the reward.

It follows that the complainants are entitled to a decree for an injunction and an accounting.

THE HAYTIAN REPUBLIC.

UNITED STATES v. THE HAYTIAN REPUBLIC.

(District Court, D. Oregon. August 8, 1893.)

No. 3,403.

1. ADMIRALTY PLEADING—EXCEPTIONS TO LIBEL—WAIVER OF OBJECTIONS.
Where, after the argument of exceptions to a libel, a brief is filed, in which, for the first time, the point is made that the facts set up in the exceptions cannot be thus raised, but are available only by answer, the court will consider the questions presented upon the assumption made by both parties in the argument, that such facts were properly presented, without determining the technical question of pleading.

2. ADMIRALTY PRACTICE — BREACH OF REVENUE LAWS — BUT ONE LIBEL FOR SEVERAL OFFENSES.
The United States is entitled to but one decree of forfeiture against a vessel for several past violations of the revenue laws, and where a vessel has been once libeled for several such violations, and released on bond, she is not thereafter subject to a second seizure for alleged violations committed during the same period as those for which she has already been seized. The Langdon Cheves, 2 Mason, 59, distinguished.

3. SAME—AMENDMENT OF LIBEL—DISCOVERY OF NEW OFFENSES.
The United States, upon finding evidence of violations of the revenue laws committed by a vessel during the same period as those for which she has already been libeled, may avail themselves of such discovery by amending the libel.

4. SAME—ILLEGAL RELEASE BOND—NEW LIBEL.
Where a vessel libeled for violation of the revenue laws is released upon a bond of doubtful legality, the United States cannot maintain a second libel for other violations of the revenue laws, committed during the same period as those for which the first libel was filed, without dismissing the first proceeding.

5. SAME—RELEASE BOND—VALIDITY.
A release bond for a vessel seized for violation of the revenue laws, which contains no condition, and is for double the value of the vessel as if drawn under Rev. St. § 941, is valid, under section 938, as an obligation to pay at least the value of the vessel, since the condition is contained in the statute.

6. SAME—CRIMES—LANDING CHINESE LABORERS.
In a libel by the United States against a vessel for breach of the revenue laws, an allegation that her master attempted to land Chinese laborers at a port of the United States does not charge a crime.

7. SAME—MATTER PLEADED IN ABATEMENT—PRIOR SEIZURE IN ANOTHER DISTRICT.
A seizure of a vessel for violations of the revenue laws, and her release on bond, may be pleaded in abatement of a subsequent libel in another district for similar offenses committed during the same period as those for which the first libel was filed.

In Admiralty. Libel by the United States against the steamer Haytian Republic for breach of the revenue laws. Heard on claimant's exceptions to the libel. Exceptions sustained.

John M. Gearin, Sp. Asst. U. S. Atty.

C. A. Dolph, W. H. Gorham, and O. F. Paxton, for claimant.

BELLINGER, District Judge. On May 28, 1893, the steamship Haytian Republic was seized at Seattle, in the district of Washing-

ton, as forfeited to the United States for violations of the revenue laws alleged to have been committed at various times between July 28, 1892, and the date of seizure. Subsequently, the vessel was released on the bond of the claimant, in double the amount of her appraised value. Thereafter, in July last, the vessel was again seized for a number of other alleged violations of the revenue laws, committed during the same period of time covered by the former charges, at dates extending from July, 1892, to January 27, 1893, and including, also, two charges of violations of the same laws, alleged to have been committed since the release from arrest at Seattle, the latter seizure being made in this district.

The claimant filed exceptive allegations to the several articles in the libel and amended libel, relating to alleged offenses committed prior to the arrest and release at Seattle, setting out particularly the proceedings had in the district court for Washington, and submitted with these exceptions a certified transcript of the record of such proceedings. The ground of these exceptions is that the United States, having taken a bond from the claimant in the full appraised value of the vessel on the former arrest, and having released her from such arrest, cannot have recourse again to the vessel, except for offenses committed since such release.

The point is made for the first time in the brief filed since the argument, in support of the libel, that the facts set up in the allegations cannot be raised on exceptions, but are available to the defendant by answer only. In admiralty, exceptive allegations correspond to pleas in abatement and special pleas in bar. A party may set up a single fact in an exceptive allegation, or he may unite the whole, answering as to all the facts, in an answer. Ben. Adm. § 368. The usual course is to set up all matters so relied upon in an answer. The exceptive allegations are, in effect, a special answer. It is immaterial what name is given to them. Courts of admiralty disregard mere technicalities. The circumstances of the case make it important, both to the government and the claimant, that the matters involved in this controversy be speedily determined. I shall not consider whether the facts alleged in an exceptive allegation must be technically within the knowledge of the court, but shall consider the questions presented by the exceptions upon the assumption made by both parties in the argument, that the facts alleged are proper to be considered by the court in the mode in which they are presented.

It is claimed in support of the libel that, when the claimant secured the release of the vessel upon the bond for her appraised value, he took it subject to all existing liens, and cases are cited which abundantly sustain that view. That there is no distinction as to this between cases where the vessel is held for forfeiture, and other cases, is shown in the case of The Langdon Cheves, 2 Mason, 59, where, in a proceeding of condemnation and forfeiture, the vessel was delivered on bail for the appraised value, and after a final decree of condemnation the amount of the appraised value was paid into court. Afterwards, the question arose as to whether

the owner, when the ship was released, took her free from a prior mortgage, which he had given for his own debt; and the court held that he did not take the ship free from this lien; that all principle and authority were against such a claim. Certainly, it would be against all principle to permit the owner of a vessel to be relieved from his own debt,—from a mortgage which he had given. In securing the release of the vessel, he protected the security which he had given, as he was in duty bound to do, and he acted with full knowledge of his own responsibility. The mortgagee was the owner in equity with him, to the extent of his lien in the mortgaged property; and the only thing to be commented upon, in the case, is the fact that the liability of the vessel, after her release, for such mortgage debt, should, under the circumstances, have been a matter of controversy. The owner cannot thus relieve himself from obligations he has incurred by an act which subjects him to a forfeiture of his vessel. It is no hardship that he is made to pay the forfeit, and the debt as well, which he does when he pays the value of his vessel into court, and takes it subject to the debt. In this case, however, the effect of what is attempted is to make the owner liable for the appraised value of the vessel, on account of the forfeiture, and continue the vessel's liability to forfeiture, as before. True, it is said that the continuing liability is for another offense, but this is a mere juggling with words. There can be but one forfeiture, no matter how many offenses there are at the time of the seizure. If the position of the United States is correct, then it may have as many distinct proceedings of condemnation as there are offenses charged in the libel. But, if so, the aggregate result is a single forfeiture. This is the sum of its remedies. A party cannot increase his recovery by the expedient of multiplying suits upon causes proper to be joined in one suit. The position of the government is that the claimant, upon giving bond at Seattle, took the vessel subject to forfeiture, as he might have taken her subject to a lien. But by such assumed taking the owner, as a matter of fact, took nothing, since he could not take what was equally forfeit after the bond as before. Upon such a theory as is relied upon in the libel, the United States may lie by through one proceeding until the owner of a seized vessel gives a bond for her discharge, and then start another like proceeding, to be followed by still another, in a series of suits, as long as the owner may be encouraged to bail the ship from successive arrests. The object of the law in permitting the release of the vessel to the owner is to enable him to save himself from the indirect consequences of the seizure, which may be deeply injurious to him, through no fault of his, without any benefit to the cause of justice, or to the proceedings in court. Ben. Adm. § 447. Good faith will not permit a party to be entrapped upon such an inducement into giving a bond, merely that a second seizure may be made as soon as the first is discharged. That the owner who gives a bond takes his vessel subject to all liens legally attaching to her, does not touch the question. A ground of forfeiture is not a lien, which may be defined to be a debt imposed upon

property. It is a confiscation of the thing itself. It admits of no right remaining in the thing forfeited.

In support of the libel the case of The Bold Buccleugh, 22 Eng. Law & Eq. 62, is cited, as a case where a vessel was libeled in Scotland for a collision, arrested and bailed out, and rearrested in England for the same cause of libel. The case is commented on in Wolf v. Cook, 40 Fed. Rep. 438, where it is stated that the proceeding in Scotland was in personam. This is not material, however. Upon the filing of the second libel, instructions were at once sent to dismiss the first, and the answer to the plea was that there was no longer any suit pending. And, besides this, it frequently happens that a party is permitted to bring a second action upon the same demand in different jurisdictions, but he is not permitted to have more than one recovery, as is attempted, or at least contended for, here. He is not allowed to split his cause of action, although the result aimed at is nothing more than the recovery of several judgments, aggregating, exclusive of costs, no more than the amount justly due. A fortiori, the party will not be permitted, by the expedient of dividing up the grounds of forfeiture, to recover the value of the forfeited property a second time.

I assume that the violations of law charged in this proceeding were not known to the libelant when the seizure complained of in this procedure was made. If so, the libelant may avail itself of this recent knowledge by amending the libel in the other district to include all the causes of action excepted to here.

The point is also made in behalf of the libelant that the bond given in the district court for Washington is not a bond, for the reason that it contains no condition, and was obviously intended to be given in pursuance of Rev. St. § 941, instead of section 938. The former section provides for bonds in proceedings in rem, in causes of admiralty jurisdiction, other than cases of seizure for forfeiture, and provides for a bond in double the value of the property claimed. The fact that the bond may have been prepared with a view to this section, and is larger than required, does not affect its validity, as to the obligation to pay at least that amount. The conditions upon which the obligation in the bond becomes absolute are contained in the statute. If, however, the bond is legally no bond at all, and there is neither the rem nor its substitute, upon which the jurisdiction of the district court for the district of Washington can lay hold, all doubts as to the effect of the pendency of the suit in that court upon this suit might have been removed, without the sacrifice of anything on the part of the libelant, by dismissing such former proceeding. I am of the opinion that the bond in question is in compliance with the statutes, and that upon condemnation in the district court for Washington, if the claimants do not, within the 20 days provided in the statute, pay the appraised value of the vessel into court, with costs, judgment can be granted upon such bond, on motion, without delay.

The allegation in the libel that the master of the vessel brought

Chinese laborers to this port, and attempted to land them, does not charge a crime.

I have had some doubts as to whether the pendency of a suit in a court of the United States for another district can be pleaded in abatement of a suit in this court. The point has not been expressly decided. The opinion is expressed that there is no difference in principle between such a suit and one in the court of another state. 1 Fost. Fed. Pr. § 129. And it has been held in the United States circuit court in Wisconsin that the pendency of an action in a state court of Iowa, where sufficient property had been attached to satisfy the demand, was a ground for the abatement of the suit in the former court. Lawrence v. Remington, 6 Biss. 44. Upon these authorities, I conclude that no jurisdiction exists in a case like this, where there has been a seizure and a release on bond in the court of the other district.

The exceptions are allowed.

THE MASCOT.

ROSE BRICK CO. v. THE MASCOT.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

TOWAGE—NEGLIGENCE OF TUG—FAILURE TO AVOID KNOWN OBSTRUCTION.

A tug is guilty of negligence in running its tow upon an obstruction which competent and experienced pilots would have avoided. 48 Fed. Rep. 917, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by the Rose Brick Company against the steam tug Mascot for negligence in towing libelant's barge Roseton. The district court rendered a decree for libelant. 48 Fed. Rep. 917. Respondent appeals. Affirmed.

Jos. F. Mosher, for appellant.

Geo. B. Adams, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We are satisfied upon the evidence in the record that there was an obstruction in the canal, inside the buried rock, which was known to exist by those conversant with the condition of the channel, and which ought to have been known to those in charge of the tug. In towing the libelant's canal boat upon an obstacle which competent and experienced pilots would have avoided, the tug was guilty of negligence.

The decree is affirmed, with interest and costs.

COVER v. CLAFLIN et al.

(Circuit Court, S. D. New York. July 3, 1893.)

CIRCUIT COURTS—JURISDICTION—SUIT BY FOREIGN TRUSTEE.

Where, pursuant to 1 Rev. St. Ohio, § 6344, a conveyance in fraud of creditors has been declared void by an Ohio court, and a trustee appointed, to "proceed by due course of law to recover" the property, and administer it for the benefit of creditors, such trustee is vested with the right of property, and may maintain a suit to recover the same in a federal court for another state.

In Equity. Suit by John F. Cover, trustee, against John Claflin and others. On demurrer to the complaint. Demurrer overruled.

Rush Taggart and D. D. Duncan, for plaintiff.
S. F. Kneeland, for defendants.

WHEELER, District Judge. By a statute of Ohio, conveyances in fraud of creditors may be declared void, and a trustee appointed, who "shall proceed by due course of law to recover" the property, and administer it for the benefit of creditors. 1 Rev. St. § 6344. The demurrer here raises the question whether such a trustee in Ohio can maintain a suit for the recovery of such property in this court. Such proceedings appear to vest the right to the property in the trustee. Conrad v. Pancost, 11 Ohio St. 685; Thomas v. Talmadge, 16 Ohio St. 438; Shorten v. Woodrow, 34 Ohio St. 648; Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. Rep. 1013. Having this right, the trustee could sue to enforce it anywhere that he could to enforce his own proper rights, the same as an assignee in bankruptcy could. Lathrop v. Drake, 91 U. S. 516; Claflin v. Houseman, 93 U. S. 130. Demurrer overruled.

DUBUQUE NAT. BANK v. WEED et al.

(Circuit Court, W. D. Wisconsin. June 4, 1892.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.

A deed of a portion of a debtor's realty, and a bill of sale of a portion of his personalty, to the presidents of certain banks, taken with a defeasance back, showing that they were given as collateral security for promissory notes to the banks, do not constitute a voluntary assignment for the benefit of creditors with preferences, under the laws of Wisconsin, in that there is no creation of an active trust.

2. MORTGAGES—WHAT CONSTITUTE—DEFEASANCE.

Such conveyances constitute a mortgage on the properties, and the fact that the defeasance was on a separate paper is immaterial.

3. SAME—MERGER.

Where mortgages were subsequently given to each of the banks on different portions of the same property, for convenience in securing each bank separately, the former conveyances were merged in the subsequent mortgages.

In Equity. Bill by the Dubuque National Bank against Alfred Weed & Co., Edwin Ellis, and Thomas Bardon to set aside a deed. Bill dismissed.

Pinney & Sanborn, for complainants.
Tomkins & Merrill, for defendants.

BUNN, District Judge. This is an action brought to set aside a certain deed of land made by the defendants A. Weed & Co. to the defendants Edwin Ellis and Thomas Bardon, dated September 4, 1890, purporting to convey certain lands in Gogebic county, Mich., consisting of a sawmill site known as the "Ramsey Sawmill," belonging to the firm of A. Weed & Co., and to have the complainant subrogated in the place of the grantees named in said conveyance, to the extent of the complainant's claim against A. Weed & Co.

The leading facts, so far as necessary to state them for the proper understanding of the case, are these: The defendants A. Weed & Co., who were a lumbering firm doing business in the north part of Wisconsin and in Michigan, early in September, 1890, became embarrassed, and unable to pay their debts. They owned quite a large amount of property, real and personal, having a mill and mill site, and a logging outfit and stock of logs, at Ramsey, Mich., and another at Ashland, Wis., with logs, lumber, shingles, and various other property, amounting in value to $20,000 or $25,000, exclusive of the property involved in this suit, about $17,500 of which was cash. Their principal home creditors were the First National Bank, the Ashland National Bank, and the Security Savings Bank, all at the city of Ashland, in this state. They owed these banks about $65,000 for cash advanced in the business of lumbering, and for which notes had been given. To secure this large indebtedness, on September 4, 1890, the defendants A. Weed & Co. executed to the defendants Edwin Ellis, the president of the First National Bank, and who was also a director and stockholder in said bank, and one of the principal stockholders in the Security Savings Bank, and Thomas Bardon, who was president of, and a director and stockholder in, the Ashland National Bank, a warranty deed of the Ramsey mill site in Michigan, together with certain bills of sale of personal property, consisting of logs, lumber, lath, shingles, logging outfit, horses, and cattle. At the same time, and as part of the same transaction, Ellis and Bardon gave back to A. Weed & Co. a defeasance in writing, as follows:

"Know all men by these presents, that the bill of sale executed this 4th day of September, A. D. 1890, by A. Weed & Co. to Thomas Bardon and Edwin Ellis, on logs and lumber in Ashland county, and the bill of sale by Alfred Weed and Paul Weed for logs, lumber, lath, and shingles, and horses, cattle, and logging outfit, on same date, said property being in Gogebic county, Michigan, and the deed hereto attached, executed on the same date, and between the same parties, on the sawmill property at Ramsey, Gogebic county, Michigan, on the S. E. ¼ of the N. W. ¼ section 13, town 47 north, range 46 west, N. E. ¼ of S. W. ¼ Sec. 13, town 47 north, of range 46 west, and the assignment of the mortgage from Bay Shore Lumber Company to A. Weed & Company of $12,000, are given as collateral securities for payment of

notes made or indorsed by said Weed & Company, and held by the First National Bank of Ashland, the Ashland National Bank, and the Security Bank, all of Ashland, Wis., to the amount of about $65,000. Witness our hands and seals the 4th day of September, A. D. 1890.

[Signed] "Thomas Bardon. [Seal.]
"Edwin Ellis. [Seal.]

"In presence of
"Ida A. Forrest.
"W. M. Tomkins."

A few days after these conveyances were made, on September 10, 1890, the banks, not being satisfied with the manner of the security taken by Bardon and Ellis, had mortgages executed in form directly to the several banks to secure the same indebtedness. Among these was one executed to the First National Bank of Ashland upon the same real estate, to secure the indebtedness to that bank, amounting to about $51,000.

The contention of the complainant is that the transaction of September 4, 1890, constituted a voluntary assignment of a portion of the defendants' property to Bardon and Ellis as trustees for the benefit of creditors, and that, as it gave a preference to these creditors, and was not, in other respects, in compliance with the statutes of Wisconsin relating to voluntary assignments, the conveyances were void as to creditors. It is further contended that, though void as to creditors, the deed, as between the parties, conveyed the title to the land to Bardon and Ellis; and the complainant seeks to have their title set aside, and to be subrogated in their place, to the extent of the complainant's claim, which is $5,000 and interest. It is claimed by the complainant that the mortgage on the same property, of September 10, 1890, though otherwise admitted to be valid, is in fact void, because the property had already been conveyed to Bardon and Ellis, as trustees, on September 4th, and, there being no reconveyance of the land, there was no title in A. Weed & Co., on the 10th, upon which the mortgage of that date could operate. It must, I think, be confessed that the reasoning by which the complainant is to be put in the place of Bardon and Ellis in respect to their title under the first conveyance is not altogether inartificial in character. Still, the contention may perhaps be supported, if the complainant's main proposition be correct, that the conveyance of September 4th was void as to creditors, as being in violation of the statutes relating to voluntary assignments. But, in the judgment of the court, this contention cannot be maintained. There was no attempt to make a voluntary assignment of the debtors' property to trustees for the benefit of creditors. The essence of the transaction of September 4th was a mortgage upon a particular portion of the defendants' real estate, and mortgages upon certain of the personal property, to secure the debts of certain creditors, which it is admitted were bona fide, and already existing and secured by promissory notes. Bardon and Ellis were not active trustees, and the conveyance with a defeasance back, showing that it was given as collateral security, was a mortgage, to all intents, the same as though it had been in any other form.

The circumstance of the defeasance being upon a separate paper was quite immaterial. In many states that is the most common form of a mortgage. The conveyances were no doubt made in form to Bardon and Ellis because they were the presidents and representatives of these several banks, whose debts the defendants wished to secure, and the real parties in interest were the three banks, in proportion to the amount of their several claims. Except for convenience in securing each bank separately, there was no need to change the security. At the same time it was competent for the parties to do so, and the mortgages taken severally to the banks on September 10th took the place, as was intended, of the mortgages given on the 4th. There was no transfer of title by the deed of September 4th, which required a reconveyance in order to change the form of the security, as would perhaps be the case where an absolute deed is given, not intended as a mortgage. And the giving of the new mortgages in a new form on September 10th —the real estate mortgage to one, and chattel mortgages to the others—merged in that transaction that of September 4th. The original transfer of September 4th, so far as I can judge, had all the qualities and requisites of a mortgage, while it lacked some of the material characteristics of a voluntary assignment, especially in that there was no creation of an active trust, which is recognized as necessary in all the adjudged cases in this state in order to stamp the transaction with the character of a statutory assignment for the benefit of creditors. It was a mortgage of particular property to secure particular creditors, which has ever been held allowable under our law. See Ingram v. Osborn, 70 Wis. 184, 35 N. W. Rep. 304; Cribb v. Hibbard, Spencer, Bartlett & Co., 77 Wis. 199, 46 N. W. Rep. 168. The latest case is Michelstetter v. Weiner, 82 Wis. 298, 52 N. W. Rep. 435. See, also, Wisconsin Cent. Ry. Co. v. Wisconsin River Land Co., 71 Wis. 94, 36 N. W. Rep. 837; Hoyt v. Fass, 64 Wis. 279, 25 N. W. Rep. 45; Schriber v. Le Clair, 66 Wis. 579, 29 N. W. Rep. 570, 889. There will be a decree dismissing the complainant's bill of complaint, with costs.

LEWIS v. SHAW et al.

(Circuit Court, D. Washington, W. D. July 17, 1893.)

PUBLIC LANDS—CANCELLATION OF ENTRY—RIGHTS OF BONA FIDE PURCHASERS.

Where an entry on public land is allowed at the land office, and payment for the land is received, the entry is prima facie valid; and proceedings by the commissioner of the general land office and the secretary of the interior to cancel the entry for misrepresentations of the entryman, without notice to a bona fide purchaser from the entryman, are void.

In Equity. Bill by Charles Lewis, alleging equitable ownership of 128 acres of land, situated in Pierce county, state of Washington, for a decree establishing his title to said land, and to have the

defendant John C. Shaw, to whom a patent has been issued by the United States, declared a trustee of said title. Demurrer to bill overruled.

John Paul Judson, for complainant.
Crowley & Sullivan, for defendants.

HANFORD, District Judge. The land which is the subject of controversy in this suit was entered in due form and paid for by one Charles C. Miller on the 16th day of March, 1883, under the provisions of the act of congress approved June 3, 1878, providing for the sale of timber lands in the states of California, Nevada, and Oregon and Washington Territory, (Supp. Rev. St. [2d Ed.] 167.) At the time of said entry Miller was an employe of one George H. Ryan, and obtained from him the money used in purchasing said land from the government. For the purpose of securing the repayment of the money so advanced, on the 22d day of March, 1883, Miller gave to Ryan a bond obligating himself to convey one-half of the tract; and on August 31, 1883, gave to Ryan a deed for one-half of said tract for the consideration of $325. On September 5, 1883, Ryan conveyed the entire tract by warranty deed to Benjamin McCready, for the price of $9,000. McCready, on the 2d day of January, 1884, by warranty deed conveyed the tract to the complainant, who is a citizen and resident of the state of Iowa, for the price of $9,000, and to confirm his title, Miller, on the 18th of July, 1885, for a nominal consideration, gave to the complainant a warranty deed for the entire tract. On the 3d of March, 1885, the commissioner of the general land office, upon a report made by a special agent of the interior department, representing said land to be agricultural land, and therefore not subject to sale as timber land, and that said entry was made for the benefit of Ryan, notified Miller that his entry was held for cancellation. A hearing was thereupon had before the register and receiver, and such proceedings followed that upon an appeal to the secretary of the interior the land was adjudged to be timber land, subject to sale under said act, but that the entry was made for the benefit of Ryan, and on that ground it was canceled. No notice of these proceedings was given to the complainant, although the fact of his purchase of the land and his post-office address were known to the special agent who made the report, and to all the officers of the land department who had occasion to review the evidence in the case, and the complainant had no information in regard to said proceedings prior to the year 1889. In February, 1890, he petitioned the commissioner of the general land office to reopen the case, that he might be heard in defense of his rights, which petition was denied. The bill of complaint avers that the land is in fact timber land, subject to sale under said act of congress; that Miller's entry was in all respects regular and bona fide, and that he did not, prior to said entry, make any agreement whereby the title he should acquire would inure to the benefit of Ryan, or any other person; and that the complainant

is a bona fide purchaser of said land for its full value, without notice of any facts whereby the validity of said entry might be impeached. On July 25, 1892, a patent for said tract was issued to the defendant John C. Shaw, and by virtue of said patent said Shaw and his codefendants now claim the whole of said land. The prayer of the bill is that by the decree of this court the complainant be declared the equitable owner of said land, and that the defendant, to whom the patent was issued, holds the legal title as a trustee for the benefit of the complainant, and that said title be conveyed to him.

The power of the commissioner of the general land office to cancel an entry of public land for sufficient cause cannot be denied, but his power is limited, and not to be exercised in an arbitrary manner, so as to divest the property rights of individuals lawfully acquired. Stimson v. Clark, 45 Fed. Rep. 760. The facts set forth in the complainant's bill show that the officers of the government, in canceling Miller's entry, assumed that false representations were made by Miller, to the effect that the entry was made for his own use and benefit, whereas in fact he was but an instrument of Ryan, who sought to acquire the land by an entry in Miller's name. Such false representations, if made, would be sufficient cause for the absolute forfeiture of the entryman's interest in the land, and of the money paid therefor; and any conveyance of the land, except to a bona fide purchaser, would be void. Supp. Rev. St. (2d Ed.) p. 168. It is established by the decisions of the supreme court that in the administration of the public land laws the land department is vested with the power of a special tribunal to determine finally questions of fact upon which the rights of persons who have made investments in the purchase of public lands must depend. It is also established by the decisions that by a valid entry of public lands rights thereto become vested, and the land becomes subject to all the incidents of private ownership, including taxation, and the owner may transfer it before the legal title passes from the government by the issuance of a patent. Carroll v. Safford, 3 How. 450; Witherspoon v. Duncan, 4 Wall. 210; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. Rep. 575. Under this rule the complainant, by his purchase of the land in question after the completion of Miller's entry thereof, acquired such an interest that he was entitled to notice of any attack upon the validity of said entry, and an opportunity to appear in any proceedings before the tribunal authorized to determine questions raised by such an attack. In this country property rights of an individual cannot be lawfully divested without granting him a hearing. Windsor v. McVeigh, 93 U. S. 274. After Miller and Ryan had parted with their interest in the land they were not authorized to defend the entry, so as to bind their vendee by any determination in a proceeding of which he received no notice. I conclude, therefore, that the commissioner of the general land office and the secretary of the interior, in assuming to cancel the entry, acted without jurisdiction, and their proceedings are void. The entry having been allowed in the land office, and payment for the land received, it is to be regarded as prima facie valid.

There is nothing in the averments or recitals of the bill to impeach the validity thereof, and, for aught that now appears to the contrary, the complainant is entitled to the relief prayed for. Demurrer overruled.

BONSACK MACH. CO. v. HULSE et al.

(Circuit Court, W. D. Virginia. July 26, 1893.)

1. CONTRACTS—EMPLOYMENT—RIGHT TO EMPLOYE'S INVENTION—SPECIFIC PERFORMANCE.
   By a contract to set up and operate cigarette machines, one of the defendants agreed that any improvement made by him in the machines should be for complainant's benefit, and, subsequently reporting an improvement, he was furnished with facilities for experimenting, and assured by complainant that it would pay him liberally if the improvement was practicable. Thereafter defendant assigned a half interest to the other defendant, a coemploye, when both denied plaintiff's interest, and asserted their intention of selling to others. *Held*, that such improvement was the property of plaintiff, and that defendants should be directed to convey to it their interest therein.

2. SAME—COMPENSATION FOR WORK OUTSIDE THE CONTRACT—REFERENCE.
   The defendant was entitled to compensation for perfecting such improvement after leaving plaintiff's employ, and, in the absence of proof as to what would be an adequate amount, there should be a reference to a master to ascertain.

In Equity. Bill by the Bonsack Machine Company against W. A. Hulse and R. H. Wright for specific performance. Decree for complainant.

S. A. Duncan and A. H. Burroughs, for complainant.
F. H. Busbee, for defendants.

GOFF, Circuit Judge. This suit is for the purpose of enforcing the provisions of a contract made July 19, 1886, by the Bonsack Machine Company and W. A. Hulse. The complainant, a company organized under the laws of the state of Virginia, has for its business the constructing, operating on royalties, leasing, and selling of machines for the manufacture of cigarettes. The contract alluded to is as follows:

"This agreement made this 19th day of July, 1886, between the Bonsack Machine Company, of the first, and W. A. Hulse, of the second, part, witnesseth: That the said company has this day employed the said Hulse to set up and operate its cigarette machines at a salary of $50 for the first month and $65 per month thereafter, with such advance of salary, up to not exceeding $75 per month, as the services of the said Hulse may justify. It is agreed that the said Hulse will serve the company wherever desired; the company to pay his railroad fares whenever traveling at the request of the company. No abatement will be made for loss of time because machines are not kept running, nor any extra payment for extra hours. The said Hulse agrees to do all in his power to promote the interests of the said company, and, in case he can make any improvement in cigarette machines, whether the same be made while in the employment of the said company or at any time thereafter, the same shall be for the exclusive use of the said company. And it is agreed that in case the said Hulse be not able to serve the said company

efficiently, or shall in any way neglect his duty, the company may stop his services at any time, paying up to such time; but, in case the said Hulse desires to quit the said company, he shall give sixty days' notice thereof.

"Bonsack Machine Company.

"By D. B. Strouse, President.

"W. A. Hulse."

It is claimed by complainant that Hulse, while operating a machine under said contract, made an improvement on the Bonsack machine, consisting of a device, which may be attached to the machine, by which the lap on the cigarette is changed from a pasted to a crimped lap. The plaintiff claims that Hulse duly reported his improvement to it, and that the Bonsack Company provided Hulse with a machine to experiment with, a private room to work in, and material to use in testing his device, assuring him, at the same time, that, if his improvement should prove practicable and valuable, the Bonsack Company would pay him liberally for his work; also, that Hulse, so using the machine, room, material, and labor employed to assist him, spent several months in perfecting such device, all at the cost of the complainant; that it is believed it will prove a practicable working arrangement, of more or less value, but the same has not yet been fully demonstrated; that complainant is, under said contract, entitled to the device, and to a conveyance of the same, and of the patents applied for relative to the said improvement; but that Hulse refuses to convey the same, and claims that he has sold an interest therein to the defendant Wright, and that they demand a large sum of money for the improvement, and are endeavoring to sell the same to others. Complainant says that R. H. Wright, the defendant, was, and still is, an agent and representative of the Bonsack Machine Company in introducing the use of its cigarette machines in certain "foreign lands," under a contract dated December 22, 1888, and that Hulse was with Wright, working the cigarette machines, and in the service of the Bonsack Company, by virtue of his employment with Wright, when the improvement was discovered; that Wright was aware of the contract of Hulse with the company when he purchased his one-half interest in the device. All these allegations of the bill are either admitted in the answer of the defendants, or, in my judgment, proven by the testimony and exhibits filed in the case.

Should the contract of July 19, 1886, between the Bonsack Machine Company and W. A. Hulse be enforced? It is claimed by defendants that it should not be, that it is void because of fraud in its procurement, because of inadequacy of consideration, and for that it is in contravention of public policy.

The charge of fraud is not sustained. The statement in the answer of the defendants, which is sworn to, that the contract was not read to or by Hulse, and not understood by him when he signed it, is shown by the testimony of several witnesses, Hulse himself being one, not to be true. The evidence is full and complete that Hulse understood the character of the instrument he signed, and that he executed it believing it to be reasonable and

just. I do not find that the contract was harsh and unreasonable when entered into. There is nothing in the case that shows—no evidence that discloses—that the contract was not a wise and advantageous one for both parties to it. I find that good reasons existed for both Hulse and the Bonsack Machine Company to execute such a contract. The one secured steady, lucrative, and most desirable employment, to continue as long as his own conduct justified it, with opportunities to greatly benefit his condition; while the other obtained a capable employe, and protected its business with such restrictions as its experience in the matter in which it was engaged had demonstrated to be necessary. Subsequent developments have fully justified the course taken, and the motive that actuated the parties in making said contract.

Finding as I do on this point, I, in effect, at the same time dispose of the objection of inadequacy of consideration, as also of the suggestion that a court of equity will withhold its decree, and not direct the enforcement of such contracts,—those that are harsh, unconscionable, and unreasonable. If I found the contract to be of that character, I would most assuredly withhold the decree of specific performance. But, after a careful consideration of the circumstances surrounding this case, as presented by the pleadings, depositions, and exhibits, I conclude that the contract should be enforced. Public policy requires that men of lawful age and proper understanding be permitted to make agreements and execute contracts concerning their business matters, and that when they are so made and executed they shall be binding upon and held sacred by those entering into them, and be enforceable in courts of justice. Even if occurrences subsequent to the execution of the contract prove that one of the parties thereto was improvident when he signed it, still it does not follow that equity will grant him relief, and set aside his agreement. Public policy is paramount, and prohibits the interference (unless for special and grave reasons) with the freedom of contract. This contract is not void because in restraint of trade, is not one in which the public is so interested as to justify a court of equity in restraining its execution. The cases are many where contracts to a certain extent in restraint of trade have been sustained by the courts. If the contract does not tend to injure the general public, and its object is a lawful one, it will be upheld, because the same general public is directly and deeply concerned in the individual freedom of those composing it, in making contracts relative to those matters in which they alone are interested. The question here is, shall Hulse or the Bonsack Machine Company have the use and benefit of the improvement made by Hulse in connection with cigarette machines? The public, in so far as questions relating to public policy are concerned, has no interest in this matter. Should the claim of the Bonsack Machine Company fail, the public would have no right to use the improvement. The device would then belong to Hulse, would be his secret, protected by patent, and guarded from public use by provisions of law. The restraint provided for

in the contract does not interfere with any interest of the public, and it only gives a fair protection to the party in whose favor it is given, for which proper compensation was stipulated for the party making it. The parties were competent to contract, and it was proper for Hulse to sell an improvement or invention not then made. Such contracts are not unusual. Hulse does not sell his labor for all time, nor does he contract to sell all improvements he may thereafter make, but only such as relate to cigarette machines. To hold that he had not the right to so contract would deprive him of a privilege that might be of great value to him, and the effect of such a rule would be to discourage improvements and prevent inventions.

I will now consider the testimony relating to matters transpiring after the execution of the contract and after the making of the improvements by Hulse. I do not think the claim set up by the defendants that Hulse was not in the employ of the Bonsack Machine Company when the improvement was made is material, and, if it should be, it cannot be sustained by the evidence. From the date of the contract, July 19, 1886, to December, 1889, Hulse was unquestionably employed by that company; his occasional absence being either at his request or with his assent.

I do not deem it necessary, in disposing of the matter now before me, to set forth in detail the arrangements existing between the Bonsack Machine Company and the defendant Wright, called in this controversy "Bonsack Oriental Affairs." A careful examination of the entire matter leads me to the conclusion that Hulse, so far as the questions involved in this suit are concerned, was in the service of the Bonsack Machine Company when he was on the rolls of, and being paid by, "Bonsack Oriental Affairs." This was from December, 1889, to August, 1891. The evidence shows that the improvement "took practicable shape" in Hulse's mind while he was in foreign lands working with "Bonsack Oriental Affairs," and that he then and there made a model of it. Soon after Hulse returned to the United States he assigned to the defendant Wright a one-half interest in the improvement he had made, by contract dated August 21, 1891, and he also advised the Bonsack Machine Company of the fact that he had made the invention, and explained to the officers of the same the character of the device. An arrangement was made between them for experimenting with and perfecting the same, Hulse giving the matter his personal attention, and the company furnishing a machine, room, labor, and material. This was done, I find from the evidence, with the mutual understanding that the device, when successfully tested and complete, should be the property of the Bonsack Machine Company, and that Hulse should be paid by that company liberally for his work. Defendant Wright was aware of the contract of July 19, 1886, between Hulse and the Bonsack Machine Company when he purchased an interest in said improvement, and he was also aware of the claim made by that company of ownership of the same, and of the fact that Hulse was experimenting in connec-

tion with it, using the machine, materials, and labor of the company for that purpose. It seems that, pending the experiments and work I have alluded to, some question arose between the parties as to the ownership of the improvement, and certain correspondence was had between Hulse and Wright, on the one part, and the company, on the other. Negotiations having in view an adjustment of the controversy were carried on, and, after several propositions had been made and rejected, the matter rested on a communication from Wright to the secretary of the company, dated March 21, 1892, in which the following language is found: "I wish it distinctly understood that we will push forward the crimping device as fast as possible, under the assurance of your board as to your liberality in the matter if we make a success of it." Within a month after this, and when the testing of the device was still going on, the defendants deny plaintiff's interest in the improvement, and assert their intention of selling it to others. This suit is then instituted.

I think the contract between the Bonsack Machine Company and Hulse should be enforced, and that a court of equity should so decree. Adequate compensation could not be obtained at law in a matter of this character. It would be impossible, from the nature of the case, to ascertain the damages the company might sustain by being deprived of the invention for which it had contracted, and the benefits of which it was entitled to. This is peculiarly the kind of contract that equity will enforce, and not compel the party asking performance to rely on the remedy at law. Let there be a decree for the specific performance of the contract of July 19, 1886, in so far as it relates to improvements on cigarette machines, and let it provide that the improvement made by Hulse, referred to in the proceedings of this cause, is and shall be the property of the Bonsack Machine Company, and let Hulse and Wright be directed to convey the same, and all interest they, and each of them, may have in the same, to said company. While the contract gives the Bonsack Machine Company the exclusive use of any improvements in cigarette machines that Hulse may make, it does not authorize that company to appropriate such improvements, if the same were made or perfected while he was not in the employ of the company, and under its pay, without making to him a reasonable and just compensation for the same. The improvement now in controversy has been worked upon and perfected by Hulse since he left the service of the company, and as to his compensation he and the company have been unable to agree, and I do not find sufficient testimony in the record bearing on this point to enable me to reach a satisfactory conclusion relative thereto; hence this case must be referred to a master, to ascertain and report whether or not the Bonsack Machine Company has paid Hulse for his actual services rendered for said company in connection with said improvement, under the contract between them; if not, what amount is still due him. Let the master also report as to the condition of said improvement, as to its efficacy for the

purposes for which it is intended. He will also report if letters patent have been issued covering the same, and, if so, to whom, when, and by what authority; if not, the condition of the applications made by Hulse for patents. Let him also report what sum, in his opinion, under the facts of the case, the evidence now in, and to be taken by him, and in the light of this opinion, will be liberal compensation to Hulse and Wright for their services and expenses in connection with the perfecting of said device, and securing patents for the same. Let the injunction heretofore issued be perpetuated.

DICKERSON v. MATHESON et al.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. SALE—PATENTED ARTICLE—NOTICE OF RESTRICTION.
   A firm in Germany, having the right, under European and American patents, to sell a patented coloring matter in Europe and the United States, was accustomed to sell with restrictions against exportation to the United States. A London firm, which knew of this restriction, sent an order to the London agents of the German firm for a quantity of the goods "strong for export." *Held*, that there was no notice of an intention to export to the United States. 50 Fed. Rep. 73, affirmed.

2. PRINCIPAL AND AGENT—NOTICE TO AGENT.
   On receiving notice of the arrival of the goods in London, the purchasers made out a check for the price, and gave it to their clerk, who, in the usual course of business, exchanged it for the invoice sent by a messenger of the seller's London agent. This invoice contained a notice of the prohibition against exporting to the United States, but the attention of the firm was not called thereto until a day or two later. *Held*, that notice to the clerk was notice to the firm, and, having accepted the goods with notice, the firm was bound by the restriction. 50 Fed. Rep. 73, affirmed.

3. PATENTS FOR INVENTIONS—SALE WITH RESTRICTIONS—INFRINGEMENT.
   The owner of patents granted in Europe and the United States, who sells the patented article in Europe with a prohibition against importation into the United States, may treat as an infringer one who sells that article in this country. 50 Fed. Rep. 73, affirmed.

4. PRACTICE—STIPULATED EVIDENCE.
   The parties stipulated that, to save the delay and expense of a commission, the cause should be tried as though certain facts therein set out had been given. On the same day a joint letter by respective counsel was sent, requesting the persons addressed to procure the affidavit of one of the purchasing firm as to the prohibition in the invoice. *Held*, that an affidavit of one of the addressed parties as to statements made by the member of said firm in the presence of the persons so addressed was mere hearsay, and not the equivalent of the affidavit requested.

5. SAME—CONTINGENCY.
   In the absence of anything in the stipulation, joint letter, or the surrounding circumstances to indicate that the use of the stipulated facts was contingent on obtaining the requested affidavit, such facts were properly admitted in evidence.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by Edward N. Dickerson against William J. Matheson and James N. Steele for infringement of a patent. From a decree for complainant, (50 Fed. Rep. 73,) defendants appeal. Affirmed.

For decision on motion for an interlocutory injunction, see 47 Fed. Rep. 319.

E. N. Dickerson, for complainant.
Henry P. Wells, for defendants.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the southern district of New York in favor of the complainant in a bill in equity for the infringement of letters patent. On November 3, 1885, letters patent of the United States, No. 329,632, were issued to Carl Duisberg, a German, for an improvement in coloring matter known as "Benzo-Purpurine." On December 21, 1885, Duisberg assigned the patent to a German corporation called "Farbenfabriken, vermals Fr. Bayer & Co.," and known in the case as the "Bayer Company," which was also the owner of a German patent for the same invention. On March 8, 1888, the Bayer Company assigned the patent, including the right to recover for past infringements, to the complainant. At the time of the transaction which is the subject of this controversy, another German corporation, by the name of the "Actien Gesellschaft fur Aniline Fabrikation of Berlin," called in this suit the "Berlin Company," had the right, as licensee of the Bayer Company, to sell the patented color both in Europe and in the United States under the European and United States patents. The alleged infringement consists in the importation into this country, in November, 1887, and the subsequent sale therein, by Matheson & Co., who are merchants in New York, of one ton of benzo-purpurine, made under said letters patent by the Berlin Company. The purchase by the defendants was under the following state of facts: Matheson & Co., in October, 1887, directed their London agents, Barnes & Co., to purchase a quantity of the patented color, if it could be bought of the parties who held the United States patents without restrictions against export to this country. The defendants knew that these restrictions were apt to be imposed. Barnes & Co. applied to the Bayer Company, who replied that their product was engaged for two months, but would deliver the color as soon thereafter as practicable. In a day or two the Bayer Company telegraphed to Barnes & Co., inquiring for whom the color was designed, as, in case it was designed for America, they should decline to sell it without restrictions. Barnes & Co. then engaged Domeier & Co., of London, to buy in their own name, but for Barnes & Co., one ton of said patented color from the Berlin Company. At this time, Domeier, of said firm, was aware that the Berlin Company was in the habit of selling the goods under restrictions against importation into the United States, and was instructed by Barnes & Co. not to buy unless he could do so without

restrictions. On November 4, 1887, he ordered from Greeff & Co., of London, the agents of the Berlin Company, one ton of the patented color. The order contained the words "strong for export." On November 15th, Greeff & Co. notified Domeier & Co. that they should send the invoice and bill of lading in the course of the day, and would like them to have a check ready for the amount of the bill. The check was drawn by a clerk, was signed by Domeier, was given to the clerk to deliver to Greeff and Co. upon receipt of the invoice, and upon such receipt was delivered accordingly, on November 15th, by the clerk. The invoice contained the following words, in German: "The importation into the U. S. of North America of our patented substantive cotton dye-stuffs, congo, benzo-purpurine, etc., is prohibited." The goods were marked with a label as follows: "The importation into the United States of North America is forbidden." No notice of any restriction upon the sale or destination of these goods was given to Domeier & Co. until the notice which was contained upon the invoice, and Domeier did not know of the contents of the invoice or of the label till he was informed by his clerk of the notice upon the invoice, from one to three days after November 15th. Greeff & Co. supposed that the goods were to be used in England.

When Domeier & Co. delivered to Barnes & Co. does not appear, but on November 22d the latter wrote to the defendants that they had received the ton. It was shipped to the defendants on November 25th.

It is apparent that the defendants and Barnes & Co. were anxious to obtain the patented color without the restrictions which they knew were customary; that, failing in the attempt to purchase from the Bayer Company, Barnes & Co. sought to use Domeier & Co., in the hope that they might purchase, without an announcement of restrictions, from the Berlin Company; that, when the order was executed by sending the invoice and the goods, the restrictions were announced upon each; that Domeier, who knew of the customary method of selling these colors, upon receiving notice that the papers had arrived and were to be delivered, left a signed check with his clerk to deliver upon receipt of the invoice. The defendants think that their attempt to obtain a purchase without restrictions was successful, because an affirmative announcement of these conditions was not made until the invoice was presented and the sale was consummated, and because, in Domeier's absence, the clerk who had been intrusted with the check was the only person who saw the invoice.

Upon this branch of the case, the circuit court well said:

"If such propositions are to receive the sanction of the courts, it will be well-nigh impossible to carry on the business of commerce. A person cannot avoid responsibility by closing his eyes and ears, and delegating his business to others. If Domeier & Co. would have been bound by the notice of restriction, had Domeier personally received the invoice in exchange for the check, the firm is equally bound by the action of their clerk. The clerk stood in the place and stead of Domeier & Co., and represented them, in that transaction."

The clerk to whom was intrusted the business of receiving and examining the invoice and bill of lading, and delivering the check in payment for the goods, must, in the absence of any evidence to the contrary, or of circumstances which repelled the idea of his knowledge of the contents of the paper, be presumed to have acquainted himself with the contents of the papers which he was to receive in exchange for the check, and, by accepting them, to have assented to the conditions of sale which they contained. It is to be observed that the invoice was not a mere notice or receipt, and was a paper which, from the nature of the business, must be expected to contain the terms of the contract of sale. Belger v. Dinsmore, 51 N. Y. 166; Kirkland v. Dinsmore, 62 N. Y. 171; Blossom v. Dodd, 43 N. Y. 264. The fact that the order of Domeier contained the words "strong for export" is commented upon by the defendants as containing a notice to the Berlin Company that the goods were to be exported; but those words, when addressed by a London firm to a German manufacturer, cannot indicate that the goods are to be exported to the United States. The attempt of the defendants' agents to buy and export into the United States a quantity of the patented color, freed from a positive restriction against such exportation, was a somewhat careful one; but the argument in favor of its success now rests upon the absence of Domeier from his place of business when the order for the goods was executed, and upon his lack of knowledge of the contents of the invoice. That argument, for the reasons already given, is insufficient.

The question as to the effect of the restriction remains. A purchaser in a foreign country, of an article patented in that country and also in the United States, from the owner of each patent, or from a licensee under each patent, who purchases without any restrictions upon the extent of his use or power of sale, acquires an unrestricted ownership in the article, and can use or sell it in this country. The cases which have been heretofore decided by the supreme court in regard to the unrestricted ownership by purchasers in this country of articles patented in this country, and sold to such purchasers without limitation or condition, lead up to this principle. Bloomer v. Millinger, 1 Wall. 340, 351; Mitchell v. Hawley, 16 Wall. 544, 548; Paper-Bag Cases, 105 U. S. 770; Holiday v. Mattheson, 24 Fed. Rep. 185. A purchaser in a foreign country of an article patented in that country and also in the United States, from a licensee under the foreign patent only, does not give the purchaser a right to import the article into, and to sell it in, the United States, without the license or consent of the owner of the United States patent. Boesch v. Graff, 133 U. S. 697, 10 Sup. Ct. Rep. 378. In the Graff Case, a dealer in this country purchased in Germany articles patented there and also in the United States, from a person authorized to sell them in Germany, but authorized only under the German patent, or under the imperial patent laws of Germany, in regard to the sales of articles patented in that country. The supreme court held that the

right of this vendor to make and sell the articles in Germany was one allowed him under the laws of that country, and did not authorize purchasers from him to sell the article in this country without the consent of the owner of the United States patent. Had Domeier obtained consent to import into the United States from the Berlin Company, which had the right to sell both under the United States and the German patents, the right of the defendants to use and sell the color would also have been unrestricted.

The appellants contend that, in an examination of the facts of this case, no attention should have been paid to the statement of the testimony contained in a written stipulation signed by the respective counsel, unless the affidavit of Mitchell, a partner of Barnes & Co., should also have been admitted. On January 16, 1890, the respective counsel stipulated, "in order to save delay and expense of a commission to England and Germany," that on the final hearing "it shall be taken as though the following testimony had been given." Then followed a statement of sundry alleged facts. On the same day a joint letter, signed by the respective counsel, was sent to Greeff & Co. and to Barnes & Co., which, after reciting the facts of the controversy, was as follows:

"The facts concerning said sale have been mutually agreed upon in a stipulation between the undersigned, excepting the question as to whether, at the time of the payment for or receipt of the invoice of these 2,000 pounds of benzo-purpurine, Domeier & Company objected to or commented upon the restriction clause of the invoice upon the grounds that the goods were bought without restriction. We mutually desire, in the case, to obtain Mr. Domeier's statement of the facts in this matter; and we request you, therefore, jointly, to see Mr. Domeier, and obtain from him such statement, in the form of an affidavit, for use in the case here. If Mr. Domeier's recollection does not correspond with the recollection of Mr. Greeff, or his representative in the transaction, then we request Mr. Greeff or his representative to make also his statement in writing, duly sworn to, of his recollection of the facts, and return said statement or statements to this address at your earliest convenience."

The affidavits of Domeier and Greeff were not obtained in reply to this letter, but William A. Mitchell, a member of the firm of Barnes & Co., made an affidavit on October 31, 1891, that on or about February 12, 1890, at a meeting between Domeier, Greeff, Deissner, who represented the Bayer Company, and himself, the first two named persons made statements in regard to the said sale which Mitchell swears to. This is not the affidavit which was requested in the joint letter, but is an affidavit of Mitchell as to the unsworn statements of Domeier and Greeff, and was manifestly hearsay. It is urged that the use of the stipulation was contingent upon obtaining the affidavits named in the joint letter, and that, they not having been obtained, the stipulation should be excluded. Nothing in the stipulation, or in the surrounding circumstances at the time it was drawn, or in the joint letter, indicates that its use was contingent upon obtaining the affidavits. In pursuance of a commission taken out May 27, 1891, Domeier and Greeff gave their depositions in the presence of the respective

counsel, and were cross-examined. These depositions were taken about October 31, 1891, and rendered affidavits entirely unnecessary.

The decree of the circuit court is affirmed, with costs.

BICYCLE STEPLADDER CO. v. GORDON.

(Circuit Court, N. D. Illinois. September 11, 1893.)

1. EQUITY—PRACTICE—MOTION TO DISMISS.
   Where complainant makes no objection, the court will determine a question of jurisdiction or of personal privilege, raised by defendant by motion to dismiss the bill instead of by demurrer or plea.
2. CIRCUIT COURT—JURISDICTION—"INHABITANT."
   A resident of Kentucky, who is temporarily in Chicago in charge of an exhibit at the World's Columbian Exposition, is an "inhabitant" of Kentucky, and not of Illinois, within the meaning of Act March 3, 1887, c. 373, § 1, (24 Stat. 552,) as corrected by Act Aug. 13, 1888, c. 866, (25 Stat. 434,) which provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant. Shaw v. Mining Co., 12 Sup. Ct. Rep. 935, 145 U. S. 444, followed. U. S. v. Southern Pac. R. Co., 49 Fed. Rep. 297, distinguished.

In Equity. Bill by the Bicycle Stepladder Company against John E. Gordon to enjoin infringement of letters patent granted to complainant for improvements in store service ladders. Defendant moves to dismiss the bill. Granted.

Elliott & Hopkins, for complainant.
Dyrenforth & Dyrenforth, for defendant.

JENKINS, Circuit Judge. The complainant files its bill to restrain the alleged infringement by the defendant of letters patent granted to the complainant for certain improvements in store service ladders. The bill charges that the complainant is a corporation organized under the laws of the state of Iowa, and that the defendant is a citizen of the state of Kentucky, residing at Lexington, in said state, "and a business inhabitant of and doing business at the city of Chicago, Illinois." Process was served upon the defendant within this district. Without otherwise appearing to the suit, the defendant moves to dismiss the bill upon the ground that upon the face of the bill it appears that the court is without jurisdiction, the defendant being a citizen of and resident within the state of Kentucky; and also asserting as a personal privilege his right to be sued only in the latter state. It is disclosed by the affidavits supporting and counter to the motion that the defendant, with his family, resides in the state of Kentucky, in which state he exercises his political rights and privileges; that he came to Chicago about the 1st of June last, where he has since remained in charge of an exhibit of ladders of his own manufacture at the World's Columbian Exposition; that these ladders were manufactured at his factory in the state of Kentucky; that he has, during his sojourn in Chicago, taken some orders for his manufacture of

ladders, which were filled from his manufactory in Kentucky, one of which orders was from a resident of Chicago; and that he intends to return to his home in the state of Kentucky at the close of the Exposition.

Following the intimation of Judge Thayer in Reinstadler v. Reeves, 33 Fed. Rep. 308, the defendant has seen fit to present the question of jurisdiction or of personal privilege by motion to dismiss, and not by demurrer or plea. The complainant making no objection to the manner in which the matter is brought to the attention of the court, I feel at liberty to determine the question involved without indorsing or considering the practice adopted.

The act of March 3, 1887, c. 373, § 1, (24 Stat. 552,) as corrected by the act of August 13, 1888, c. 866, (25 Stat. 434,) determining and asserting the jurisdiction of the circuit courts of the United States, contains this provision:

"And no civil suit shall be brought before either of the said courts against any person or by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the case is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The suit here being for an alleged infringement of patent granted by the United States, the court has jurisdiction of the subject-matter. The case falls, therefore, within the first clause of the provision quoted. The objection to the entertaining of the suit by this court is one going not to the jurisdiction of the court, but rests upon the assertion by the defendant of his personal privilege to be sued only in the district of which he is an inhabitant.

There has been some diversity of opinion in the circuit courts with respect to the proper definition of the term "inhabitant," within the meaning of the act. It was used in the original judiciary act, (1 Stat. 78,) as explained by Justice Gray in Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. Rep. 935, "to avoid the incongruity of speaking of a citizen of anything less than a state," when two or more districts were embraced in one state. In that case the second clause of the provision was considered, but the language employed is equally applicable to the first clause here involved, so far as it affects the judicial interpretation of the term "inhabitant." Mr. Justice Gray, speaking for the court, says at page 449, 145 U. S., and page 937, 12 Sup. Ct. Rep.:

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of the earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

I cannot but hold that ruling to be decisive here. The court, in effect, construes the word "inhabitant" to be, within the meaning of the act, synonymous with "resident." In the light of previous legislation upon the subject of the original jurisdiction of the federal courts, and of the connection in which the word is used, I think the word is here employed in the sense of "resident." It comprehends locality of existence; the dwelling place where one maintains his fixed and legal settlement; not the casual and temporary abiding place required by the necessities of present surrounding circumstances. A mere "sojourner" is not an "inhabitant" in the sense of the act. The meaning, I think, is well expressed by Judge Deady in Holmes v. Railway Co., 5 Fed. Rep. 523: "An inhabitant of a place is one who ordinarily is personally present there; not merely in itinere, but as a resident and dweller therein."

The case of U. S. v. Southern Pac. R. Co., 49 Fed. Rep. 297, decided by Mr. Justice Harlan, is pressed upon my attention. The question there considered was with respect to the domicile of a corporation created by one state and operating and maintaining offices in another. It was held that, although a corporation was a legal habitant in the state of its creation, it could also become an inhabitant of another state for the purposes of business and of jurisdiction in personam. This proceeded upon the ground that the corporation carried on business in the other state by express license of that state, and upon the implied condition that it was subject to the process of courts within that jurisdiction. Whether or not that decision can be upheld I need not here inquire. Mr. Justice Harlan's ruling certainly appeals to one's sense of justice, and of what ought to be, if it is not. The decision rests upon peculiar ground, not applicable to natural persons. It is further to be observed that that case was decided prior to the decision in Shaw v. Mining Co., supra, and that Mr. Justice Harlan dissented from the opinion of the court in the latter case.

Upon the face of the bill the defendant is a citizen and resident of Kentucky. He cannot also be, within the meaning of the term as employed in the act, an inhabitant of Illinois. He is a "sojourner" in the city of Chicago during the time of the Exposition. That does not, however, subject him to this suit in this jurisdiction, if he chooses to avail himself of his privilege of exemption. The motion to dismiss will be granted.

EDMANSON v. BEST.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 40.

1. JUDGMENT—RES JUDICATA.

A judgment at law rendered upon an account stated is conclusive of the fairness of the account, since fraud in obtaining it could have been set up as a defense.

2. SAME—COLLATERAL ATTACK—INJUNCTION.
It would be no ground for enjoining collection of a judgment that the court refused to allow the defendant to show that the instrument sued on was obtained by fraud, since such ruling would be mere error, which would not affect the judgment on collateral attack.

3. EQUITY—PRACTICE—NEW TRIAL AT LAW.
A bill to restrain the collection of a judgment at law will not be treated as a petition for a new trial where the bill is not framed on that theory, and shows no ground for a new trial which complainant could not have presented as a defense to the action.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Bill by George Edmanson against John L. Best to restrain the collection of a judgment. Decree for defendant. Complainant appeals. Affirmed.

Marcus Cavanagh and Allan C. Storey, (Gibbons, Cavanagh & O'Donnell, on the brief,) for appellant.

Nelson Monroe, (Jesse A. Baldwin, on the brief,) for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. The bill in this case was dismissed for want of equity. Its object was to restrain the collection of a judgment at law, rendered in the court below, to cancel for fraud an agreement of settlement, upon which the judgment was based, and to obtain an accounting. The averments, in substance, are: That the complainant, Edmanson, had been engaged in buying and selling oysters in Chicago, at wholesale and retail, and had had the respondent, Best, in his employ as bookkeeper, cashier, and manager, in general control, entitled to receive in compensation for his services a stipulated sum per week and a percentage of the net profits of the business; that on July 9th, 1888, by means of false statements in respect to the amount of uncollectible claims, representing them as amounting to not more than $300, when in fact they amounted to $3,000 or more, the respondent procured the complainant to execute an agreement which, omitting date and signatures, is of the following tenor:

"It is hereby agreed between Geo. Edmanson and John L. Best that the following settlement is to day made, viz.: That John L. Best's balance to his credit and due him on July 1, 1888, is five thousand eight hundred and forty-eight dollars and seventy-nine cents, ($5,848.79,) and is correct, and is so considered by both parties to this agreement; any difference arising from former agreements is fully settled by this; and in consideration that Geo. Edmanson allows John L. Best percentage of profits, in addition to salary as agreed upon, to stand as credited on Geo. Edmanson's books, and will not charge back to John L. Best his percentage of loss as shown by balance sheet from January 1, 1888, to April 21, 1888, and that George Edmanson also hereby agrees not to charge back any percentage of bad debts to John L. Best. In consideration of which John L. Best agrees to waive his right to back salary, interest on money to his credit from time to time, and also to make no claim on George Edmanson for keep of George Edmanson's horses and cows, kept for his private use, the expense of which was charged up to barn account, and affected the profits of the business to the extent of said expense;"

That, instead of the sum stated in this agreement, there was in fact due the respondent, if anything, a very small sum; that in April, 1889, the respondent brought a suit at law against the complainant, in the court below, upon a declaration containing the common counts only, including an account stated, to which the complainant pleaded the general issue; that at the trial the only evidence adduced in behalf of the plaintiff was the agreement aforesaid; that the complainant offered evidence to show the true relations between the parties, and that the contract of settlement had been obtained by fraud, as charged, but that the court declared the defense inadmissible in the case at law, and available only in a court of equity, and on February 5, 1890, gave judgment against complainant for $3,933.39, and for the costs of suit, the amount of the recovery being made less, by reason of certain credits, than the sum stated in the agreement.

The answer sets up two defenses: First, the contract of settlement, which, it is alleged, was fairly made; and, second, the judgment at law, by which, it is claimed, the matter now sought to be disputed was adjudicated,—it being alleged that the evidence offered by the parties was substantially the same as that adduced before the master in this case, that it was received and considered by the court, and judgment given as stated.

The complainant replied in the usual form, and there was a reference to the master to take the evidence and report upon the issues. In his report the master, though he says he in no manner endeavored to enter into a full accounting between the parties, in fact made up a statement of account between them by which it appeared that the amount named in the settlement agreement as due the respondent was too large by $2,001.22; but, treating that as a partial want of consideration for the agreement, he reported that "the proof, neither in this case nor in the case at law, made out the defense of fraud or circumvention;" that the same evidence, substantially, was adduced in the law case upon the question whether the settlement was procured by fraud, as has been offered in this case; and that, in the opinion of the master, the judgment at law is conclusive upon that question.

Though it was competent and necessary for the master to inquire into the accounts and books of Edmanson in order to determine whether or not the contract of settlement was procured by means of false representations in respect to those books and accounts, it was no part of his duty to state an account between the parties, and especially an incomplete one, which ignored the basis upon which the contract of settlement by its terms appeared to have been made; and the court committed no error in sustaining an exception to that part of the report.

It is not now an open question whether the settlement between these parties was fair, or was brought about by false and deceitful means. We agree with the court below that the question was lawfully tried and determined in the case at law and is not open to reconsideration by a court of equity. Though the declaration in

the suit at law made no mention of the contract of settlement, it was competent for the plaintiff in the action to introduce it, as he did, in proof of his demand, (Chit. Pl. 341; Packet Co. v. Sickles, 24 How. 342; Wilson v. King, 83 Ill. 236;) and the instrument not being under seal, and, under the Illinois practice, even though it had been under seal, the defendant had the right to show in defense, as he attempted to do, that it was obtained by fraud or was without consideration, (Greenl. Ev. § 135; Wilson v. King, supra.) The issue having been made and tried in that way, the judgment rendered became conclusive until set aside by the court which rendered it or by an appellate court. It is not material that the defense was of such a nature that, if the question were open, there might be ground for a suit in equity. It was a proper defense to the action at law, and, having been interposed and determined, the judgment is conclusive proof that the fraud attempted to be proved was not committed. While the relief obtainable in equity, if the fraud were proven, would be broader than the mere establishment of a defense in the action at law, the law court was quite as competent as a court of equity to try the question of fact; and, it having been so determined that there was no fraud, the question of the extent of relief obtainable in another court if the fraud were provable is immaterial. If it were true, as asserted, that the court held that the defense could not be made at law, that was an error upon which the complainant should have asked a new trial, and, if necessary, should have taken a writ of error. The record, however, shows no such decision, and the proofs and the master's report are to the contrary.

It is further insisted that the bill should be treated as a petition for a new trial, filed within time, under section 987, Rev. St. U. S. The bill manifestly was not framed upon that theory, and is defective because it shows no ground for a new trial which was not available, or which the complainant was prevented by fraud or accident from presenting, as a defense in the case at law. Story, Eq. Jur. §§ 887, 1574, and notes.

The decree below should be affirmed, and it is so ordered.

COLE v. OIL-WELL SUPPLY CO.

(Circuit Court, S. D. New York. September 6, 1893.)

1. RECEIVER—INSOLVENT CORPORATION—PROPERTY ATTACHED UNDER PROCESS OF STATE COURT.

If the property of an insolvent foreign corporation has been seized by the sheriff under a warrant of attachment issued by a state court in an action which has afterwards been prosecuted to judgment, and execution issued and levy made upon the property seized, a receiver appointed subsequent to the attachment by the United States circuit court of the district in which such property is situated takes the property of the corporation in the jurisdiction subject to such rights over the same as had been acquired by the prior proceedings in the state court.

2. SAME--ASSIGNMENT BY INSOLVENT CORPORATION.
On June 19, 1893, a receiver of the property of a foreign corporation was appointed in an action brought in the circuit court for the western district of Pennsylvania. Pursuant to the terms of the order, the corporation on the same day executed and delivered to the receiver an assignment of its property in New York city, including the property in controversy, and the property was taken possession of by an agent of the receiver. On June 29, 1893, the sheriff of New York county seized the property in controversy under a warrant of attachment issued by a state court in an action brought against the foreign corporation. In an action brought against the corporation in the circuit court for the southern district of New York, that court appointed the Pennsylvania receiver the receiver of the property of the defendant within its jurisdiction. As receiver appointed by the New York circuit court, he applied to that court for a summary order to the sheriff to surrender the seized property. *Held*, that the assignment executed pursuant to the decree of the Pennsylvania circuit court passed the title to the property to the receiver as an officer of that court, and not as an officer of the New York circuit court, and that in his capacity of receiver, appointed by the New York court, he was not entitled to possession of the property, and the order asked should not be granted.

In Equity. Petition by John Eaton, receiver of the property of the defendant in an action by Edward H. Cole against the Oil-Well Supply Company, for a summary order to the sheriff of the county of New York to surrender certain personal property seized by the sheriff under a warrant of attachment issued by the state court in an action against the defendant, a foreign corporation. Denied.

Abel Crook, for petitioner.
Lockwood & Hill, for defendant.

LACOMBE, Circuit Judge. By order made in this action, one John Eaton was on July 24, 1893, duly appointed receiver of the property of the defendant, within the jurisdiction of this court. Prior thereto, and on June 29, 1893, the sheriff of the county of New York had seized and taken possession of certain personal property at No. 32 Courtland street, which personal property originally belonged to the defendant corporation. The seizure by the sheriff was under a warrant of attachment issued by the state court in an action brought against the defendant, a foreign corporation, which action has since been prosecuted to judgment, execution issued, and levy made upon the property so seized. The receiver, as petitioner, applies for a summary order to the sheriff to surrender such property to the receiver. Under the facts above stated, he is not entitled to such relief. He took the property of defendant in his jurisdiction by virtue of the order of this court, subject to whatever rights over the same had been acquired by prior proceedings in the state court; and it is the universal practice of the federal courts not to interfere with the state court if it has acquired custody of property prior to the entertainment by the federal court of an application for a receivership.

The petitioner relies, however, upon other facts happening before the issuance of the attachment, and which he contends entitle him to the relief prayed for. On June 19, 1893, in an action brought in

the circuit court for the western district of Pennsylvania by Edward H. Cole, the plaintiff here and another plaintiff, one E. Parke Coby, against this defendant, the same John Eaton was appointed receiver of the property of said defendant corporation, wherever situated. It is conceded that Eaton's appointment by that court did not transfer to him the legal title to any property of the defendant outside of the western district of Pennsylvania. But it further appears that on June 19th the defendant executed and delivered to Eaton, as receiver under such decree, and in accordance with its terms, an assignment of its property in New York city, including that in question; and it is further alleged that the property was taken possession of at 32 Courtland street by one Collins, as agent of the receiver.

The only question in the case is, does such assignment entitle this petitioner in this action to the relief prayed for? If the assignment was inoperative to transfer the legal title to the property, as was contended on the argument, the title still remained in the corporation, and it was subject to the sheriff's levy. If, however, the assignment was valid and operative, then the legal title to that property passed to the receiver appointed by the court in Pennsylvania on June 19th, and, being no longer property of the corporation in this jurisdiction, did not pass to the receiver appointed by this court under its order on July 24th. In neither view of the case is John Eaton, as receiver appointed by this court, entitled to its possession, and it is as receiver appointed by this court in this action that he prays in this action for a summary order ousting the sheriff, and putting the property into his possession. What rights and title he acquired by the assignment he acquired under his Pennsylvania appointment. They were complete before this action was brought, and, if he desire to test them, it must be otherwise than by such an application in this action. It is true the same individual has been appointed receiver in both actions, but that was because, as matter of comity, the second appointing court so chose. It was under no legal obligation to appoint him. It might have selected some one else, and the legal effect of the orders of the two courts is not changed by the circumstance that the same individual happens to be the nominee of both.

SOUTHERN PAC. CO. v. LAFFERTY.

(Circuit Court of Appeals, Ninth Circuit. July 17, 1893.)

No. 91.

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER.

In an action against a railway company for the death of a brakeman from injuries caused by his train being struck by two "live" engines, which in some unexplained manner had run away from the railroad yard, it appeared that the engines had been left in the yard at the conclusion of the day's run; that they and another engine were cared for by the only person on duty in the yard, who was also watchman; that after ex-

amining the engines in question, and while such person was working on the other engine, about 75 yards distant, the two engines moved away; that the night was dark and foggy, and objects were not discernible at a distance of over 30 feet, and that instructions had been given to group the engines, but as to the time when given the testimony was conflicting. *Held*, that the railroad company was liable for failure to take reasonable precautions to provide against the engines being put in motion of themselves or by outside persons.

2. SAME—RISK OF EMPLOYMENT.
The collision which caused the injuries and subsequent death, having resulted from the failure of the company to take proper precautions, was not one of the risks incident to the deceased's employment.

3. SAME—REASONABLE PRECAUTION—QUESTION FOR JURY.
The duty was imposed upon the company of taking reasonable precautions to prevent the engines being tampered with or moved, and whether or not the employment of but one person in the yard to care for the engines as well as to act as watchman was such reasonable precaution was properly submitted to the jury.

4. SAME—EVIDENCE—NOTICE OF DEFECT.
Testimony that the fog was so dense on the night of the accident that the watchman could not have had knowledge that the engines were moved out; that the weather had been foggy for two weeks prior; and that the foreman of the men who ran on that division and worked in the locomotive department had been told that the yard was insufficiently manned, two months prior to the accident,—was properly admitted.

5. ACTION FOR NEGLIGENCE—PECUNIARY DAMAGE.
The action was brought by the mother of the deceased as administratrix, and the proof showed that she had no other children, and was dependent on him; that at the time of his death he was 21 years old, in perfect health, earning $75 a month, of which he gave her $30; and that prior to this employment he had given her $25 a month. *Held* sufficient proof of pecuniary damage.

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

Action by Mollie Lafferty, administratrix of the estate of James Lafferty, deceased, against the Southern Pacific Company, for the death of plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Affirmed.

Foshay Walker, (A. B. Hotchkiss, on the brief,) for plaintiff in error.

M. E. C. Munday, (C. L. Russell, on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On the night of December 26, 1890, James Lafferty, while in the employ of the Southern Pacific Company, plaintiff in error, as a brakeman on a freight train, received injuries in a collision of said freight train with two engines belonging to said company, which resulted in his death. It appears from the evidence that the two engines were, on the evening in question, taken into the yard of the railroad company at Fresno, and there left by their respective engineers, at the conclusion of their day's run, standing upon one of the railroad tracks, with

water in their boilers and fires burning, known in railroad parlance as "live engines." There is no evidence in the record to show in what particular manner the engines were moved from the place where they were left by the engineers; but it is a fact that in some way, in a manner not shown by the evidence, the engines did leave the yard, and got out upon the main railroad track, and ran a distance of about 2½ miles from Fresno, when the collision occurred. This action was brought by the defendant in error, as administratrix of the estate of James Lafferty, deceased, to recover damages for his death, which it is alleged was caused by the negligence of the railroad company. It is not claimed by the administratrix that there was any negligence on the part of any of the employes of the railroad company, or that any of the railroad tracks or switches, or that the engines, or either of them, were in any manner defective.

The only question that was submitted to the jury, in so far as the question of negligence upon the part of the railroad company was concerned, was as to whether or not it was negligent in not taking the necessary, proper, and reasonable precaution to guard the engines left upon its tracks in Fresno. As bearing upon this question it was shown that three engines were usually left in the yards at night, sometimes four; that on the night in question there were three,—two road engines and one switch engine; that one of the road engines was left on the tank track; that the others —which were afterwards moved out upon the track—were left on the turntable track, about 30 feet apart, and about 75 yards distant from the engine on the tank track; that one Riley was employed by the company to watch all the engines at night. Riley testified that on the night in question he "was to take care of the two engines, to keep fire and water in and wipe another engine, get the three ready for morning, * * * or whatever time they were called for;" that he had partially cleaned the engine on the tank track, and then examined the two engines on the turntable track, saw that they had suffcient fire and water in them to last for at least three hours, and then left them, and went back to the other engine, and continued wiping it for about half an hour or more, and then heard of the accident, which was the first knowledge he had that the two engines had been moved away. It was also shown that the night was dark, and so foggy that a person could not see objects at a distance of over 30 feet or thereabouts. There was evidence tending to show that the engineers were instructed to group the engines together, and that they failed to do so on the night in question. There was some question raised as to the time when these instructions were given. Riley testified that he had not been informed of such instructions until after the accident.

It is contended by counsel for the railroad company that the engines must have been put in motion by some evil-disposed persons; that, if there was any negligence, it was not the negligence of the railroad company, but the carelessness or negligence of the

coemployes, either of the watchman or the engineers who failed to obey their instructions in grouping their engines together, who were fellow servants with the deceased; and that for this reason the court erred in refusing to instruct the jury, as requested by them at the close of the testimony, to find a verdict in favor of the defendant, (plaintiff in error.)

The court instructed the jury that the railroad company was not an insurer of the lives or limbs of its employes, but was bound to exercise ordinary care and reasonable precaution for their protection; that Lafferty, (the deceased,) when he accepted the employment of the company as a brakeman, undertook all the risks that naturally appertained to the business; that the engineers who left their engines in the yard at Fresno, and Riley, the watchman, were fellow employes of the brakeman, and for their negligence, if any was committed by them, the railroad company would not be liable. After referring to the conflict in the testimony as to the time when the orders were given to the engineers to group their engines together,—whether before or after the accident,—and also as to the purport of such orders, and leaving these questions of fact to be determined by the jury, the court further instructed the jury as follows:

"If you should find that those engineers were instructed to group their engines together in the yard after completing their day's run, then you are to consider the case as if all three of the engines on the night in question were grouped together; and then you are to say whether or not, in that aspect of the case, the appointment by the railroad company of a competent watchman (because there is no claim that Riley was not competent, nor is there any claim that he did not perform his duty in all respects) to look after those engines, and see that they were not tampered with, or moved from their place, was a reasonable precaution to be taken by the company. They were obliged to exercise ordinary care to see that no damage came, no injury resulted, to its employes. Now, was that reasonable, in view of all those facts and circumstances? They were not bound to insure against any accident, but to exercise a reasonable caution; and, under those circumstances, it is for you to say whether or not the appointment of a competent watchman and rubber of or wiper of the engines was such a reasonable precaution."

We are of opinion that the court did not err in declaring that the law imposed upon the railroad company the duty of taking reasonable precautions to see that the engines left upon its tracks at night in the yard at Fresno, with water in the boilers and fires burning, were not tampered with or moved; and that the court properly submitted to the jury the question whether or not the employment of only one watchman to perform that duty, it being also required of him to wipe the engines and put them in proper order for service the next day, was a reasonable precaution.

The general rule is that a person who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of his employment, but this rule is subject to many well-known and clearly established qualifications, and, among others, it is well settled that the master should not expose his employes, when conducting and carrying on

his business, to perils or hazards against which they might be guarded by ordinary diligence and reasonable precautions on his part. The master is bound to exercise the care which the exigencies of the business in which he is engaged reasonably requires for the protection of his employes. Hough v. Railway Co., 100 U. S. 213. Applying these principles to the particular facts of this case, we are of opinion that the railroad company would have been negligent to have allowed its engines to remain upon its tracks in the yard at Fresno without taking some precautions to provide against their being put in motion of themselves, or by the act of careless, thoughtless, or evil-disposed persons. Live engines, thus placed, without any person to guard or take charge of them, are liable to be interfered with; and if, from any of the causes before mentioned, they should be started in motion, and run out upon the main track, and continue in motion, they would, in the very nature of things, become engines of great danger, imparting unusual peril and hazard to the lives and limbs of all the employes of the company who might be in charge of other engines and cars upon the main track, in the regular course of their employment, in conducting the business of the railroad company. The liability of preventing this peril rested with the company, and it was for the jury to determine as a question of fact whether the employment of Riley as a watchman, with the additional duties imposed upon him, was a reasonable precaution upon the part of the company. It was conceded that the employment of one watchman would have been sufficient to have properly guarded the engines if they had been grouped together on one track, and no other duty assigned to him; but the contention of the defendant in error is that one man—no matter how competent, trustworthy, and careful—could not properly guard the engines, and at the same time perform the duty of wiping them and putting them in order. Whether the company did employ sufficient means to reasonably care for the safety of its employes was a question of fact correctly left to the jury, under proper instructions as to the law, to decide.

In Patterson on Railway Accident Law (page 39) it is said that, where the plaintiff's injury can be traced to negligence on the part of the railway as its primary and proximate cause, the concurrence of the negligence of a person unconnected with either the railway or the person injured will not relieve the railway from responsibility for the consequence of its negligence. This general doctrine is asserted in many cases. One of the latest illustrations of this doctrine is to be found in the case of Smith v. Railroad Co., 46 N. J. Law, 7, where a railway was held liable for injuries caused by collision resulting from the movement of certain cars which had been negligently left on a siding in such a situation that a wrongdoer could readily throw them on the main line. In Flike v. Railroad Co., 53 N. Y. 549, the question as to the duty of railroad companies to employ sufficient workmen to properly conduct their business, and their liability where accidents occur on account of their negligence in this respect, is dis-

cussed at considerable length. The plaintiff's intestate in that case was a fireman employed upon one of the defendant's freight trains. Another freight train accidentally became detached, and a portion of the cars ran back and collided with the train on which plaintiff's intestate was employed, by means of which collision he was killed. The testimony tended to show that the detached freight train was deficient in brakemen; that there were only two brakemen, when the usual number was three; and that, if the third brakeman had been aboard, he would have been stationed upon the runaway cars, and could have controlled their impetus, and thereby prevented the accident. The court held that the railroad company was negligent in starting the freight train without sufficient help. The company sought to relieve itself from liability by showing that it had employed one Rockafeller as a head conductor, whose duty it was to make up the trains, hire and station the brakemen, and dispatch the trains, and that he had employed a third brakeman to go out upon the train in question, but that this person so employed failed to get aboard the train by reason of his oversleeping; and it was argued for the company that for this reason the accident which occurred must be attributed to his negligence in not boarding the train. In reply to this the court said:

"The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly dispatch, the train in question; and this duty remained to be performed although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockafeller cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a coservant merely, for the reason that all his acts constituted but a single duty."

In Booth v. Railroad Co., 73 N. Y. 38, which arose out of the same accident as the Flike Case, the same principles were applied. The trial court submitted the question to the jury to determine from the evidence whether two brakemen were sufficient on the first train, or whether three brakemen were necessary, for its proper management; and, if they should find that three brakemen were necessary, submitted to them the further question whether the absence of the third brakeman caused the injury, and charged them that, if both of these facts were found for the plaintiff, he was entitled to recover. These instructions were sustained by the appellate court, and it was held to be the duty of a railroad company to see that there are a sufficient number of brakemen aboard a train when it starts upon its trip, and that, if this duty is neglected, and an injury to a servant results therefrom, without contributory negligence on his part, the company is liable, although the immediate negligence in starting the train without sufficient help was that of a coservant. Both of these cases were decided upon the application of the familiar principle of law, which is clearly and distinctly stated by the supreme court of the United States in Hough v. Railway Co., supra, that the master is liable to the servant for an injury

caused by the master's own negligence. It is true that in the cases referred to this principle was applied to trains put in motion by the railroad company; but it seems to us that the general doctrines therein announced are equally applicable to the facts of this case. It is the duty of a railroad company to see that its locomotive engines, after their run, are left in a place of safety. If left where they are liable to be put in motion by the careless, negligent, or willful act of outside parties, it is as much the duty of the railroad company to see that they are properly guarded to prevent accidents from occurring as it is to see that a sufficient number of employes are put on board the trains set in motion by its own orders. The company is bound to take ordinary care to prevent such engines from running out from the side tracks or turntable tracks, where they are left, onto the main track, of their own motion, or from being run out by any interference of outside parties. This duty it owes to its employes on trains regularly upon the main track, in order not to expose them to the extra risks of danger from accidents which might otherwise be liable to happen. The moving of such engines at such a time and in such a manner from the side tracks is not one of the ordinary risks incident to the business in which Lafferty, the brakeman, was engaged.

Mr. Justice Field in delivering the opinion of the court in Railroad Co. v. Herbert, speaking of the duty of railroad companies to have agents to look after their cars, and see that they are in good condition, said:

"If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable." 116 U. S. 652, 6 Sup. Ct. Rep. 590.

We cannot say as a matter of law that leaving live engines on a side track connected with the main track by switches, without any watchman to look after them, or taking any precaution to avoid their being moved by any one, is not negligence; and if it be true, as we think it is, that reasonable precaution must be taken by the railroad company to prevent the happening of such accidents as would be liable to take place from such negligence, it necessarily follows that the court did not err in submitting the question to the jury whether or not ordinary and reasonable care was exercised by the company in the employment of a watchman whose duty it was to also wipe the engines. To quote the language of the supreme court in Jones v. Railroad Co., 128 U. S. 445, 9 Sup. Ct. Rep. 118:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

In Railway Co. v. Ives, 144 U. S. 417, 12 Sup. Ct. Rep. 679, the court said:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reason-

able and prudent, and what shall constitute ordinary care, under any and all circumstances. * * * What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

See authorities there cited. Also Railroad Co. v. Foley, 3 C. C. A. 589, 53 Fed. Rep. 462.

It is next claimed that there was no proof of any pecuniary damage to plaintiff as administratrix of the estate of James Lafferty, deceased. Upon the question of damages the court, at the request of counsel for the railroad company, instructed the jury as follows:

"If you find any liability on the part of the defendant for the accident in question, in assessing plaintiff's damages, should you find she has sustained any, you must limit the amount of your verdict to mere pecuniary loss to plaintiff by reason of his death. This is not an action by a mother for the death of a minor child, but is an action by the administratrix of the estate of a deceased adult. You cannot give any damages whatever because of the sorrow or mental suffering of the mother on account of his death, nor for any suffering of the deceased. If plaintiff was not pecuniarily damaged by reason of his death, she is not entitled to any damages. If she was pecuniarily damaged, she is only entitled to the extent of such actual pecuniary damage, if any has been shown."

This instruction is conceded to be within the principles announced by the supreme court of California in Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. Rep. 603, and is admitted to be correct. The contention of counsel is that under the proofs and the instruction the jury erred in finding any damages. The testimony upon this point shows that the administratrix is the mother of the deceased; that she had no other children, and depended upon him for her support; that this son at the time of his death was 21 years old, in perfect health, and was at the time receiving $75 per month; that he had been working for the railroad company as a brakeman for about 4 months, and during that time he gave to his mother $30 each month out of his wages; that prior to the time of his employment by the railroad company he was employed in different vocations at wages of about $60 per month, and then gave his mother about $25 per month. Upon this evidence it is claimed that it is clearly shown that the plaintiff in the court below, as the administratrix of his estate, was not damaged, because, had the son lived and pursued the same course, "he would have left no estate whatever." This contention furnishes absolute proof of its unsoundness. The testimony shows that the son, out of his wages, had been able to save $30 per month. The fact that he gave this amount to his mother was creditable to him, and shows, as clearly as any proof could, that his life was of a pecuniary value to the mother. The

method of estimating the pecuniary damages in cases of this character is, at best, somewhat problematical, and depends to a great extent upon the sound judgment of the jurors as to what would be just, reasonable, and proper under all the circumstances, taking into consideration the age of the deceased, his condition of health, his employment, and reasonable expectations of life.

The only other questions discussed by counsel relate to the admission of certain testimony to the effect that the fog was so dense on the night of the accident that the watchman could not have heard or seen anybody move the engines out, if they were moved out by anybody; that it had been foggy weather for over two weeks prior to the accident; that the attention of the foreman of the men that ran on that division and worked in the locomotive department had been, about two months prior to the accident, by one of the engineers employed by the company, called to the fact that the yard at Fresno was insufficiently manned. There was no error in admitting this testimony.

The judgment of the circuit court is affirmed, with costs.

RISLEY v. VILLAGE OF HOWELL.

(Circuit Court, E. D. Michigan. July 22, 1893.)

No. 7,846.

1. CONSTITUTIONAL LAW—LEGISLATIVE POWER—MUNICIPAL BONDS.
   The legislature of Michigan has no power to authorize a municipality to submit to its electors a proposition to issue bonds in aid of a railroad. People v. Salem, 20 Mich. 452, and Bay City v. State Treasurer, 23 Mich. 499, followed.
2. RAILROAD COMPANIES—MUNICIPAL AID—"IMPROVEMENT" BONDS—VALIDITY.
   The legislature of Michigan, which had no power to authorize a municipality to issue bonds in aid of a railroad, passed an act authorizing the electors of a village to vote an issue of bonds to make "public improvements" in the village, the money to be expended under the direction of the council "for the purpose aforesaid." The electors having duly voted in favor of the proposition, the council passed an ordinance declaring that a certain railroad was "a public improvement in the village," and directing the issuance and delivery of the bonds to an agent of the railroad company. *Held*, that the action of the council was unlawful, and the bonds were invalid.
3. SAME—INNOCENT PURCHASERS—RECITALS.
   Each bond, as thus issued, was styled on its face "Improvement Bond," but also referred by date to the ordinance in question as one source of authority for its issuance. *Held*, that this reference was notice of the provisions of the ordinance, and of its invalidity, and the bonds were void, even in the hands of innocent purchasers.

At Law. Action by Oliver H. K. Risley against the village of Howell, Mich., on certain bonds and coupons. Judgment for defendants.

Statement by SWAN, District Judge:

This is an action of assumpsit for the recovery of the amount of bonds Nos. 5, 6, 7, 8, of the village of Howell, Mich., and 10 interest coupons, each for $30, belonging to said bonds, and also of 37 interest coupons for $30 each,

formerly attached to other bonds of the same issue. The total amount claimed, with interest to the day of trial, is $5,726.70. These bonds bear date August 12, 1885, and form a part of an issue of 20 bonds of $1,000 each, and were in the following form, viz.:

"No. ——. $1,000.00.

"The United States of America.

[Michigan Coat of Arms.]

"State of Michigan, Village of Howell. Improvement Bond.

"Know all men by these presents that the village of Howell, in the state of Michigan, acknowledges to owe and promises to pay to J. M. Ashley, Jr., or bearer, one thousand dollars, lawful money of the United States of America, on the first day of ——, in the year of our Lord one thousand eight hundred and ——, at the Fourth National Bank in the city of New York, with interest at the rate of six per cent. per annum, payable semiannually on the first days of December and June in each year on the surrender of the annexed coupons as they severally become due. This bond is issued under and by authority of the special act of the state of Michigan entitled 'An act to authorize the village of Howell to raise money to make public improvements in the village of Howell, being No. 248 of the Local Acts of 1885 of the legislature of the state of Michigan,' approved February 25, 1885, and also under the ordinance of the village of Howell passed August 12, 1885.

"In testimony whereof the said village of Howell has caused these presents to be signed by the president and recorder of said village, and to be sealed with the seal of said village, this twelfth day of August, A. D. 1885.

[Seal.] [Sgd.] "Jay Corson, President.

[Sgd.] "Geo. H. Chapel, Recorder."

The act of the legislature referred to in the bonds authorized the common council of the village of Howell "to borrow money on the faith and credit of said village, and issue bonds therefor to an amount not exceeding $20,000, which shall be expended in making public improvements in said village of Howell: provided, that a majority of the electors of said village voting at an election to be called in compliance with the provisions of this act shall vote in favor of such loan in the manner specified in this act and not otherwise." Section 2 of the act provided how the question of raising the said sum by loan should be submitted to the electors of the village, and empowered the common council to order a special election if it should deem it necessary. "Sec. 3. If such loan shall be authorized by a majority of such electors, said bonds may be issued in such sums, not exceeding the amount hereinbefore limited, and payable at such times, with such rates of interest, not exceeding six per centum per annum, as the said common council shall direct, and shall be signed by the president of said village, and countersigned by the recorder of said village, and negotiated by or under the direction of said common council; and the money arising therefrom shall be appropriated in such manner as said common council shall determine for the purpose aforesaid; and the said common council shall have power, and it shall be their duty, to raise by tax upon the taxable property of said village such sum or sums as shall be sufficient to pay the amount of said bonds and the interest thereon as fast as the same shall become due." This act was approved February 25, 1885. Local Acts 1885, p. 16. Pursuant to the authority conferred by section 2, the common council, on March 5, 1885, voted to call a special election to submit to the electors of the village "the question of raising money on the faith and credit of said village to the amount of $20,000, with interest not exceeding six per cent. per annum, to be secured by the bonds of said village, and signed by the president and countersigned by the recorder of said village, payable, principal and interest, at such time or times as the common council may direct, for the purpose of making public improvements in said village of Howell." This was the only question submitted to the electors. The election was ordered to be had March 23, 1885, and 10 days' notice thereof was directed to be given. Such notice was given in the manner required by law and the vote of the common council. Neither the sufficiency of the notice nor the regularity of the registration or election is

questioned. The registration books show that the number of the registered electors of the village was 554. The total vote cast was 433, of which 427 were "for the loan" and 6 "against the loan."

On the 12th day of August, 1885, a special meeting of the common council of the village was held, at which the proceedings were had which constitute the ordinance of August 12, 1885, referred to in the bonds as in part the authority for their issue. That ordinance reads as follows: "Whereas, by virtue of the special act of the legislature of the state of Michigan the village of Howell is authorized to issue bonds in the sum of not more than $20,000, and to bear interest at not more than six per cent., in aid of public improvements in the village of Howell; and whereas, on the 23d day of March, A. D. 1885, the majority of the electors voted in favor of said loan. Now, therefore, resolved, by the common council of the village of Howell, that by virtue of said act and said vote thereon, that the said village borrow and loan the said sum of $20,000.00 at six per cent. per annum, payable semiannually on the first day of June and December of each year until paid, the sum of $20,000 for making public improvements in said village of Howell. And resolved, that the Toledo, Ann Arbor & North Michigan Railroad Company is a public improvement in the village of Howell. And resolved, that the bonds of the village of Howell be issued to the amount of $20,000.00, with interest at six per cent. per annum, payable on the first day of June and December until paid; payable $2,000 on the first day of January, A. D. 1888, $2,000 on the first day of June, A. D. 1889, $2,000 on the first day of December, A. D. 1890, $2,000 on the first day of June, A. D. 1891, $2,000 on the first day of December, A. D. 1892, $2,000 on the first day of June, A. D. 1893, $2,000 on the first day of December, A. D. 1894, $2,000 on the first day of June, A. D. 1895, $2,000 on the first day of December, A. D. 1896, $2,000 on the first day of June, A. D. 1897, in aid of said Toledo, Ann Arbor & North Michigan Railroad Company, payable to James M. Ashley, Jr., agent of said railroad company, or bearer, but not to be delivered to said James M. Ashley, Jr., or the company, except in accordance with the contract this day made between said James M. Ashley, Jr., and said railroad company and the said common council of the village of Howell. And the president of the said village is hereby authorized and directed to sign said bonds, and the recorder of said village is hereby authorized and directed to countersign said bonds, and to sign the coupons attached thereto."

This ordinance was duly signed and filed, and appears of record in the proceedings of the common council. The bonds were signed by the president and countersigned by the recorder of the village, and by the direction of the council were sent by express to the Fourth National Bank of New York, to be filed in escrow until the railroad commissioner of Michigan should certify that the Toledo, Ann Arbor & North Michigan Railroad had been completed to Howell in the manner stipulated between the council and J. M. Ashley, Jr., the representative of the railroad company, and the payee of the bonds. The railroad was completed to Howell, and Ashley performed the contract with the common council which was made the condition of his right to the bonds, and they were delivered on his order. The whole issue was negotiated by him to different persons, through some of whom plaintiff bought for value and before maturity, and without actual notice of any infirmity in them.

Luke S. Montague, for plaintiff.

Edwin F. Conely and Orla B. Taylor, for defendant.

SWAN, District Judge, (after stating the facts.) It is conceded that the entire issue of bonds of which those here in suit are part were delivered to the Fourth National Bank of New York, and by that bank were turned over to J. M. Ashley for the consideration set forth in the ordinance of the common council of the village of Howell recited above. There is no evidence that the plaintiff or his

predecessors in the ownership of the bonds, except Ashley, had any other notice of the purpose and circumstances under which they were issued than that imparted by the reference on their face to the ordinance of August 12, 1885, passed by the common council of the village of Howell. The questions are: (1) Was the issue of the bonds for the purpose for which they were given authorized by law? and, (2) if not so authorized, were the purchasers chargeable with notice of their invalidity by reason of the express mention on the face of the bonds of the ordinance of August 12, 1885?

It is clear that under the laws of Michigan the legislature could not lawfully authorize the submission to the electors of a municipality of a proposition to issue its bonds in aid of a railroad. People v. Salem, 20 Mich. 452; Bay City v. State Treasurer, 23 Mich. 499. It is equally clear that the act of February 25, 1885, did not sanction the submission of that question, nor was the question submitted, to the vote of the electors. The common council, by the ordinance in question, formally enacted that the issue of bonds voted for "public improvements in said village of Howell" should be issued for and devoted to the benefit of the Toledo, Ann Arbor & Northern Michigan Railroad Company. This action was manifestly and undeniably unlawful. The common council not only exceeded its authority, but acted without authority. That body could not by its fiat make that a "public improvement" for which the legislature itself could not authorize the municipality to expend money or create indebtedness.

Each of the securities on its face is styled "Improvement Bond." Had there been nothing on these instruments to challenge the attention of a purchaser to the ordinance, and had they omitted all reference thereto, and had these recitals made mention only of the statute of February 25, 1885, as the authority for their issue, the effect of that recital on the liability of the village would be presented. The express reference to the ordinance of August 12, 1885, as one of the sources of authority for the issue of the bonds confines the inquiry, on this feature of the case, to the effect of that reference upon the rights of the purchasers of the bonds. Unfortunately for the plaintiff, this question is concluded by controlling authority. "Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance." Barnett v. Denison, 145 U. S. 135, 12 Sup. Ct. Rep. 819. See, also, Post v. Pulaski Co., 1 C. C. A. 405, 49 Fed. Rep. 628. The purpose specified in the ordinance being unlawful, the bonds in suit were not authorized obligations of the village of Howell. Their invalidity was notified to the purchaser by the ordinance, of which he was bound to take notice.

For these reasons judgment must be entered for the defendant, with costs.

PAULY v. WILSON.

(Circuit Court, S. D. California. August 21, 1893.)

No. 356.

NEGOTIABLE INSTRUMENTS—ACTION ON NOTE—PAYMENT—CONVERSION OF COLLATERAL SECURITY.

In an action by a bank on a promissory note, it appeared that defendant delivered as security the promissory note of S., to which was annexed, as collateral security, a certificate of corporate stock in the name of S.; that defendant, with the consent of S., agreed that the bank might sell the stock, and take in place of the note of S. the note of the purchaser, secured by the same stock reissued in the name of the purchaser; and that the bank sold the stock, and took in payment notes secured by the stock, payable to itself, with which notes defendant had no connection, and over which he had no control. *Held* that, as the bank had converted the stock to its own use, defendant's note must be credited with the value of the stock at the time of conversion.

At Law. Action by Frederick N. Pauly, as receiver of the California National Bank of San Diego, against Warren Wilson, on a promissory note. Judgment for defendant.

M. T. Allen, for plaintiff.

Conklin & Hughes, for defendant.

ROSS, District Judge. This is a suit upon a certain promissory note for $9,306.50, with interest, executed by the defendant on the 13th of June, 1891, payable three months after date to the California National Bank of San Diego, of which the plaintiff is, and was at the time of the commencement of the action, the duly appointed, qualified, and acting receiver. This note was a renewal of a similar note from the defendant to the bank. At the time of the execution of the original note given by the defendant for the money loaned to him, there was delivered by defendant to the bank, as collateral security for the repayment of the money, with interest, a certain promissory note of one Smith, to which was annexed, as collateral security for its payment, a certificate in Smith's name for 220 shares of the stock of a California corporation called the San Diego Sun Company, which collateral continued as security for the note sued on. It is not claimed that the defendant has ever repaid the money, or any part of it, for which the note sued on was executed, nor is it pretended that the bank or the receiver has ever in fact received any part of the principal thereof, or of the interest thereon; but it is contended on the part of the defendant that certain transactions were had with respect to the collateral security which amounted, in law, to a conversion on the part of the bank of the 220 shares of the stock of the San Diego Sun Company, claimed to have been at the time worth $40 a share, and to this extent it is said the note of the defendant should be credited.

The facts in respect to the note of Smith, and the annexed certificate in his name for 220 shares of the stock of the Sun Com-

pany, appear to be these: For some reason not appearing, it was desired by the president of the bank, who was a man named Collins, and by the president of the Sun Company, who was W. E. Simpson, to get Smith out of that company, and with defendant's consent, as also with that of Smith, Simpson was deputed to find a purchaser or purchasers for the 220 shares of stock owned by Smith, and then held, together with Smith's note, by the bank, as collateral security for the payment of defendant's note for $9,306.50 with interest. Accordingly, Simpson sold 45 of those shares, together with 5 other shares, to L. A. Wright, taking in payment therefor Wright's note for $2,000, payable three months after date to the California National Bank of San Diego, and to A. H. Isham he sold 175 of the shares, taking in payment therefor Isham's promissory note for $7,000, payable three months after date to himself. The certificate for the 220 shares of stock owned by Smith was thereupon surrendered, and in lieu thereof a certificate for 175 shares was issued to A. H. Isham, and a certificate for 45 shares was issued to L. A. Wright. The certificate to Isham was indorsed by him, and annexed to his $7,000 note made payable to Simpson as collateral security for its payment, and the certificate for the 45 shares issued to Wright, together with a certificate for the additional 5 shares sold to him, were indorsed by Wright, and annexed to his note for $2,000 made payable to the California National Bank of San Diego as collateral security for its payment. The $7,000 note made payable to Simpson was by him indorsed in blank, and both notes, together with the annexed certificates of stock, were by him delivered to the bank in lieu of the Smith note and the Smith certificate for 220 shares. The note of Smith was thereupon surrendered by the bank to the defendant, Wilson, and by him to Smith, its maker.

Previous to the sale of the 175 shares of the stock to Isham, there had been executed in writing by Isham and Simpson the following instrument, marked "A:"

"I, A. H. Isham, of San Diego, California, hereby agree, upon demand, to indorse for W. E. Simpson to the amount of $7,000: provided, that for such indorsement I shall receive from said W. E. Simpson $7,000 worth of the San Diego Sun Publishing Company stock at par, which is $40 00/100 per share, free of all incumbrance, and that I shall be entitled to my proportion of the book debts owing to said San Diego Sun Publishing Company, as appear on the books upon the date of my acceptance of said note for $7,000, and, further, that said W. E. Simpson agrees and hereby binds himself not to at any time dispose of any of the stock now held by him in said San Diego Sun Publishing Company without first offering the same to me, and with a reasonable time—say two week—to arrange for the purchase of same, at the same price as others are willing to pay for said stock. That the said W. E. Simpson is now the owner of 260 shares of said San Diego Sun Publishing Company stock, and the said W. E. Simpson furthermore agrees that he will not dispose of said stock except the purchaser or purchasers will also agree to buy the $7,000 worth of stock as herein mentioned, to be assigned to me (A. H. Isham) at the same price, terms, and conditions upon which said W. E. Simpson agrees to sell. The San Diego Sun Publishing Company is a corporation existing under the laws of the state of California, with a capital stock of $50,000, and the amount paid up is $20,000. The stock referred to above is the paid-up stock. This agreement also includes that

I (A. H. Isham) shall be entitled to my proportion of receipts over and above expenses from the job office now in operation in connection with said San Diego Sun Publishing Company, in proportion as 7 is to 20. The notes indorsed to be payable at not more than $1,000 of principal per annum, with interest.

[Signed] "A. H. Isham.
[Signed] "W. E. Simpson."

At the time of the sale of the 175 shares of the stock to Isham, and as a part of that transaction, there was executed in writing, by Simpson and Isham, the following instrument:

"Received of A. H. Isham this day his note for seven thousand dollars in fulfillment upon his part of contract marked 'A,' in consideration of which I agree to at once deliver to him 175 shares of stock in the San Diego Sun Co., paid-up stock, (at forty dollars per share,) the said note to be renewed quarterly, and one thousand dollars paid annually on the same until fully liquidated; and I furthermore guaranty, in consideration of his purchase of said stock, that, in addition to the contract between us marked 'A,' that no contract or agreement in reference to the disposition or otherwise of the stock now held by the parties named in contract A shall be entered upon without the full knowledge and consent of both. This condition also refers to any intention to increase the capital of said San Diego Sun Co. Further, that said A. H. Isham allows the full amount of stock issued in his name to remain as collateral until it is fully released by payment of this obligation; that is to say, as each payment in gold coin is made of the principal, that a corresponding amount of stock shall be released. W. E. Simpson further agrees that no greater charge than $25 00/100 per week shall be made for his service, unless with the consent of A. H. Isham, and that no one will be employed in the Sun office at a greater salary than $30 00/100 (thirty) per week. That the stock purchased by A. H. Isham is that once owned by Warren Wilson, and in no way lessens the holding of the majority of stock now held by W. E. Simpson.

[Signed] "W. E. Simpson.
"Accepted: A. H. Isham."

Defendant agreed with the bank that Simpson should sell the Smith stock, and take the note of the purchaser or purchasers for the purchase price, payable three months after date, secured by a pledge of the stock. Smith also consented that his stock, held as it was as collateral security for the payment of his note to defendant, should be sold, and when sold he received the surrender of his note in consideration of the sale of his stock. But defendant's agreement with the bank was that the note or notes to be taken for the Smith stock were to take the place of the Smith note owned by him, and pledged to the bank as collateral security for the payment of his own note, and were to be secured by the same stock reissued in the name of the purchaser or purchasers. Such note or notes, so secured, would have been his property, although held by the bank as collateral security for the payment of defendant's note, and subject to his disposition upon the discharge of the obligation for which they were held as security. But the bank did not dispose of the Smith stock in accordance with that agreement, or upon that basis. It sold it for two promissory notes, one of which was made payable directly to itself, and the other made payable to Simpson, and by him indorsed in blank to the bank, and each of which was secured by the Smith stock re-

issued in the name of the purchaser and maker of the notes, respectively. It thus assumed absolute dominion and control over the stock, and disposed of it without the consent and contrary to the agreement of the defendant. It thereby converted it to its own use.

In the transaction with Isham and Wright, the purchasers of the stock, defendant was not known. Indeed, it is quite evident that in the transaction between Simpson and Isham the bank was not known, for Isham's note for the purchase price of the 175 shares was made to Simpson, who, in the contemporaneous written agreement, recited that the transaction was in fulfillment of the previous written agreement between him and Isham, and who further agreed that, although the note was upon its face made payable three months after date, that but $1,000 of the $7,000 for which it was executed should be paid annually, and that the note should be renewed quarterly. The testimony of Simpson is that the president of the bank knew of that contemporaneous agreement, and ratified it. It is not necessary to decide whether the bank would be bound by such action of its president, assuming such knowledge. Defendant did not know of it, and consequently never consented to it. The bank, having treated the stock as its own, —having sold it, taking in payment therefor notes secured by the stock, payable to itself, with which defendant had no connection, and over which he had no control,—must be held to have converted it to its own use, and defendant's note must be credited with its value at that time, which I find from the evidence to have been $40 a share. There will be findings and judgment in accordance with these views.

WHILTON v. RICHMOND & D. R. CO.

(Circuit Court, D. South Carolina. September 19, 1893.)

1. RAILROAD COMPANIES — ACCIDENTS AT CROSSING — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.
   In an action for injuries received at a railroad crossing, plaintiff offered testimony that he stopped and listened; and defendant, that the whistle was blown and the bell rung; and the court instructed the jury to decide the issue of fact from the testimony. *Held*, that the failure of the court to charge that contributory negligence of plaintiff is a matter of defense, which defendant must show by a preponderance of evidence, was not reversible error.

2. SAME—CONSTRUCTION OF STATUTE.
   Gen. St. S. C. § 1529, relating to cases of personal injury by collision with an engine or cars at a railroad crossing, is in derogation of the common law, and, being strictly construed, does not apply where horses are frightened by a train at a crossing, and the person injured is thrown from the vehicle, but not so as to come in collision with the train.

3. JURY—PROVINCE—CONFLICTING TESTIMONY.
   Where the testimony is conflicting, the determination of the fact is exclusively within the province of the jury.

At Law. Action by Ebenezer J. Whilton against the Richmond & Danville Railroad Company for damages for injuries received at a railroad crossing. Verdict for defendant. Plaintiff moves for a new trial. Denied.

John R. Bellinger, for the motion.
Cothran, Wells, Ansell & Cothran, opposed.

SIMONTON, District Judge. This issue having been submitted to a jury, and their verdict being for the defendant, the plaintiff now submits his motion for a new trial. The case, as it went to the jury, was substantially as follows:

The plaintiff, a stonecutter by trade, and at the time employed in the building of the waterworks on Paris mountain, was in Greenville, with a companion, another stonecutter, on the night of the accident sued on. They remained in Greenville until after midnight, and then left for Paris mountain in a four-seat wagon, drawn by a horse and a mule, they and the driver being the only occupants of the vehicle. There is some discrepancy in the testimony as to the character of the night. It was most probably an ordinary, clear, starlight night. On their way it became necessary to cross the railroad of the defendant at the Paris mountain crossing. Just before the railroad track crosses this public road, there is a considerable curve, almost up to the crossing. The plaintiff, his companion, and the driver concur in saying that before crossing the track they stopped and listened, and heard nothing of an approaching train. They vary a little as to the length of time of their stop. Hearing nothing, they went on, and just as they were crossing the railroad track they suddenly saw approaching, at speed, a locomotive and train. The team became alarmed, and dashed across. The plaintiff was thrown from the wagon a few feet from the track. He says that he lost consciousness in the fall; that the wagon proceeded some distance, and then returned to him, when his companion got out of the wagon and helped him in. This companion says that the team took fright, and dashed off to some distance; that he aided in turning them, went back with the wagon to where plaintiff was lying on the ground, lifted him up, and put him in the wagon. The driver, a young white man, quite intelligent, says that as the train dashed by the team started, and went a very little way off the road; that he kept control of them, and backed them into the road; that then he saw plaintiff walking up, evidently lame; and that on reaching the wagon he was assisted by his companion, who extended his hand to him without leaving his seat. The plaintiff was carried to his lodging on the mountain, and remained all of the next day in bed, Sunday. On Monday he went to work, but did not remain all day. On Thursday he left Greenville, and went to Georgia, on another job. The plaintiff says that when he fell the wheel of the wagon passed over his legs, his chest, and across the lower

part of his body at the hips, and that, by this last, hernia was produced. He has worked at his trade since the accident, but he says that his capacity for work has been much diminished. He has to wear a truss. The medical examination of this man was made long after his accident, and it came out in the examination that he has married a wife since it occurred. The crew of the train which caused the accident testified that before approaching the crossing the whistle was blown, and that the bell was rung until the crossing was reached. This is the testimony bearing on the accident itself. The jury, during the trial, inspected the locus in quo, and, while so engaged, a train of cars passed them at the crossing. No exceptions were noted during the trial. No written request to charge was submitted, and no exceptions made to the charge. The following is the substance of what was said to the jury. In delivering it, the court simply amplified points in it, and repeated such parts as was deemed necessary.

"This case turns entirely upon the question, were the railroad people negligent, and was there no negligence whatever on the part of the plaintiff? for, even if you should come to the conclusion that the railroad people were negligent, still, if the plaintiff could have avoided the accident by the exercise of proper care, and negligently did not exercise it, he cannot recover anything. Then you examine into the testimony, and inquire, first, were the railroad people negligent? The law requires them, when approaching a public crossing like this,—the Paris mountain crossing,—to blow the whistle and ring the bell from a point 500 yards off until the crossing is reached. If this was not done, they were negligent. Did they do this, or not? This you determine from the testimony. If you come to the conclusion that they did not ring the bell and blow the whistle, then you must decide from the testimony whether the plaintiff was also negligent. Could he, by the exercise of due care,—that is, the care a prudent man would exercise,— could he have heard the coming train, and so avoided it? If he could have heard the train coming, and so could have avoided it, he cannot recover. If you conclude that the railroad people were negligent, and that the plaintiff was not negligent, then you inquire, was the plaintiff injured thereby? Was he thrown from the wagon by the fright of the team, or did he fall from any other cause? If he was thrown from the wagon by the sudden start of the team from fright caused by the train, then to what extent was he hurt by this. This you decide from the whole testimony. [Repeat some of this.] If you conclude that the whole fault was on the part of the railroad people, no fault on part of plaintiff, and that the plaintiff was hurt thereby, you must compensate the plaintiff, not by punishing the defendant, but by giving him such a sum of money as will compensate him. He evidently has not been entirely disabled from work in his special calling. So, in fixing your damages, you must confine yourselves to compensating him for such impairment of his ability as the accident caused."

The motion for a new trial is based on five points, four of them law points.

The first ground is the failure of the court to charge the jury that contributory negligence is a matter of defense, and that plaintiff is not called upon to show the absence of contributory negligence, but it was incumbent upon the defendant to show by a preponderance of evidence that such negligence did exist, in order to make it available. A jury trial is a practical thing. There is no room for abstract principles of law. The plaintiff

offered testimony tending to show that he and his companions stopped and listened, and so were not guilty of contributory negligence. To this defendant offered testimony to show that the whistle was blown and the bell rung. The jury was instructed to decide this issue of fact from the testimony.

The next ground is that during the examination of Surratt, a witness for the defendant, the judge warned the plaintiff's attorney to be careful, and that the defendant's attorney subsequently, when the case went to the jury, propounded a theory that the whole case was a conspiracy against the defendant, in which Surratt had a part, and that this tended to create the impression in the minds of the jury that such a conspiracy really existed, and that but for the warning of the judge the plaintiff's attorney, continuing the examination, would have developed this fact. This exception is evolved from the constitutional modesty of the plaintiff's attorney. Not even the most simple of laymen who witnessed his management of his case, and his full possession of it, would believe for a moment that he would inadvertently bring out such damaging testimony. Surratt was called by the defendant, but was openly hostile to that side. The defendant's attorney had exhausted ability and ingenuity in endeavoring to get out of him evidence that plaintiff had tempted him, with money, to testify. His questions were put in every conceivable form, and every effort to get out admissions to that effect had been met and excluded. The warning by the judge, given during cross-examination, was that possibly these objections might have been cured. The suggestion made by the defendant's counsel that there was a conspiracy was pure theory, in no sense a condition supported by fact.

The next ground is that the preponderance of the evidence was in favor of the plaintiff. No doubt the counsel thinks so. The court may think so. But the question is one neither for the court nor the counsel. It is exclusively within the province of the jury, and they thought otherwise. In trial by jury, at common law, where there is a conflict in the evidence on a vital issue, and the jury decide this conflict, the decision is final, unless it can be made to appear that the jury were corrupt or partisan. Of this there is not a shadow of proof here. It is to be regretted that the phrase "preponderance of evidence" is so much used. It is metaphysical, and always confuses a jury. In its last analysis the verdict of a jury depends upon what witnesses they believe. You may pile up testimony, Pelion upon Ossa, on one side, and produce but a single vital fact on the other, and the verdict of the jury is fixed. They do not go balancing testimony, setting up this witness against that, discussing their age, the color of their eyes, the length of their noses, or the trim of their beards. They simply believe one man; they do not believe a multitude of others who contradict him.

The fourth ground is based on a statement of fact as to what occurred during the argument. The fact is denied by the defend-

ant's attorney. The attention of the court was not attracted to it, and he cannot decide it.

The last ground has received most careful consideration. It is this:

"That the court should have charged the jury that if they found that the proper signals were not given by the agents of the defendant, and that such neglect contributed to the injury, the defendant would be liable for all damages caused thereby, unless the plaintiff was guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence, or such unlawful act, contributed to the injury."

This is the language of section 1529 of the General Statutes of South Carolina, and it is apparently intended to change, in so far as railroads are concerned, the law of contributory negligence. We will assume, simply for this case, that this peculiar provision of law of South Carolina controls this court. It is not easy to construe this section. It is almost if not quite impossible to define shades of negligence. The surrounding circumstances determine this. What would be in some places, and under some circumstances, slight negligence, in other places, and under other circumstances, would be negligence amounting to recklessness. See Bridger v. Railroad Co., 25 S. C. 30. Then, what is meant by "willful negligence?" Is it a synonym of "gross," or is it more intense in meaning, involving suicidal intent? See Petrie v. Railroad Co., 29 S. C. 315, 7 S. E. Rep. 515. Whatever may be the definition, is it too much to say that a man in a vehicle drawn by animals, who about midnight approaches a railroad crossing known to him to be at the end of a sharp curve, and neither stops or listens for the mail train due about that time at that point, or does not hear its bell or whistle, or, hearing it, still goes on,—such a man, under such circumstances, would be guilty of gross, willful, suicidal negligence? But the judge made no allusion to this section whatever. If nothing whatever had been said in the charge on this point, the omission of the judge to charge upon it would not now induce him to grant a new trial. If he omitted it, and counsel did not call it to his attention, either by a request to charge on it, or by an exception, it is too late now to correct it. The court sits to correct its own errors, not those of the counsel. But the charge does instruct the jury as to contributory negligence, and does not allude in any way to the statute. Was this error? Did this section apply to the fact proved on the trial? At common law the doctrine of contributory negligence is as stated in the charge. One cannot recover for an act of negligence to which he has contributed. The construction put on this section—and for the purpose of this case we assume it to be correct—changes this general law. It is thus in derogation of the common law, and must be construed strictly. Indeed, it is in the nature of a penal statute to enforce a statutory obligation. We cannot, therefore, bring cases within the equity of the statute. The section, by its terms, applies only to cases in which a person is injured in his person or property by

collision with the engine or cars of a railroad corporation at a crossing. Kaminitsky v. Railroad Co., 25 S. C. 53, does not enlarge the language of this section. That case only holds that, when one is injured in his person by collision with a train at a public crossing, it makes no difference whether he placed his person in the path of the collision, or whether he was thrown from a vehicle under the train, by reason of the fright occasioned by the train in the animals drawing the vehicle. This section has no place in this case. The motion for a new trial is overruled.

HERCULES IRON WORKS v. DODSWORTH et al.

(Circuit Court, S. D. Ohio, W. D. October 2, 1893.)

No. 4,481.

1. SALE—WARRANTY—ACCEPTANCE.
An ice machine was furnished under a written contract specifying the various parts, and a guaranty to produce 25 tons of ice daily. The buyer operated the same from the 1st of June until September, when he notified the seller that it did not fulfill the contract, and was not accepted, and requested its removal. The seller declined the request, claiming that the machine was a full compliance with the contract, and had been accepted in July. Afterwards the purchaser continued to use the machine through the fall and during the entire ice season of the two following years. *Held*, that this conduct was an acceptance of the machine, and the seller could sue on the contract; the buyer's only remedy being to recoup from the stipulated price—First, any sums required to cure defects in the parts specified in the contract; and, second, the difference in value between a machine of the actual capacity of the one in controversy and a 25-ton machine.

2. EVIDENCE—WEIGHT AND SUFFICIENCY—EXPERT TESTIMONY.
The court will not set aside a verdict based upon conflicting evidence of experts as to the capacity of a machine, especially when the evidence of the defeated party's experts was weakened by manifest exaggerations and inconsistencies.

At Law. Action by the Hercules Iron Works against Caleb Dodsworth and others to recover the contract price of an ice machine. There was a verdict for plaintiff, and defendants now move for a new trial. Motion overruled.

R. S. Fulton and Harmon, Colston, Goldsmith & Hoadly, for plaintiff.

Frank O. Suire, Drausin Wulsin, and Wm. Worthington, for defendants.

TAFT, Circuit Judge. A verdict was rendered by a jury duly impaneled in favor of the plaintiff, the Hercules Iron Works, for the purchase price of an ice machine furnished by plaintiff to defendants under a written contract and guaranty, less certain credits which, plaintiff conceded, should be allowed on the claim. The contract described the machine to be furnished by specifications of its various parts, and contained the warranty "that the machine shall be capable of producing 25 tons of good, crystal, merchantable

ice each twenty-four hours of continuous operation, provided it is kept in good order and properly handled, and the temperature of the condensing water is not above 60 degrees Fahrenheit." The answer set up that the machine furnished had not been a compliance with the contract; that the machine furnished was not the article purchased; and that plaintiff had been notified that the machine was not accepted, and must be removed. It appeared beyond controversy that the machine was ready for operation about June 1, 1890; that it was operated during the summer and fall of that year; that the ice made was sold by and for the benefit of the defendants; that in September defendants sent word to plaintiff that the machine furnished did not fulfill the contract in any respect, and was not accepted, and requested its removal; that plaintiff declined to remove the same, claiming that there had been a full compliance with the contract on its part, and that the machine had been accepted by defendants in the July previous; that, after this correspondence, defendants continued to make ice with the machine during the remainder of September and October, 1890, and during the entire ice seasons of 1891 and 1892, and to sell the ice thus made for their own benefit. It was contended on the part of defendants that, if the machine failed in any material respect to fulfill the description of it in the contract, then this action, which was on the contract, must be defeated. In view of the evidence, the court declined to submit this issue to the jury. It appeared that the machine, described by parts in the contract, had been supplied in substantial compliance with the contract. Some of these parts were claimed to be defective, but none of the defects, if they existed, were of a character which could not be remedied by repairs at a cost very small in comparison with the cost of the machine.

It also was strongly contended that the machine would not make 25 tons of ice a day, and that failure in this was a failure in identity of the article furnished with that agreed to be furnished, so that recovery could only be had on a quantum valebat after defendants had declined to accept the machine under the contract, even if they subsequently kept and used the machine as their own. The court refused to take this view of the case, but charged the jury that the course of the defendants was an acceptance of the machine under the contract, which made the defendants liable for the contract price, but that they might recoup from that price damages of two kinds: First, the equivalent of the sum required to cure defects in the machine, as described by parts in the contract; and, second, the differences between the value of the machine producing the amount of ice per day it could produce and its value if it had been a 25-ton machine. It will not be necessary to review the correctness of this view of the law, for it was fully argued at the trial, and the conclusion reached only after full consideration. Counsel for defendants suggest that they were misled by some observations of the court early in the trial as to the rule of law on the general subject into thinking that the court

would submit to the jury the issue as to the identity of the machine furnished with that described in the contract, and that, relying on the merits of this issue, they did not adduce evidence of the difference in value between the machine furnished and that contracted to be furnished. The remarks referred to, in my opinion, cannot be reasonably construed to indicate any such intention on the part of the court. The issues to be submitted could only be determined after the evidence had all been put in. The admitted facts at the close of the evidence showed that the defendants had actually accepted and used the ice machine which the plaintiff had furnished in attempted compliance with the contract. The machine furnished corresponded substantially in respect to size, form, measurements, material, and otherwise with that described in the contract. It would have been entirely proper for defendants to have introduced evidence of the value of the machine furnished, and of that to be furnished, whatever their contention as to a complete defense to the contract. They could not foresee with certainty what view the jury might take of the issue upon which their main contention was rested, even if the court had submitted it to the jury. If they were content to risk the decision of the jury on this issue, they risked also the action of the court in respect to the sufficiency of the evidence to raise the issue.

The main argument in support of the motion for a new trial is based on the claim that the verdict is against the weight of the evidence. The verdict was for the full amount claimed. The jury could not have returned the verdict without finding that the ice machine furnished would make 25 tons of ice in a day, in continuous operation, when properly handled. This finding, counsel for defendants claim, is so clearly against the weight of the evidence as to require the court to set it aside. The machine in question was a "compression" machine; that is, the ammonia gas was reduced to a liquid by pressure effected in a "compressor," and the cold was produced in this process of reduction. The liquid ammonia was forced through coils of one-inch iron pipe, placed in rows in a large tank of brine, and reduced the brine to a temperature varying from 10° to 17° Fahrenheit. In the tank of brine, or freezing tank, and between the coils of pipe, (which were 23 in number, 6 pipes high, and ran the width of the tank, 41½ feet,) were 440 galvanized iron cans, 11 inches wide, 22 inches long, and 36 inches deep, in which was placed the water to be made into ice. The heat of the water was extracted by the low temperature of the brine, and after a certain number of hours the water was frozen into a solid and clear cake, weighing on the average 250 pounds. It is said by counsel for defendants to be established by the great weight of the evidence that the amount of pipe provided in the contract, and furnished under it, was not enough to make 25 tons of ice a day. The only evidence to support this contention is that of one Rinman, the superintendent of the Blymyer Ice Machine Company, which makes a machine operating on a different principle from that of the plaintiff. Instead of re-

ducing the ammonia gas to a liquid by pressure, this change is brought about by absorption, and water is an agent in the process. The witness had had some little experience 10 or 12 years ago with compression machines. He said that, to produce a ton of ice a day, from 315 to 330 lineal feet of 1-inch iron pipes were required for circulating the ammonia through the brine. This would require from 7,875 to 8,250 feet of pipe. In the machine furnished there were but 5,727 feet of pipe in the freezing tank. If Rinman's statement be true, then the machine as furnished could not furnish more that 5727-7875 of 25 tons a day; that is, not more than 18.18 tons. As the capacity of the machine by actual use by defendants, at various times, for several days of continuous operation, averaged 22 tons a day, the evidence of Rinman is shown to be unreliable to the extent of at least 3 tons a day. Counsel for defendants, when this was pointed out by opposing counsel, frankly admitted that Rinman had put his requirement of pipes too high. If he has made an error at all in the matter, it is difficult to see how his statement can be qualified or reconciled with facts, and then have any weight to overcome the evidence of the experts engaged in making plaintiff's machine, who say that the amount of pipe furnished was ample for the production of 25 tons. At least, it is obvious that, upon this part of defendants' contention, the answer of the jury against defendants is sufficient.

But it is said that the number of cans, and therefore the size of the freezing tank, was not sufficient to produce 25 tons of ice in 24 hours. The argument is this: It is said to be established by Rinman and Zoast, and also by McDonald, that it takes 60 hours to freeze a can of water 11x22x36 into a solid cake of ice. Now, to make 25 tons of ice a day, the machine would have to freeze solid 200 cans of 250 pounds each, or $8\frac{1}{3}$ cans an hour. To pull $8\frac{1}{3}$ cans an hour when it requires 60 hours to freeze a can, there would have to be $8\frac{1}{3}$x60 or 500 cans in the different stages of freezing, instead of the 440 cans actually supplied. The capacity of a freezing tank of 440 cans of a size 11x22x36, on this theory, would be $\frac{440}{60}=7\frac{1}{3}$ cans an hour, or $24x7\frac{1}{3}=176$ cans of 250 pounds each,—that is 44,000 pounds, or 22 tons. This is a mathematical demonstration that the machine was not up to the guaranty if the premise of the argument is established that it takes 60 hours to freeze a can of water 11x22x36 inches in dimension. This is shown, it is said, by Rinman, Zoast, and McDonald. Rinman says that, to freeze such a can of water with brine at more than $12\frac{1}{2}°$ Fahrenheit, he would require at least 68 hours. The temperature of the brine in this machine was generally more than $12\frac{1}{2}°$, and was intended to be. Rinman says that, at less than $12\frac{1}{2}°$ brine temperature, he would require 63 hours. Zoast says that at the Cincinnati Cold Storage Company, when he operated as engineer a compression ice machine, known as the "Arctic," it took 60 hours to freeze cans of ice containing 300 pounds of water, and of dimensions $10\frac{1}{2}$x22x38, with a brine temperature of from 16° to 18°. McDonald

did not say that it would require 60 hours to freeze a can of water in plaintiff's machine. What he said was that in beginning the operation of the machine with the water, brine and ammonia, all in the normal state, it would take from 60 to 75 hours to freeze a can solid. With reference to the time required for freezing cans in continuous operation with other cans partly frozen and brine temperature 17° or lower, he said that the different system or machines varied from 48 to 60 hours in their freezing period. The necessary effect of McDonald's evidence, and that of Knox, another expert of plaintiff, was that 52 or 53 hours was enough to freeze a can solid in plaintiff's machine. Now, it is said that the time of freezing with the brine at a constant temperature must be the same in every machine, because the difference in the machines is only in the method of reducing the temperature of the brine, and cannot be in the action of the brine thus reduced in temperature upon the water; for that process is wholly natural, and can only vary with the size and shape of the can and the temperature of the brine. Concede that this is true; I do not think that the weight of evidence is clearly in favor of 60 hours as a freezing period. Rinman's evidence upon this point is weakened exactly as it was upon the question of the necessary amount of pipe. It is conceded that plaintiff's machine could make 22 tons a day with 440 cans, at a brine temperature of more than 12½°. Rinman's 68 hours' freezing period, for 22 tons' daily production, would require 499 cans of the size used by plaintiff, and, even if his figures are put at 63 hours for the freezing period, the machine should have 462 cans to produce 22 tons of ice. Rinman is clearly wrong in stating that it would take 68 hours to freeze plaintiff's cans. Why should his estimate be reduced to 60 when he did not do it himself?

Then take Zoast's figures. He differs widely from Rinman. His temperature he puts at from 16° to 18°. His size of can contains 300 pounds of water; i. e. one-sixth larger than plaintiff's can. Confessedly, the size of the can, if thicker or broader, materially affects the freezing period. The dimensions of his can as he gave them were 10½x22x38. If the water in them weighed 300 pounds, he has made an error in his size dimensions, because plaintiff's cans are 11x22x36, and the water they contain weighs 250 pounds. If the thickness dimension of the Arctic were 13 inches, instead of 11, the difference in weight would be about 50 pounds, and the reason for a longer freezing period than in plaintiff's machine might be explained. However this may be, Zoast has made an error somewhere. He differs radically from Rinman in his freezing period. Such evidence does not so clearly establish a necessary freezing period longer than 52 or 53 hours as to require the court to say that the jury, in disregarding it, and in crediting the witnesses for plaintiff, violated its duty.

Finally, there was a test made by plaintiff's engineer, Knox. It is said that neither in this test nor in the subsequent operation of the machine was it able to produce 25 tons of ice a day in contin-

uous operation. It appears that Knox ran the machine for a period of 59 hours upon the 21st, 22d, and 23d of July, 1890, and produced 25 tons for one 24 hours, and 28 tons for the second 24. But it is said that this was not a proper proof of the capacity of the machine in continuous operation, because for 12 hours before beginning it he allowed the freezing tank to continue at a temperature of from 16° to 10°, and during that time drew no cans of ice at all, and also because, when he finished his test, the temperature of the brine had risen from 10°, at the beginning, to 17°, indicating that a continuance of the operation would have increased the temperature of the brine beyond 17°, and prevented the constant production of ice. Both criticisms are just, but, as opposed to them, it may be properly urged that the required capacity was exceeded. The further operation of the machine by defendants' men developed at times a capacity of 23½ tons, and on one occasion of more than 25 tons. Sometimes the daily yield is explained by a storing of low temperature through a failure to draw cans the day before, and in other instances it is not.

Plaintiff contended that the failure to constantly produce 25 tons a day was due to careless and improper handling of the machine, to imperfect insulation of the freezing tank, and to bad oil used in lubricating the joints, etc. It was claimed on plaintiff's behalf that the insulation had been rendered imperfect by a failure of defendants to construct a foundation in accordance with the plans and specifications furnished by plaintiff under the contract, and evidence was adduced tending to show this. It was claimed that defendants did not buy the oil which plaintiff's engineers directed them to use. Whether these causes existed, and whether they fully accounted for the failure of the machine to do its guarantied work, were questions for the jury to decide. Many circumstances tended to show to the jury that much of the trouble in the construction and operation of the machine was due to the interference of Caleb Dodsworth, the managing defendant, in the operation of the machine, and his stubborn views of how the machine should be constructed, operated, based on little, if any, experience in making ice. Counsel for plaintiff dwelt upon this in addressing the jury, and complaint is made that this misled the jury. I think that this was a legitimate argument, founded on a great deal of the evidence, and that it is probably the best explanation of the failure of the machine to do the work promised. Not only do I not think that the verdict is against the weight of the evidence, but I am not prepared to say that I would not have reached the same conclusion as the jury.

The motion is overruled, and judgment may be entered on the verdict.

KAHNWEILER et al. v. PHOENIX INS. CO. OF BROOKLYN.

(Circuit Court, D. Kansas, First Division. September 4, 1893.)

1. INSURANCE—PROOF OF LOSS.
Failure to furnish proof of loss within 30 days after a fire, in accordance with the provision of an insurance policy providing that persons sustaining loss or damage by fire shall forthwith give notice of such loss, and within 30 days thereafter render a particular and specific account thereof, does not work a forfeiture of the policy, but merely delays the date when the loss will become payable.

2. SAME—ARBITRATION—PREMATURE ACTION ON POLICY.
The policy also provided that, in case of disagreement as to the amount of loss, arbitration should be had, and that no action should be brought by the assured upon the policy until after an award fixing the amount of the claim, and further provided that such an award should be a condition precedent to an action. *Held*, that such provision was legal and enforceable, and the bringing of an action on the policy before arbitration and award was premature. Hamilton v. Liverpool, L. & G. Ins. Co., 10 Sup. Ct. Rep. 945, 136 U. S. 242, and Same v. Home Ins. Co., 11 Sup. Ct. Rep. 133, 137 U. S. 370, 385, followed. Vangindertaelen v. Insurance Co., 51 N. W. Rep. 1122, 82 Wis. 112, distinguished.

3. SAME—DEFENSE TO ACTION ON POLICY.
The insurer was not required, in the event of failure to agree as to the amount of loss, to demand arbitration, and could avail itself of the provision as a defense notwithstanding its denial of liability.

Action by A. B. Kahnweiler & Bro. against the Phoenix Insurance Company of Brooklyn upon a fire insurance policy. Judgment for defendant. Motion for a new trial denied.

Rossington, Smith & Dallas, for plaintiffs.
H. M. Jackson, for defendant.

FOSTER, District Judge. On or about the 8th day of January, 1887, the plaintiffs' stock of merchandise was totally destroyed by fire, excepting about $30 salvage. The stock was insured for over $40,000 in something like 20 different companies. The defendant company had a policy of $2,500 on the goods. Shortly after the fire an adjusting agent of the defendant company made a full investigation into the circumstances of the loss, and thereupon informed the plaintiffs that their total loss was $22,700, and further said: "We have got to go away, and want to settle. We have had dealings with your nationality before." "This amount the companies are ready to pay," and he was ready to pay the proportionate part due from the Phoenix company. The insured replied: "We had over $45,000 loss, and will not accept any such settlement." On the 4th of February the insured wrote to the office of the company, at Brooklyn, N. Y., for blanks on which to make proofs of loss, and received an answer from its Chicago office, dated February 7th, declining to furnish the blanks. On or about the 23d day of February the proofs of loss were made out, and were received at the Chicago office in four or five days thereafter. The company made no objection to the proofs of loss, or the time of making the same. This suit

was commenced on the 13th of August, 1887, about seven months after the fire. The policy of insurance contains the following provisions:

(9) "Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular and specific account of such loss, signed and sworn to by them. * * *" (10) "The amount of sound value and of damage to property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then be submitted to competent and impartial arbiters, one to be selected by each party; the two so chosen, in case of disagreement, to select an umpire, to whom they shall refer each subject of difference. And the award of any two of them, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question, except only the amount of such loss or damage. Each party shall pay their own arbitrator, and one-half of the cost of the umpire. It shall be optional with the company to take the whole or any part of the articles at their appraised value; and, further, that it shall be optional with this company to repair, to rebuild, or replace the property lost or damaged, with like kind or quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs * * * are produced by the claimant, and such examinations and arbitrations permitted and had, the loss shall not be payable. * * *" (12) "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim, in the manner above provided, which is agreed to be a condition precedent, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The defendant insists that this action cannot be maintained—First, because the proofs of loss were not rendered within 30 days after the fire; second, because there has been no arbitration to determine the amount of loss sustained.

The first objection is untenable. A failure to furnish the proofs of loss within 30 days did not work a forfeiture of the policy. It merely delayed the date when the loss would become payable; the insurer having 60 days after the proofs were furnished to make payment, or replace the property destroyed. Hall v. Insurance Co., (Mich.) 51 N. W. Rep. 524; Vangindertaelen v. Insurance Co., 82 Wis. 112, 51 N. W. Rep. 1122.

On the second objection many decisions have been cited by the parties on either side, and the plaintiffs insist that the provision in the policy for arbitration has been waived by the company, and is inoperative; that the company could not invoke that provision to abate or defeat the plaintiffs' suit, because it made no demand for arbitration, and because it denies its liability in toto. This denial of liability in toto appears for the first time in the answer of the defendant in this suit. Up to that time the company had offered to pay its proportion of what it claimed was the actual loss of the

insured, but there was an irreconcilable difference between the parties as to the amount of that loss, thus bringing the case within the provisions of the arbitration clause of the policy. Inasmuch as the arbitration should precede any suit, at no time during the period for arbitration did the company deny its liability for the loss. That the company has set up in one count of its answer a denial of any liability does not affect the case. It might waive any objection to the cause of the fire, and offer to settle, to avoid litigation; but this would not effect its right, when sued, to set up in its answer any legal defense it had to the action. Did the insurance company lose its right to invoke this provision of the policy by not making demand for arbitration? Counsel for plaintiffs has cited many authorities on this point, but it will be observed that in the cases cited the provision in the policy was different from this. There the contract provided for arbitration if either party demanded it in writing. It was not an absolute covenant, but was optional, nor was it made a condition precedent to the bringing of suit. See Wright v. Insurance Co., (Pa. Sup.) 20 Atl. Rep. 716; Nurney v. Insurance Co., 63 Mich. 633, 30 N. W. Rep. 350; Wood, Ins. § 1015; Mentz v. Insurance Co., 79 Pa. St. 478; Schollenberger v. Insurance Co., 7 Ins. Law J. 697; Insurance Co. v. Badger, 53 Wis. 283, 10 N. W. Rep. 504.

In Vangindertaelen v. Insurance Co., 82 Wis. 112, 51 N. W. Rep. 1122, the company received proofs of loss, but did not make objection to the amount claimed; hence the insurer, having no notice of a disagreement as to loss, took no steps toward arbitration. It must be observed that in the case at bar the provision for arbitration is absolute, and forms a part of the contract. It is also, in terms, declared to be a condition precedent to the bringing of suit. There were no conditions required to make it operative, except a disagreement between the parties touching the amount of loss. If the company was bound to make a demand for arbitration, when should that demand have been made? There was no time fixed. The plaintiffs had a year after the loss in which to bring their suit, and they could delay arbitration for many months, if they desired; so they demanded it before suit was brought, and this suit was brought nearly five months before the year expired. I cannot see any reason why the company was compelled to take any action in the matter of arbitration before this suit was commenced. It had a right to rest upon the terms of the policy, and to expect the assured would bring no suit until they at least attempted to comply with those terms. Whatever difference of views may be found in the decisions of different states, it is enough for this court to know and follow the decisions of the supreme court, and that court has held that this provision in the policy of insurance is legal, and can be enforced. Hamilton v. Liverpool, L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. Rep. 945; Same v. Home Ins. Co., 137 U. S. 370, 385, 11 Sup. Ct. Rep. 133.

In the first above cited case the policy provided that, in case of difference as to the amount of loss, either party could demand, in

writing, that it be arbitrated. There was a difference between the parties, and the company demanded arbitration; but the assured sought to impose further conditions, and the arbitration failed. In that case the court held that the insurance company, after making a demand, had an absolute right to arbitration. In this case the right was absolute without any demand, by the terms of the policy itself. For the reasons above stated the motion for a new trial must be overruled.

WHITLOCK v. COMER.

(Circuit Court, D. South Carolina. August 17, 1893.)

CARRIERS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

An adult male passenger, waiting for a railroad train to come to a full stop before attempting to alight, who, when directed and required by the conductor, jumps from the moving train, when it is obvious that he cannot do so with safety, and thereby sustains injuries, cannot recover damages for such injuries.

At Law. Action by W. J. Whitlock against H. M. Comer, receiver of the Port Royal & Western Carolina Railway Company, for personal injuries. Defendant demurs to the complaint. Sustained.

Haynsworth & Parker, for plaintiff.
Joseph Ganahl and M. F. Ansel, for defendant.

SIMONTON, District Judge. This case is by a passenger on a train of the defendant, injured by jumping off the train while in motion. He had purchased a ticket to High Point, a station on the railway. The question comes up on oral demurrer to the complaint. The plaintiff is an adult, and a male.

The action is for negligence. The gist of it appears in the third paragraph of the complaint:

"That on arriving at High Point the said receiver, through gross negligence, failed to stop his train of cars sufficiently to allow the plaintiff to alight with safety and convenience, but, on the contrary, when the plaintiff was waiting for the train to come to a full stop before attempting to alight, the said receiver, through his servant, the conductor of said train, without bringing said train to a stop, in reckless disregard of what was due the plaintiff, directed and required him to alight by jumping, and that in attempting so to do the plaintiff was thrown violently upon the ground, head foremost, and seriously injured about head, shoulders, and chest."

The defendant, when the complaint was read, interposed an oral demurrer that the complaint does not state facts sufficient to constitute a cause of action.

When a passenger, upon a train which is approaching the place at which he expects to get out, jumps from the train while it is in motion, and suffers injury, his right to recover depends upon circumstances. If the danger attending his mode of leaving the train is so obvious that a prudent man would not encounter it, then the accident is the immediate result of his own action, and he cannot

recover. The fact that he acted upon the advice or urgency or instruction of the conductor of the train will not change the character of the act. 2 Beach, Ry. Law, p. 987; Patt. Ry. Acc. Law, p. 21, § 23, and cases quoted; Railway Co. v. Schaufler, 21 Amer. & Eng. Ry. Cas. 405. The plaintiff, in stating the facts on which he relies, says that at the time of the happening of the accident the train had not stopped sufficiently for him to alight with safety and convenience, so it was obvious to him that the attempt to get off would be accompanied with danger. He further states that he was waiting until the train could come to a full stop before attempting to alight, so he knew when he could alight without danger; that the conductor nevertheless directed and required him to alight, in reckless disregard of what was due to him. This emphasizes the fact that the danger was obvious, so obvious that the instruction of the conductor was in reckless disregard of what was due to the passenger,—so much so that no man of ordinary prudence would encounter it; yet he jumped from the train. Nothing that the conductor said by way of advice or direction can relieve him of the consequence of his own act. Jones v. Railroad Co., 95 U. S. 439.

The demurrer is sustained.

COOPER v. SUN PRINTING & PUBLISHING ASS'N.

(Circuit Court, S. D. New York. September 27, 1893.)

LIBEL—EXCESSIVE VERDICT—MOTION TO SET ASIDE.

The damages which a jury may award in an action for libel being not only compensatory, but, where malice or its equivalent (gross negligence) is found, also punitive or exemplary, the court will not set aside a verdict of $2,500 in favor of the plaintiff, a girl of 16, for a libel published in a newspaper charging her with having eloped with a married man.

At Law. Action by Caroline Cooper, an infant, by her next friend, against the Sun Printing & Publishing Association, for damages for the publication of a libel in the Sun newspaper of October 3, 1891, charging the plaintiff, a girl of 16, and a resident of Danbury, Conn., with having eloped with Charles W. Bennett, a married man. The jury returned a verdict for the plaintiff for $2,500. Motion to set aside verdict as excessive. Denied.

Thomas E. Rochfort, for plaintiff.
Franklin Bartlett, for defendant.

LACOMBE, Circuit Judge. That in actions for libel the damages which a jury may award may be not only compensatory, but, where malice or its equivalent (gross negligence) is found, may be punitive or exemplary, seems to be a proposition so abundantly settled by authority as to call for no extended discussion. The excerpts from the charge to which defendant on this motion calls attention correctly state that proposition; and, for any error in

charging, the defendant has his remedy by writ of error. The only question to be now determined is whether or not the verdict of $2,500 was excessive. It was left to the jury to say whether or not the defendant had manifested such reckless indifference to the rights of others as would call for punitive damages, and it must be assumed that they found against it on that question. That being so, there is no way in which the court can ascertain how much of the verdict represents what they considered compensation to the plaintiff, and how much of it represents what they considered a proper punishment by way of example. Taking both elements of damage into consideration, the amount found is not so clearly excessive as to warrant the court in disturbing the finding of the jury, which, under our system of jurisprudence, is specially charged with the determination of that question.

THEBAUD et al. v. NATIONAL CORDAGE CO.

(Circuit Court, S. D. New York. September 25, 1893.)

ATTACHMENT—INDEMNITY BOND TO SHERIFF—MOTION TO CANCEL.

Where a sheriff has levied an attachment upon personal property, and, upon claim thereto being made by third parties, has required the attaching creditor to give him a bond of indemnity, the court will not cancel the bond, upon motion by the plaintiff in the attachment suit, when the rights of the third parties claimant against the sheriff have not been determined in the action.

At Law.

Action by Paul L. Thebaud and another against the National Cordage Company, a foreign corporation. The action was begun in the New York supreme court by attachment, and was removed by the defendant to the circuit court for the southern district of New York. Property in storage warehouses, which the plaintiffs claimed belonged to the defendant, was levied on by the sheriff. Thereupon, replevin suits were begun against the sheriff by various parties claimant. The sheriff demanded from the plaintiffs in the attachment suit an indemnity bond for $150,000. The plaintiffs obtained a bond for that amount from the Lawyers' Surety Company, as surety, depositing with that company $50,000 as cash to secure it against liability. The plaintiffs and the surety company were substituted as defendants in the replevin suits in place of the sheriff, pursuant to the provisions of the New York statute. The replevin suits were discontinued by consent, the plaintiffs in these suits consenting to a discharge of the bond of indemnity. Thereafter, the attachment was vacated. The plaintiffs moved upon affidavits setting up those facts, and also that the Lawyers' Surety Company refused to repay to them the $50,000 deposited with it as collateral until the bond was canceled, and moved for an order of the court to cancel the bond. The sheriff replied by affidavits setting up that he was still in possession of a part of the property levied on, and that keepers' fees and the poundage of the sheriff had not been paid. He also set up the fact that he had not received a general release from the attorneys, or any of the claimants, releasing him from damage and responsibility by reason of the levy of the attachment. Motion denied.

William J. Courtney, for the motion.
Strong & Cadwalader, opposed.

LACOMBE, Circuit Judge. The motion is denied. This court, upon summary motion made in this case, should not undertake to

determine what rights, if any, the third parties claimant of the goods levied upon may or may not have against the sheriff, nor, in advance of a final adjustment of all possible claims in such form as would be binding upon all parties, should it interfere with the security the sheriff has obtained from those who required him to take the responsibility of levy. That the complainants entered into a most improvident contract with the surety company, or that the latter is acting unconscionably in retaining their cash as collateral security, when all chance of the company's being called on to respond is at an end, does not alter the situation, so far as the sheriff is concerned.

LOEB et al. v. HENDRICKS, Collector.

(Circuit Court, S. D. New York. September 14, 1893.)

CUSTOMS DUTIES—EXCESSIVE VALUATION—STATUTORY REMEDY EXCLUSIVE.

Under the customs administrative act of June 10, 1890, § 13, which provides for an appeal to the board of general appraisers if the importer is aggrieved by valuation of the import, and section 25, which declares that no action shall be against the collector in any case in which the importer is entitled to appeal under the provisions of the act, the remedy by appeal from an appraisement is exclusive, and an action cannot be maintained against the collector to recover an alleged excess of duties paid on a valuation advanced by an appraiser over the invoice value of imported merchandise.

At Law. Demurrer to complaint for want of jurisdiction. Sustained.

On an importation and entry of cotton embroideries from St. Gall, Switzerland, by Loeb & Schoenfeld, at the port of New York on November 7, 1891, the invoice of the goods was transmitted by the collector to the appraiser of the port for appraisement. The complaint in the action alleged that the appraisement was not conducted according to law; that the appraiser made no attempt to appraise the market value of the goods, but proceeded in an irregular, arbitrary, and illegal manner to appraise the cost of production thereof, and made an addition to the invoice value of said merchandise of 3 per cent., purporting to be for general expenses; that the collector liquidated the duties upon such illegal advanced valuation returned by the appraiser, which liquidation was therefore alleged to be wholly null and void. The collector assessed and collected the duties on the advanced valuation, and the importers brought suit directly in the United States circuit court against the collector to recover judgment for the alleged excess. The United States attorney, on behalf of the collector, filed a demurrer to the complaint, on the ground that the court had no jurisdiction of the cause of action therein alleged against the defendant.

The act of congress of June 10, 1890, relative to the collection of customs duties, contains the following provisions: "Sec. 13. * * * The decision of the appraiser or the person acting as such (in cases where no objection is made thereto, either by the collector, or by the importer, owner, consignee or agent,) or of the general appraiser in cases of reappraisement, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall within two days thereafter, give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low, in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers,

which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the secretary of the treasury for such duty at that port or at any other port, which board shall determine and decide the case thus submitted, and their decision or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector, or the person acting as such, shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon according to law." "Sec. 25. That from and after the taking effect of this act no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act."

Henry C. Platt, Asst. U. S. Atty., in support of the demurrer.

(1) There is no longer any right of action at common law by an importer against collectors of customs for the recovery of an alleged excess of duties. Cary v. Curtis, 3 How. 236; Arnson v. Murphy, 109 U. S. 238, 240, 241, 3 Sup. Ct. Rep. 184; Hager v. Swayne, 13 Sup. Ct. Rep. 841, 842; section 29, Act June 10, 1890; U. S. v. Davis, 4 C. C. A. 251, 54 Fed. Rep. 155, 156.

(2) There is now no statute under which this action against the collector is authorized to be brought in the United States circuit court. The act of February 26, 1845, was the first act giving exclusive statutory right of action. It was repealed by the act of June 30, 1864. Barney v. Watson, 92 U. S. 449. The act of June 30, 1864, was repealed by the Revised Statutes, (section 5596.) The statutory right of action provided for in the Revised Statutes was repealed by section 29 of the act of June 10, 1890, wherein a new and exclusive remedy was provided by a new procedure. In re Sherman, 55 Fed. Rep. 276, 277. This repeal did not revive the former acts of 1845 or 1864, nor revive the common-law right of action which was abrogated by the act of 1839, (chapter 82, § 2.) U. S. v. Philbrick, 120 U. S. 52, 57, 58, 7 Sup. Ct. Rep. 413. The exclusive remedy of an importer for a review of any advance in the invoice valuation by the appraiser is plainly pointed out in section 13 of the act of June 10, 1890.

(3) The collector is by law relieved from such actions against him in the United States circuit court. Section 25, Act June 10, 1890. This exemption is not confined to those matters as to which the importer can now appeal from the decision of the board of general appraisers to the United States circuit court, under the provisions of section 15 of the act of June 10, 1890, but covers all matters as to which the importer is entitled to appeal from the decision of the collector or other officer. Section 25, Id. The appraiser is an officer. He is appointed by the president. 14 Stat. 303; sections 6, 7, c. 284, Act July 27, 1866. The importer is now entitled to appeal from the appraiser to the board of general appraisers, whose decision as to dutiable valuation is final and conclusive. Section 13, Act June 10, 1890; Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. Rep. 572; U. S. v. Strauss, 55 Fed. Rep. 388, 390.

W. Wickham Smith, for plaintiffs.

(1) A collector of customs was suable at common law for money extorted colore officii from a merchant, and paid under protest. Elliott v. Swartwout, 10 Pet. 137.

(2) The repeal of the acts of 1845 and 1864 and of the Revised Statutes leaves the importer just where he was before they were enacted.

(3) Section 25 of the act of June 10, 1890, does not take away the common-law right of action against the collector in a case which does not relate to the classification of merchandise or the rate of duty chargeable thereon.

LACOMBE, Circuit Judge. The language of section 25 of the customs administrative act of June 10, 1890, is controlling of this case. Its phraseology is comprehensive; its exemption of the collector from personal liability to the importer is plain; and the act was one which it was within the power of congress to pass. The suggestion that the importer in a case involving the appraisement of merchandise has no right of appeal from the board of general appraisers is immaterial. He is, under this act, entitled to appeal from the decision of the collector, and in such case the statute secures the collector exemption from personal suit.

Demurrer sustained.

In re LANGFORD.

(Circuit Court, D. South Carolina. August 21, 1893.)

1. INTOXICATING LIQUORS—EFFECT OF WILSON ACT.
   The Wilson act (26 Stat. 313) puts an imported package of intoxicating liquors, whether in its original shape or otherwise, under the police power of the state "upon arrival in such state," precisely as other intoxicating liquor in the state is subject to the police power.

2. SAME—MEANING OF "UPON ARRIVAL."
   The expression, "upon arrival in such state," means neither on entrance within the borders of the state, nor on delivery to the consignee, but on reaching its destination.

3. SAME—DISPENSARY ACT—CONSTITUTIONALITY—POLICE POWER.
   The South Carolina dispensary act, (approved December 24, 1892,) § 25, subsecs. 1, 3, 4, require knowledge on the part of a person charged that the intoxicating liquor was intended for sale; but subdivision 2 makes it a criminal offense for any servant, agent, or employe of a special class of common carriers to remove from a car any intoxicating liquor whatever, without any qualification as to knowledge that it is intoxicating liquor, or that it is intended for sale, and without attaching any criminality to the person receiving the liquor from the carrier. *Held*, that subdivision 2 discriminated, in singling out one class from the whole community for punishment, and was not within the exercise of the police power, under Const. S. C. art. 1, § 12, which provides that no person shall be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any personal rights, than such as are laid on others under like circumstances.

4. SAME—VALIDITY—INTERSTATE COMMERCE.
   The South Carolina dispensary act, § 25, subsec. 2, not being an exercise of police power, the section contravenes the interstate commerce act and the fourteenth amendment, and is void.

5. COURTS—STATE AND FEDERAL—COMITY.
   Where a federal court has jurisdiction in a case of great moment to the parties and to the public, and can speedily hear the case, and give the desired relief, the case should not be left to the determination of a state court because of the comity between the state and federal courts.

Application by D. M. Langford for discharge from custody on return of writ of habeas corpus. Granted.

Cothran, Cothran & Wells, for petitioner.
D. A. Townsend, Atty. Gen., and Mr. Ansel, for respondent.

SIMONTON, District Judge. This case comes up upon petition for habeas corpus, the writ, and the return thereto. The peti-

tion sets forth that the petitioner, a citizen of the United States and of the state of South Carolina, is the agent of the receivers of the Richmond & Danville Railroad at Prosperity, a town in South Carolina; that on the 14th of July, 1893, as such agent, he received by a regular train, over a railroad of the receivers, a keg of whisky consigned to A. A. Singley, a resident of said town, which keg, as shown by the way bill, was shipped from Pleasant Ridge, in North Carolina, to said town in South Carolina; that he delivered the keg to the consignee, and that soon thereafter he was arrested under a warrant issued by a trial justice of said state, charged with violating the provisions of an act of the legislature of South Carolina entitled "An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state except as herein provided;" and that he is yet in custody. The petition further shows that the delivery by him of the keg of whisky, as aforesaid, was made by him under and pursuant to the laws regulating commerce between states, and that the act of the legislature of the state under which he has been arrested and is held in custody is in conflict with said interstate commerce law, and is null and void, so that his arrest is illegal. He prays his discharge from arrest. The return of the sheriff having him in custody admits that the petitioner is held for violation of the said act, by reason of the delivery of the keg of whisky as stated, and denies that the act is in conflict with the interstate commerce law, and, on the contrary, avers that it comes within the provisions of the act of congress approved August 8, 1890, commonly known as the "Wilson Act." It further avers that the petitioner is in custody for trial in the courts of the state for a crime against the state, and that this court, in comity to the courts of the state, ought not to interfere herein until the said state courts have first passed upon the question involved in the case.

In Cantini v. Tillman, 54 Fed. Rep. 970, the alleged conflict of the dispensary act with the constitution and laws of the United States was discussed, and the validity of the act was sustained. The opinion, however, expressly reserved any question as to the validity of this twenty-fifth section. The case at bar raises the issue on this section. The petitioner is in custody under the charge of violating section 25 of the act of the legislature referred to. This section is in these words:

"No person shall knowingly bring into this state, or knowingly transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any intoxicating liquors, with the intent to sell the same in this state in violation of law, or with intent that the same shall be sold by any person, or to aid any other person in such sale, under a penalty of $500, and costs for each offense, and in addition thereto shall be imprisoned in the county jail for one year. In default of payment of said fine and costs, the party shall suffer an additional imprisonment of one year. Any servant, agent, or employe of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation, at

any place other than the usual and established stations, wharves, depots, or places of business of such common carriers within some incorporated city or town, where there is a dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of $50, and imprisonment for thirty days for every such offense: provided, that said penalty shall not apply to any liquor in transit, when changed from car to car to facilitate transportation. All such liquor intended for unlawful sale in this state may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. And any steamboat, sailing vessel, railroad, express company, or other corporation, knowingly transporting or bringing such liquor into the state, shall be punished upon conviction by a fine of five hundred dollars and costs for each offense. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company."

There can be no doubt that but for the passage of the Wilson act the provisions of this section would be in conflict with the interstate commerce law, and void. Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681. This last case induced the passage of the Wilson act. Caldwell, J., in Re Van Vliet, 43 Fed. Rep. 766.

The Wilson act is as follows:

"An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.

"That all fermented, distilled, or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

What were the interstate commerce regulations which were in existence at the passage of this act, from which intoxicating liquors were by it exempted? This question is answered in the two cases quoted above. The first of these cases had declared that under the interstate commerce regulations the right to import intoxicating liquors into any state existed, and the second case declares that this right of importation involved the right to the importer to sell so long as the liquor remained in the original package; that therefore the police power of the state could not prevent the importation except under restrictions, nor forbid the sale of the importation by the importer so long as it remained in the original package. The Wilson act put the imported package, whether in its original shape or otherwise, under the police power of the state, upon its arrival in such state, precisely as other intoxicating liquor in the state is subject to such police power.

What is the meaning of the term "upon its arrival?" The respondent insists that by this term is meant its entrance within the borders of the state. Thus it is a prohibition of the importation of intoxicating liquors into this state. That does not seem to be within the scope of the Wilson act. It provides "for all fermented, distilled or other intoxicating liquors or liquids transported into any state," and declares them not exempt from the operation of the police laws by reason of being introduced therein in original pack-

ages or otherwise. It is clear that the Wilson act deals with liquors after their introduction within the state, and therefore the word "arrival" cannot be construed to be at the border of the state. Goods "arrive" when they reach their destination. In the term is involved a cessation of the transit. Goods shipped from Virginia to Alabama cannot be said to arrive in North Carolina, South Carolina, or Georgia. They "arrive" when they reach their destination in Alabama.

On the other hand, the petitioner contends that the Wilson act does not subject the imported package to the operation of the police regulations of the state until the whole duty of the carrier has been performed; that the carrier does not perform his whole duty until the goods are delivered; that when the act uses the expression, "upon arrival in such state," it means when the delivery by the carrier has been made. This position depends upon the construction to be given to this word "arrival." Words used in a statute, not technical in their character, must be taken in their ordinary signification. Persons and goods arrive when they reach their destination. It is proper to say that, after a man arrives at a city, he goes to his home therein, or to the home of a friend, or to his hotel. So goods, after "arrival" at their destination, are either delivered to the consignee after notice of arrival, or are held until the freight is paid, or C. O. D., or are stored. The money for the freight or the cash delivery cannot be demanded until the goods have arrived, and because of such arrival. If the freight be not paid, or if the cash on delivery be not produced, or the consignee be not known or do not appear, these cannot in any way affect the arrival of the goods, or permit us to say that they have not arrived. The delivery of goods is not an essential element of their arrival at their destination. Compare Benj. Sales, pp. 759, 760, §§ 873, 874. The same conclusion would appear in using the analogy of stoppage in transitu. This right of stoppage ends upon the delivery into possession of the consignor. Says Benj. Sales, p. 1070, § 1245: "The vendor's right of stoppage in transitu is very frequently not ended on their arrival at their ultimate destination, because of his retention of the property in them."

The package in question, upon its arrival at Prosperity, in South Carolina, came within the exercise of the police power of the state.

The next question is, is this twenty-fifth section of the act of assembly, December, 1892, a lawful exercise of the police power? Examining this section we find that it contains four distinct subdivisions: (1) No person shall knowingly bring into this state, or knowingly transport from place to place within the state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any intoxicating liquors, with intent to sell the same in this state in violation of law, or with intent that the same shall be sold by any other person, or aid any other person in such sale. (2) Any servant, agent, or employe of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any intoxicating

liquors from any railroad car, vessel, or other vehicle for transportation, at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers, within some incorporated city or town where there is a dispensary, or who shall aid in or consent to such removal, etc. (3) All such liquor intended for unlawful sale in this state may be seized in transit, and proceeded against as if it were deposited in any place. (4) Any steamboat, sailing vessel, railroad, express company, or other corporation knowingly transporting or bringing such liquor into the state, shall be punished, etc. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company.

Thus, in every subdivision but the second above set forth, there must exist on the part of the person charged the knowledge that the intoxicating liquors were intended for sale. The liquors to be seized must be intended for sale. No private carrier or other person can offend this section if he does not know that the liquor is brought in for sale. The liquor cannot be seized in transit unless it is intended for sale. The company transporting the liquor into the state is punishable only when its authorized agent knows that it was intended for sale. This is in harmony with all the other parts of the act, the purport and purpose of which is to regulate the sale of intoxicating liquors. This is plainly shown in the first section:

"The manufacture, sale, barter, or exchange, or the keeping or offering for sale of any spirituous, malt, vinous, fermented or other intoxicating liquor or compound or mixtures thereof by whatever name called, which will produce intoxication by any person, business, firm, corporation or association, shall be regulated and conducted as provided in this act."

More than this, no criminality is attached to the person receiving from the common carrier the liquors mentioned in the second subdivision of this twenty-fifth section. But this second subdivision makes it a criminal offense for one special class of persons, servants, employes, and agents of a special class of common carriers, to remove from the car, etc., any intoxicating liquor whatever, without any sort of qualification. No knowledge on the part of such servant, agent, or employe that it is intoxicating liquor is required. Nor does it make any difference whether the liquor be intended for sale, personal use, or consumption in any other way. None of the safeguards thrown around every other criminal offense exists. The only qualification is that the city or town in which the package is has no dispensary. This is discrimination,—the separation of a class from the whole community, and singling it out for prosecution and punishment. It is the class on whom interstate commerce largely depends, without whom it cannot be conducted. And if we are permitted to infer from the words of the act the motive for this discrimination, the natural inference would be that it is intended to prevent any possible chance of competition with dispensaries elsewhere established; an intention sought to be perfected, not by punishing all persons connected with the act,—the importer and

the consumer,—but confining the crime and the punishment to this one class; creating for this special class a new crime. If this be assumed to have been done in the exercise of the police power, it will be difficult to sustain it. The Wilson act created no new power in the states. It professed to do no more than to limit the regulations of interstate commerce. But the most broad and liberal construction of the act would not permit a state, under the guise of the police power, to single out and punish the agents of interstate commerce for a crime specially created for them, in the teeth of the fourteenth amendment to the constitution of the United States.

It is extremely difficult, if not impossible, to give an exact definition of, and to describe the limits of, the police power. It is clear, however, that the legislature of a state cannot assume the exercise of the police power in a way forbidden by the constitution of the state. The constitution of South Carolina, (article 1, § 12.) provides "no person shall * * * be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances." This limits the power of the legislature, and prevents this provision of the act of 1892, known as the "Dispensary Act," from being an exercise of the police power. This being so, the provisions of the twenty-fifth section under this act contravene the interstate commerce law and the fourteenth amendment, (Leeper v. Texas, 139 U. S. 463, 11 Sup. Ct. Rep. 577; Missouri v. Lewis, 101 U. S. 22,) and are null and void. The arrest of the petitioner, based on these provisions, is void.

The return suggests that comity between the courts should induce this court to hold its hand, and leave the determination of the questions involved in this case to the state courts. It is the duty of a judge, when relief is sought before him in a matter within his jurisdiction, speedily to hear the plaint, and, if the party is entitled to the relief, to give it. He cannot shift from his shoulders the responsibilities of his judicial function, and impose them upon another. Strong as the temptation is, and agreeable as it would be, to do so, he cannot do it without loss of self respect. Besides this, both parties to this controversy desire a speedy solution of it. The public interest demands that the legal questions arising in, we may say impeding, this grave and interesting experiment of the dispensary act, be shortly settled. An appeal from this court lies directly to the supreme court. A final decree of the tribunal of last resort is very near at hand. It is ordered that the defendant be released from custody.

In re WELCH.

(Circuit Court, S. D. New York. September 29, 1893.)

1. HABEAS CORPUS—HOMICIDE—JURISDICTION OF STATE COURT.
The question whether a state court has jurisdiction over a pilot indicted for manslaughter, in causing the death of a person on another boat by causing the boat in his charge to collide therewith, cannot be raised by an application for a writ of habeas corpus, when the prisoner may raise it by appeal or otherwise in the state courts, and may carry it thence, should the decision be adverse, to the United States supreme court by writ of error.

2. SAME—DIFFERENT OFFENSES.
A pilot was indicted under a state statute for the crime of manslaughter, in that he willfully and feloniously propelled and forced a tugboat in his charge against a yacht in which the deceased was, and did thereby willfully and feloniously cast and force the deceased into the river, whereby he was drowned. By Rev. St. U. S. § 5344, every pilot, "by whose misconduct, negligence, or inattention to his duties" the life of any person is destroyed, is guilty of manslaughter. *Held* that, as the offense charged in the indictment consisted in a willful and felonious assault, it was different from that provided for by the Revised Statutes, and that the question whether the indictment was properly framed under the state law, and whether the acts charged therein constituted the crime of manslaughter under the state statute, could not be raised on habeas corpus.

On Application by Thomas A. Welch for a Writ of Habeas Corpus. Denied.

Lorenzo Semple, for petitioner.
Henry B. B. Stapler, Asst. Dist. Atty., for respondent.

LACOMBE, Circuit Judge. The relator, pursuant to section 4442 of the Revised Statutes of the United States, was duly and legally licensed to act as a second-class pilot on steam vessels by the United States local board of inspectors of steam vessels for the district of New York. While said license was in full force and effect, and while said relator was engaged in the actual performance of his duties under said license, a collision occurred, June 15, 1891, on the Hudson river, between the towboat F. W. Devoe, which was under relator's control and management as pilot, and the sloop yacht Amelia, which collision resulted in the death by drowning of one Francis Jenkins, at that time on board the yacht Amelia. Thereafter, on July 7, 1891, a grand jury of the city and county of New York found an indictment against relator for the crime of manslaughter in the second degree, for the killing of said Jenkins, charging that, at the place and time above stated, "said Thomas Welch, then being in a certain steam vessel known as a tugboat, called the F. W. Devoe, upon the said river, did then and there willfully and feloniously propel and force the said tugboat against the said yacht, wherein said Francis Jenkins was, as aforesaid, and did thereby then and there willfully and feloniously cast and force said Francis Jenkins out of said yacht into the said river," whereby said Jenkins was drowned.

The crime of manslaughter in the second degree, as defined in the Penal Code of the state of New York, (section 193,) is homicide,

when committed without a design to effect death, either (1) by a person committing, or attempting to commit, a trespass, not amounting to a crime; or "(2) in the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or (3) by any act, procurement or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor of manslaughter in the first degree." These last two subdivisions, with which only is this case concerned, are not new. They will be found substantially in the Revised Statutes passed in 1827--28. See part 4, c. 1, tit. 2, art. 1, §§ 18, 19, 2 Rev. St. (1st Ed.) p. 662.

"Sec. 18. The involuntary killing of another by any weapon, or by means neither cruel or unusual, in the heat of passion, in any cases other than such as are herein declared to be excusable homicide, shall be deemed manslaughter in the fourth degree.

"Sec. 19. Every other killing of a human being, by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this [act] to be murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."

These two somewhat similar offenses—killing in hot blood, without intent and without dangerous weapon, and killing by culpable negligence—were criminal under the common law, (Whart. Crim. Law, §§ 351--355;) and, so far as appears, were deemed manslaughter, and have been always punishable as such when committed within the jurisdiction of the state. The relator was tried before a petit jury upon the indictment, and convicted of manslaughter in the second degree. Under this conviction he is now held.

By section 5344, Rev. St. U. S., it is provided:

"Sec. 5344. Every captain, engineer, pilot, or other person employed on any steamboat by whose misconduct negligence or inattention to his duties on such vessel, the life of any person is destroyed * * * shall be deemed guilty of manslaughter, and upon the conviction thereof before any circuit court of the United States shall be sentenced to confinement at hard labor for a period of not more than ten years."

This section first appeared as section 12 of the act of July 7, 1838, and is included in title 70 of the Revised Statutes; a title which is prefaced with the provision:

"Sec. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

The relator contends that the state court had no jurisdiction to try him for the offense charged in the indictment, because such offense is, by the law of congress, exclusively cognizable in the circuit court of the United States, and that the indictment, and all proceedings thereunder, are null and void. He relies upon, and asks this court to discharge him from a custody which he contends is in violation of, a law of the United States, to wit, Rev. St. U. S. § 711:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states—First. Of all crimes and offenses cognizable under the authority of the United States," etc.

It is a sufficient answer to this application to refer to the decisions of the United States supreme court, discountenancing the

practice of employing the writ of habeas corpus to present questions of this character in advance of any decision thereon by the state courts, when no reason is shown why the prisoner may not as fully and fairly present the question by appeal or otherwise to the state courts, and carry it thence, should the decision be adverse, to the United States supreme court by writ of error. Ex parte Fonda, 117 U. S. 516, 6 Sup. Ct. Rep. 848; In re Wood, 140 U. S. 286, 11 Sup. Ct. Rep. 738; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. Rep. 40.

There is, however, another, and it seems a quite sufficient, reason for holding the relator's contention to be unsound. The crime of which he was convicted, and the crime defined in section 5344, though both called manslaughter, are manifestly different offenses. The latter consists in "misconduct, negligence, or inattention to his duties" as pilot on a steamboat; the former in a "willful and felonious" assault on the deceased, which assault was accomplished by "willfully and feloniously" forcing the tugboat against the yacht, and thus knocking the deceased overboard. Evidence which might be sufficient to establish the one offense might be wholly insufficient to establish the other.

Whether the indictment was properly framed under state procedure, and whether the acts charged in the indictment do or do not constitute the crime of manslaughter, under section 193 of the Penal Code of the state, are matters which this court will not examine into upon habeas corpus. They must be reviewed by appeal in the state courts, and writ of error to United States supreme court, if any federal question is involved.

The writ is dismissed, and prisoner remanded.

In re CARRIER.

(District Court, D. Colorado. August 25, 1893.)

EXTRADITION—INTERNATIONAL—BAIL PENDING HEARING.

In international extradition proceedings, the accused cannot be admitted to bail during a continuance of a hearing to obtain further testimony concerning his probable guilt, as neither act of August 12, 1848, (9 Stat. 302,) relating to extradition, nor the amendatory acts, provide for bail pending a hearing.

Petition by Leon M. Carrier for a writ of habeas corpus. Denied.

Joseph W. Taylor and A. M. Stevenson, for petitioner.

Henry B. Johnson, Dist. Atty., and Thomas Ward, Jr., for respondent.

HALLETT, District Judge. Petitioner is charged with larceny in the dominion of Canada before a commissioner of the circuit court, under the treaty of 1842 with Great Britain, and title 66 of the Revised Statutes, relating to extradition. The commissioner has continued the hearing for some days with a view to obtain

further testimony, and he has refused to admit the petitioner to bail during the time of such continuance. The matter for consideration upon the petition is whether the accused is entitled to be enlarged on bail under the circumstances. Obviously, a proceeding in extradition under the treaty and the act of congress of 1848, (9 Stat. 302,) with a view to determine the probable guilt of the accused before executing the terms of the treaty, is quite aside from the general course of criminal procedure. It is not a question whether larceny is a crime bailable at common law, or by our law, or by the law of Canada. The proceeding stands upon the statute only, and it is believed that no departure can be made from the statute in any substantial matter. It is said that in matters not mentioned in the statute the practice should be according to the course of our law. The matter of admitting to bail is not a question of practice. Since the time of Edward I. it has been regulated by statute; and, in our day, bail is not allowed in any case except in pursuance of some statute.

It was said by counsel for petitioner that there is nothing in the act of 1848 to forbid the allowance of bail pending a hearing. But this is not enough; the authority should be expressed in the act itself. It provides that, if the charge be sustained at the hearing, "it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made;" so that, in so far as there is in the act any expression on the subject, bail is denied. It is significant that in the earlier act of 1789, (1 Stat. 91,) relating to the arrest of persons in one federal district who may be charged with crime in another district, there is ample provision for taking bail, and therefore it cannot be said the subject was overlooked in the act of 1848. In 1882 the act of 1848 was considerably amended in respect to the manner of getting testimony and some other matters, but the subject of bail was not touched upon, (22 Stat. 215.) This last act further shows the intention of congress to regulate all proceedings in extradition by special act, leaving nothing of substance to be borrowed from the general course of criminal procedure. Inasmuch as there is not in the act of 1848 or in any of the amendatory acts any provision for bail pending a hearing, under those acts the decision of the commissioner seems to have been correct, and the writ will be refused.

UNITED STATES v. OLSEN.

(District Court, N. D. California. September 4, 1893.)

No. 2,902.

1. CRIMINAL LAW—PLEAS — FORMER JEOPARDY — AUTREFOIS CONVICT—SUFFICIENCY.

A plea of autrefois convict is insufficient which fails to aver that the judgment pleaded in bar is unreversed and continues in full force and effect.

2. SAME—EFFECT OF PENDING APPEAL.
The fact that there is an appeal pending does not deprive defendant of the protection of the judgment pleaded in bar, where such judgment is otherwise sufficient.

3. SAME—FORFEITURE OF VESSEL NOT A BAR TO INDICTMENT.
A judgment of forfeiture entered against a vessel under Act July 5, 1884, § 10, (23 Stat. 117,) for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 2 of the act, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in section 11 of the act. U. S. v. McKee, 4 Dill. 128; Coffey v. U. S., 6 Sup. Ct. Rep. 437, 116 U. S. 436; and U. S. v. One Distillery, 43 Fed. Rep. 846, distinguished.

Indictment of William Olsen for violation of Act July 5, 1884, § 11. Plaintiff demurs to defendant's plea in bar. Demurrer sustained.

Charles A. Garter, U. S. Atty.
Daniel T. Sullivan, for defendant.

MORROW, District Judge. The indictment, filed January 17, 1893, charges defendant with the crime of bringing within the United States, and aiding and abetting the landing of, 35 Chinese laborers, contrary to law. To this indictment the defendant has interposed a plea in bar, alleging that all the acts and wrongs charged against the defendant in the indictment herein constitute part of the acts, wrongs, and violations of law set forth in a certain libel of information filed in this court January 6, 1893, and entitled "The United States vs. The Steam Schooner Louis Olsen," etc., upon which libel a decree of forfeiture was made and entered May 8, 1893, ordering, adjudging, and decreeing that the said schooner Louis Olsen, her engines, tackle, apparel, and furniture, be forfeited to the use of the United States. The district attorney has demurred to this plea on the ground that it is not sufficient in law to bar the United States from prosecuting the defendant upon the indictment. The second count of the libel is based upon section 10 of the act of May 6, 1882, as amended by the act of July 5, 1884, and charges, in substance, that F. C. Deering, the master of the said vessel, did on or about the 3d day of November, 1892, knowingly, wrongfully, and unlawfully bring into the United States, by said steam schooner Louis Olsen, from a foreign port or place, and land, and permitted to be landed, 35 Chinese laborers, who were not entitled to come into or be in the United States. It is further alleged that the master, F. C. Deering, knowingly, wrongfully, and unlawfully aided and abetted the landing of the said Chinese laborers by furnishing them transportation upon the said steam schooner Louis Olsen from the foreign port to the United States. The case was heard May 8, 1893, and a decree of forfeiture was entered in favor of the United States for the reasons and causes set forth in said libel of information.

William Olsen, the defendant in the present case, was the claimant and owner of the steam schooner Louis Olsen. In the indictment now before the court the defendant is charged with the of-

fense of bringing into the United States 35 Chinese laborers. He is also charged, in the same count, with the crime of aiding and abetting the landing of the said Chinese laborers from the steam schooner Louis Olsen, which had arrived from a foreign port or place, and it is set forth that he so aided and abetted such landing by furnishing transportation to the said Chinese laborers from a foreign port to the United States, providing them with food and other accommodations during the voyage, and by employing the officers and crew to manage the vessel, and by supplying them with boats, crews, and other means and appliances to enable them to land in the United States. It is claimed on the part of the defendant that the transaction alleged in the libel of information against the steam schooner Louis Olsen and the transaction charged against the defendant in this indictment are but one and the same, and that the judgment of forfeiture in the proceedings in rem against the vessel is a bar to the prosecution of the defendant under the indictment. The district attorney contends that the plea in bar is not sufficient, in this: that it is not alleged that the judgment in bar has become final, since, for aught that appears in the plea, the condemnation proceedings may be now pending on appeal. The allegations of the plea are that the district court of the United States "determined the issue joined between the United States and said claimant in favor of the United States, and ordered, adjudged, and decreed that the said schooner Louis Olsen, her engines, tackle, apparel, and furniture, be, and they were accordingly, condemned as forfeited to the use of the United States, for the reasons and causes set forth in said libel."

In Coleman v. Tennessee, 97 U. S. 509, a soldier in the military service of the United States, during the war of the Rebellion, committed the crime of murder in the state of Tennessee. He was tried by a military court-martial, convicted, and sentenced to suffer death, but for some cause unknown the sentence was not carried into effect. After the constitutional relations of the state of Tennessee to the Union were restored, he was, in one of her courts, indicted for the same murder. To the indictment he pleaded his conviction before the court-martial. The plea being overruled, he was tried, convicted, and sentenced to death. The question in the supreme court of the United States was the jurisdiction of the state court over the person of the defendant, and it was held that the state court had no jurisdiction to try him for the offense, as he, at the time of committing it, was not amenable to the laws of Tennessee; and that his plea, although not proper, inasmuch as it admitted the jurisdiction of that court to try and punish him for the offense, if it were not for such former conviction, would not prevent the supreme court from giving effect to the objection taken in this irregular way to such jurisdiction. In a dissenting opinion, Mr. Justice Clifford upholds the jurisdiction of the state court, and, among other things, discussed the sufficiency of the plea in bar. The learned judge says:

"Since the time of Lord Coke it has been settled law that such a plea is bad, unless it contains the averment that the prior judgment is in full force

and unreversed. * * * Speaking of the plea of autrefois convict, Chitty says: 'It is of a mixed nature, and consists partly of matter of record and partly of matter of fact;' and he adds, with emphasis, 'that it is settled to be absolutely requisite to set forth in the plea the record of the former acquittal; and, if so, it is equally requisite that it should be averred that the judgment is unreversed and in full force, as every lawyer of experience in criminal law knows that, if the verdict was set aside, or the judgment arrested, at the request of the person convicted, the conviction becomes a nullity.'"

As there is nothing here stated in the dissenting opinion in conflict with the prevailing opinion of the court, it may be accepted as authority as to the necessity of an averment in the plea that the judgment in bar is unreversed, and continues in full force and effect. I am therefore of the opinion that the plea in bar is defective in that particular, but I am not prepared to say that the plea must also show that no appeal or writ of error has been taken from the judgment pleaded in bar. It is true that a single line in Wharton's Criminal Pleading and Practice (section 435) seems to express that view, but the authorities cited do not support the text. The true rule appears to be that, where the judgment has been entered by a court of competent jurisdiction, upon a valid indictment, sufficient in form and substance to sustain a conviction, it will protect the defendant from a second prosecution for the same offense while it stands. Bishop, in his work on Criminal Law, (section 1021,) states the rule in this way:

"Sec. 1021. When the grand jury is organized so imperfectly as not to be a lawful body, there is no valid indictment; therefore no jeopardy. Again: An indictment so ill in its averments that any judgment thereon will be reversible for error is too defective a preliminary thing of record for a jeopardy upon it to be possible. Therefore, though there has been a form of trial on it, the defendant may be indicted anew. Still, after a verdict of guilty on such indictment, and judgment rendered thereon, there can be no second prosecution while the judgment is unreversed; not because there has been a jeopardy, for there has not, but because the judgment is voidable only, and of the same effect while it stands as a valid one."

Applying this rule to the libel of information and judgment of forfeiture in this case, it is apparent that, even though there is an appeal pending in the case, the defendant is not, for that reason, deprived of the protection of the judgment, if it is otherwise sufficient.

This brings us to the consideration of the most important question involved in the plea. It is contended on the part of the defendant that, his vessel having been forfeited under the provisions of section 10 of the act of May 6, 1882, for a violation, on the part of the master, of section 2 of the same act, as amended by the act of July 5, 1884, such judgment of forfeiture is a bar to the prosecution of the defendant criminally for a violation of section 11 of the act of July 5, 1884, and in support of this position he cites, among other cases, the following: Ex parte Lange, 18 Wall. 163; U. S. v. McKee, 4 Dill. 128; Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. Rep. 437; and U. S. v. One Distillery, 43 Fed. Rep. 846. There is nothing in Ex parte Lange applicable to the present case. In the Case of McKee the defendant was being prosecuted in a civil action,

under section 3296, Rev. St., to recover the penalty of double the tax on certain distilled spirits, removed to a place other than the distillery warehouse provided by law, and it was charged that the defendant aided and abetted the removal of such distilled spirits. To this action the defendant pleaded that he had been indicted, convicted, and punished for this same offense, under a charge for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon, contrary to the provisions of section 5440 of the Revised Statutes; that the judgment of the court was that he pay a fine of $10,000, and be imprisoned in the county jail for two years; and he further pleaded a full and unconditional pardon by the president, and he exhibited a copy of the pardon with his plea. The court held that the specific acts of removal of distilled spirits, on which the civil suit was brought, were the same acts which were proved in support of the indictment in the criminal case, and that the pardon was also a bar to the civil suit, and, moreover, the court was strongly of the opinion that the pardon would be a good bar to an action for acts not included in that prosecution, but of the same character. The plea was accordingly sustained. Here the same party was being prosecuted in the two actions for the same specific acts, and the issues were therefore identical. This is not the case at bar, as we will find presently, when we come to examine the issues presented by the pleadings.

In Coffey v. U. S. the action was to forfeit certain property under the provisions of sections 3257, 3450, and 3453 of the Revised Statutes. The claimant of the property, in his answer, among other things, set up a prior judgment of acquittal on a criminal information against him by the United States in the same court, founded on the same sections of the Revised Statutes, and he alleged that such criminal information contained allegations of all the violations of law charged in the libel against his property. There was a demurrer to this part of the answer. The supreme court, in discussing the question thus presented, said:

"Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The defendant in the present case certainly does not come within any rule here established,—First, because the prior proceedings

were not against him individually, but for the forfeiture of an offending thing; second, it was not the act of the defendant that was in issue as the cause of the forfeiture; and, third, the judgment was of conviction, and not of acquittal. That these distinctions were recognized as important by the supreme court in the case cited is evident, not only from the language just quoted, but also from what the court further said on the subject. The court said:

"When an acquittal in a criminal prosecution in behalf of the government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same."

The court says further:

"Whether a conviction on an indictment under 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit in rem under that section, and whether a judgment of forfeiture in a suit in rem under it would be conclusive evidence in law for a conviction on a subsequent indictment under it, are questions not now presented."

Referring now to section 10 of the act of July 5, 1884, under which the judgment of forfeiture was entered against the steam schooner Louis Olsen, we find it provides as follows:

"That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

The provision of the act which, it was alleged, the master violated, was section 2, which provides as follows:

"That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year."

The act that was in issue in the forfeiture proceedings was the act of the master, and the alleged guilty thing was the vessel. The defendant was not the master, but claimed to be the owner, and he lost his property because it was, in the judgment of the court, an offender against the law. In the case of The Palmyra, 12 Wheat. 14, the supreme court said:

"The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be malum prohibitum or malum in se. * * * Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other; but the practice has been, and so this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam."

This distinction has been observed in many acts of congress fixing fines, penalties, and forfeitures for the violations of law, and particularly in those relating to the customs revenue, and vessels

engaged in foreign and domestic commerce; and until recently no question has been raised as to the right of the government to proceed in one action for the forfeiture of the offending thing, and in another for the punishment of the offender. In Wapples on Proceedings in Rem (page 22, § 21) the author, in speaking of an action in rem, says:

"The case proceeds without reference to any criminal proceedings that may be at the same time progressing before the same or another tribunal against the culprit; without reference to the entire absence of ownership, should the property have been abandoned; without reference to the fact that the offender may have been already punished for the very act that caused the forfeiture of the property proceeded against. The smuggler, convicted and punished for his crime, cannot plead his conviction in bar of the civil action in rem to declare the forfeiture of the goods smuggled. He is not, in the eye of the law and of the constitution, thus twice punished for the same offense, for the action to fix the status of the goods is not against him."

In the case of U. S. v. Three Copper Stills, etc., 47 Fed. Rep. 495, Judge Barr of Kentucky adopts this view of the law in a case arising under the internal revenue law, and in the course of an able opinion he reviews the decisions in U. S. v. McKee and Coffey v. U. S., and arrives at the conclusion that in neither case did the court intend to declare or intimate that the proceedings in rem, taken to forfeit property, was putting the offender "twice in jeopardy of life or limb," within the meaning of the constitutional prohibition. These authorities would seem to be conclusive of the question now under consideration, but for the reliance placed by counsel for the defendant upon the decision of Judge Ross, of the southern district of California, in the case of U. S. v. One Distillery, 43 Fed. Rep. 846. An examination of that case will show, however, that, like the other cases cited in support of the defendant's plea, it presents a state of facts necessarily limiting the law of the case. The proceedings were under the internal revenue laws. A corporation was engaged in distilling. The secretary of the corporation, who was a stockholder, was indicted, tried, and convicted in 1888 for the violation of certain provisions of the law and regulations relating to the business operation of the distillery, alleged to have been committed in 1887. Proceedings in rem were also taken in 1888 to forfeit the distillery property for these alleged violations of law. Claimants appeared and filed an answer, alleging their ownership of the property in partnership, and its purchase by them at a public sale, in good faith, and for a valuable consideration, after the alleged violations of law. They also alleged that they made large and expensive additions to the property, admitted that they were owners of stock in the original corporation, but denied that they had any knowledge of the alleged frauds on the part of the corporation or its officers, or ever heard of them until after the seizure of their property by the collector. They denied that the brandy and alcohol found on the premises at the time of the seizure constituted any part of the property alleged to have been in possession of the corporation at the time of the violations of law charged against the corporation. They alleged that, in order to secure the release

of their property from seizure and prevent its sale, and save further loss and damage by the suspension of their business, they were compelled to pay, and did pay under protest, to the collector, the sum of $3,392, alleged to have been due to the government by reason of the failure of the corporation to comply with the rules and regulations of the revenue department in 1887. By an amended answer the claimants set up the further defense that the secretary of the corporation had been indicted and tried upon an indictment containing five separate counts, charging him with unlawful acts against the revenue laws while he was the secretary of the distillery company; that upon this indictment he was convicted upon the first count and acquitted as to the other four. The district attorney demurred to this answer, and the demurrer was overruled, the court holding that the same fraudulent acts and omissions that were introduced in evidence in support of the indictment against the secretary of the corporation were presented as grounds of forfeiture in the proceedings in rem against the property; that the right which the government was seeking to enforce in the forfeiture proceedings was a right which vested at the time the fraudulent acts were committed by the secretary, while he was a stockholder in the corporation, and interested in every part and parcel of the property; and to enforce this right was to take his property, and punish him twice.

Without expressing an opinion as to whether the action for a forfeiture might not have been maintained under the statute in that case, it is sufficient for the present purpose to observe that it appears from the statement of the case made by the court that the proceedings in rem involved a retrial of the same issues between the same parties, and in this important particular the case differs from the one at bar. Here the defendant is charged with the violation of section 11 of the act of July 5, 1884, in aiding and abetting the landing in the United States of Chinese laborers from a foreign port or place. It is true the indictment sets forth that he so aided and abetted the landing of such Chinese laborers by furnishing them transportation on the steam schooner Louis Olsen from a foreign port to the United States, and this is substantially the offense charged against the master of the vessel in the second count of the libel of information upon which the vessel was forfeited, but it needs no argument to show that more than one person might be guilty of the offense of aiding and abetting the commission of a crime of this character by the use of the same means. Manifestly, the government will have to show upon the trial of this indictment, either by direct testimony or by evidence from which the fact may be inferred, that the defendant had guilty knowledge of the illegal employment of his vessel, and that he did, independently of the master of the vessel, in fact aid and abet the landing in the United States of Chinese laborers from a foreign port or place. In this view of the case the plea in bar is not sufficient, and the demurrer must be sustained, and it is so ordered.

In re LINTNER.

(District Court, S. D. California. August 30, 1893.)

No. 466.

CHINESE—WARRANT FOR ARREST—EXECUTION OF GEARY ACT—JUDICIAL COGNIZANCE.

A warrant for the arrest of a Chinese person under the act of September 13, 1888, (25 Stat. 476,) will not be refused by a district judge, who has no judicial knowledge that the executive department is without the funds necessary to deport such person under the Geary act of May 5, 1892, (27 Stat. 25.)

Application by William F. Lintner for a warrant for the arrest of Ah Wong, a Chinese person. Granted.

Willoughby Cole, for applicant.

ROSS, District Judge. An application has been made to me, as judge of the United States district court for the southern district of California, based upon a complaint to which the applicant asks to be sworn, for the issuance of a warrant for the arrest of one Ah Wong, charged with a violation of the sixth section of the act of congress entitled "An act to prevent the coming of Chinese persons into the United States," approved May 5, 1892, and commonly known as the "Geary Act." That section of that act was involved in the case of Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. Rep. 1016, and its validity sustained by the supreme court; and there is also in force, as decided by the district court for this district on the 30th day of June, 1893, in the case of U. S. v. Wong Dep Ken, 57 Fed. Rep. 203, section 13 of an act entitled "An act to prohibit the coming of Chinese laborers to the United States," approved September 13, 1888, (25 Stat. 476,) a part of which section reads as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be not one lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

I, therefore, while much regretting that the application has been made to me, feel it my duty, under my oath of office, and in view of the obligations resting upon me to administer the laws of the United States in all cases properly brought before me, to award the warrant, upon a verification of the complaint, in the absence of any judicial knowledge that the department of the government charged with the execution of the provisions of the act of May 5, 1892, is not provided with the means to carry out its provisions. Were I so advised, I would not hesitate to refuse the warrant, for it is plain that

the executive department of the government cannot execute the orders of the judges directing the deportation of Chinamen who failed to register pursuant to the provisions of section 6 of the act of May 5, 1892, unless congress gives it the money with which to send them away. Without the necessary funds, the executive department would be manifestly powerless; and no judge, in my opinion, should order into custody, for deportation, any Chinaman whom he judicially knows cannot be deported by the executive department, for want of the necessary means. Such a course would not only strongly tend to embarrass the administration, but, it is pertinent to ask, what, in that event, would become of such Chinamen? They could not be put in the penitentiary at hard labor, as provided by section 4 of the Geary act, for the reasons given in the recent opinion of the district court of this district in the case of U. S. v. Wong Dep Ken, and any unreasonable detention of them by the officers would doubtless entitle them to discharge on writs of habeas corpus. In the case last mentioned the defendant was found and adjudged to be unlawfully in the United States, and was therefore ordered deported, and was deported by the executive department; and, nothing to the contrary appearing, it is to be presumed that the same department is possessed of similar means for the deportation of any other Chinaman or Chinamen legally found and adjudged to be unlawfully in this country, and for that reason legally ordered to be deported. For these reasons, upon the proper verification of the complaint, the warrant for the arrest of the person complained of must be issued.

UNITED STATES v. CHUM SHANG YUEN.

(District Court, S. D. California. September 5, 1893.)

CHINESE—FUNDS FOR DEPORTATION—JUDICIAL COGNIZANCE—NOTICE FROM ATTORNEY GENERAL.

Congress having appropriated funds for the enforcement of the provisions of the Geary act, a district judge should take judicial cognizance that there are funds for the enforcement of any or all of the sections of such act, and should order the deportation of a Chinaman who has not procured certificates of residence, as required by section 6, although the attorney general has informed such judge "that there are no funds to execute the Geary law, so far as the same provides for the deportation of Chinamen who have not obtained certificates of residence."

Proceeding for the deportation of Chum Shang Yuen for violation of the sixth section of the Geary act. Order of deportation granted.

George J. Denis, U. S. Atty.
G. Wiley Wells, for defendant.

ROSS, District Judge. Pursuant to the provisions of section 13 of an act of congress entitled "An act to prohibit the coming of Chinese laborers to the United States," approved September 13,

1888, (25 Stat. p. 476,) which section was not only not repealed by the act of May 5, 1892, commonly known as the "Geary Act," (Stat. 1891-93, p. 25,) but was thereby, in express terms, continued in force, and based upon a verified complaint charging the defendant with a violation of the provisions of the sixth section of the Geary act, a warrant was issued for his arrest, and made returnable before this court. Upon the calling of the case for hearing the district attorney presented to the court a telegram from the attorney general, a copy of which was placed on file, and which reads as follows:

"Dated Washington, D. C. (Sept.) 2nd.

"To U. S. Atty. Denis, Los Angeles, Calif.: I am advised by the secretary of the treasury that there are no funds to execute the Geary law, so far as same provides for deportation of Chinamen who have not procured certificates of residence. On that state of facts, circuit court of United States for southern district of New York made following order: 'Ordered, that blank be, and he hereby is, discharged from the custody of the marshal, and ordered to be deported from the United States whenever provision for such deportation shall be made by the proper authorities.' Ask court to make similar order in like cases.

"Olney, Atty. Genl."

This communication was, no doubt, occasioned by the statement made in the opinion given at the time of issuing the warrant, to the effect that the warrant was issued in the absence of judicial knowledge on my part that the department of the government charged with the duty of executing the provisions of the Geary act was not provided with the necessary funds for the purpose, and that, were I so advised, no warrant for such offending Chinamen would be issued, nor order for their deportation made. These views were grounded in the fact that to do so would not only greatly embarrass a co-ordinate branch of the government, which, without the necessary funds, would be manifestly powerless to send out of the country persons ordered to be deported, and in the further fact that such offending persons could not be constitutionally imprisoned at hard labor in the state prison, as provided by the fourth section of the Geary act, and because any unreasonable detention of them would entitle them to discharge from restraint by the very court ordering their deportation, or by any other court having the power to inquire, by writ of habeas corpus, into the illegal restraint of such persons of their liberty. Such a course is in no respect inconsistent with the entire independence of the judiciary. While, under our system of government, each of the great departments—executive, judicial, and legislative—is, within its proper sphere, wholly independent of the others, yet the design is that all shall work in harmony, and not at cross purposes. The provision of the statute in question is not a penal law. It was so decided by the supreme court in the case of Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. Rep. 1016. Its enactment was the exercise of the political power by congress to expel a certain class of aliens from the country, which could be exercised, as was decided in the case cited, entirely through executive officers, or through them with the aid of the judiciary. By neither method could the objectionable persons be sent away

without money to defray the necessary expenses of their deportation; and I therefore repeat what was said when awarding the warrant,—that no judge, in my opinion, should order into custody, for deportation, any Chinaman whom he judicially knows cannot be deported by the executive department, for want of the necessary means. But the information conveyed to the court through the attorney general is not that there are no funds available for the execution of the Geary act, but that "there are no funds to execute the Geary law, so far as same provides for deportation of Chinamen who have not procured certificates of residence."

That portion of the Geary act requiring such certificates to be procured is the sixth section, and its validity having been sustained by the supreme court in the case of Fong Yue Ting v. U. S., supra, it is as much a part of the Geary law as any other part of it. Any Chinese laborer violating its provisions, and thereafter remaining in this country, is as much unlawfully here as if he smuggled himself into the country contrary to other provisions of the statute, for the simple reason that in each case the existing law makes the act unlawful. The violator of each is subject to deportation, and equally so. No distinction can be legally made between the offenders, and I can see no valid ground for withholding a warrant for the arrest of any person properly charged with a violation of any of the provisions of the law in question, nor for denying an order for the deportation of any such person, proved, upon a proper hearing, to have violated the law, in the absence of judicial knowledge that the department of the government charged with the duty of executing its provisions is not provided with the necessary funds with which to execute such order. That information, as has been said, is not conveyed by the communication from the attorney general. On the contrary, the clear inference to be drawn from it is that there are funds available for the execution of the Geary law, other than its sixth section. The distinction thus attempted to be drawn between the different offenses denounced by the statute is, in my judgment, without authority of law, and my sense of duty obliges me to disregard it.

Congress made no such distinction in making, as it did, an appropriation for the enforcement of the provisions of the Geary act in the act of August 5, 1892, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes," and in making a similar appropriation for the same purpose in the act of March 3, 1893, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes." The provision first referred to is found in United States Statutes at Large 1891–1893, (page 365,) and is as follows:

"Enforcement of the Chinese exclusion act: To prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China

all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation, and for enforcing the provisions of the act approved May fifth, eighteen hundred and ninety-two, entitled 'An act to prohibit the coming of Chinese persons into the United States,' one hundred thousand dollars."

And the appropriation for the fiscal year ending June 30, 1894, is found in the same volume, (pages 589 and 590,) and is as follows:

"Enforcement of the Chinese exclusion act: To prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation, and for enforcing the provisions of the act approved May fifth, eighteen hundred and ninety-two, entitled 'An act to prohibit the coming of Chinese persons into the United States,' fifty thousand dollars, together with the unexpended balance of the appropriation for this object for the fiscal year eighteen hundred and ninety-three."

The evidence in the case showing that the defendant is, and was at the time of the passage of the Geary act, a Chinese laborer residing in this state, and that he failed to register in accordance with the provisions of the sixth section of that act, and no excuse therefor being attempted to be shown, there will be findings accordingly, and an order that he be deported.

UNITED STATES v. AH FAWN.

(District Court, S. D. California. September 18, 1893.)

No. 487.

CHINESE—DEPORTATION—WHO ARE LABORERS—TREATY OF 1880—CONSTRUCTION.

The words "Chinese laborers," as used in section 6 of the Geary act, (27 Stat. 25,) have the same meaning as in the treaty with China of 1880, (22 Stat. 826,) in which they are broad enough in their true meaning and intent to include Chinese gamblers and highbinders, since section 2 of the treaty by exclusion provides that no Chinese should be entitled to the benefit of the general provisions of the Burlingame treaty (16 Stat. 739) but those who come to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity.

At Law. Proceedings by the United States for the deportation of Ah Fawn for violation of section 6 of the Geary act. Order for deportation granted.

George J. Denis, U. S. Atty.

A. B. Hotchkiss and F. J. Thomas, for defendant.

ROSS, District Judge. The complaint in this case charges the defendant with a violation of the sixth section of the act of congress of May 5, 1892, commonly called the "Geary Act." It alleges that the defendant was at the time of the passage of the act a Chinese laborer within the limits of the United States, and en-

titled to remain therein, and that he failed to procure the certificate of residence required by its sixth section of all such resident Chinese laborers, and that he was found after one year from its passage without such certificate within the jurisdiction of the United States, and within this judicial district. The evidence in the case clearly shows that the defendant is, and has been for several years last past, a gambler, engaged in conducting games of chance in this city. In other cases submitted with the present one the evidence shows that the defendants, in addition to being gamblers, belong to the criminal class commonly called "highbinders." The sixth section of the act in question applies alone to "Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States."

The question to be determined is, what is the true construction of the words "Chinese laborers," as here used by congress? Etymologically, a laborer is one who labors. In that broad sense, a practicing physician is a laborer, and a hard one, too. So, also, is the practicing lawyer. In that sense the professional journalist is a laborer; as is, also, every minister of the gospel. In the same sense every merchant is a laborer. But in neither speech nor writing is such the common or ordinary acceptation of the term "laborer." Worcester thus defines it: "One who labors; one regularly employed at some hard work; a workman; an operative; often used of one who gets a livelihood at coarse, manual labor, as distinguished from an artisan or professional man." And the definition given by Webster is to the same effect. Neither of these considerations furnishes, in my opinion, a true solution of the question. Undoubtedly a gambler is not a "laborer," in the ordinary and popular meaning of that term; nor is a "highbinder," whose avocation is understood to be the commission of any and every species of crime. In the act in question congress did not define the terms "Chinese laborers" employed by it. To ascertain the true meaning of the words so used the purpose of the act must be considered. As its sixth section, providing, as it does, for the expulsion from this country of all Chinese laborers within it at the time of the passage of the act who should fail to comply with its provisions, whether they came here at the invitation of our government or otherwise, in its stringency went far beyond the provisions of the existing treaties between the two countries, it would be altogether unreasonable to hold that the words "Chinese laborers" in that very section of the act were used in any narrower sense than were the same words in the treaty under which congress was legislating. It is pertinent and important, therefore, to inquire what is the scope of those words in that treaty.

Under the treaty of 1868, known as the "Burlingame Treaty," as construed in practice, the Chinese had the absolute right to come in any numbers to the United States. The trouble caused by the great influx of them induced the United States government to ask, through a commission composed of Messrs. James B. An-

gell, John F. Swift, and William Henry Trescot, that the Chinese government consent to such a modification of the Burlingame treaty as would enable it, without raising unpleasant questions of treaty construction, to regulate, limit, suspend, or prohibit Chinese immigration. Commissioners on the part of China were also appointed, and after the necessary preliminary negotiations the United States commissioners made to the Chinese commissioners the following proposition:

"To indicate more precisely the wishes of the United States, we suggest the following proposition for the consideration of the Chinese government:

"Article 1. The United States of America and the emperor of China recognize the mutual benefit which results from the proper intercourse of the citizens and subjects of all nations, and, in order to encourage such intercourse between the two countries, agree that citizens of the United States visiting or residing in China and subjects of China visiting or residing in the United States for the purpose of trade, travel, or temporary residence for the prosecution of teaching, study, or curiosity shall enjoy in the respective countries all the rights, privileges, immunities, and exemptions which are granted by either country to the citizens and subjects of the most favored nations.

"Art. 2. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects, or threatens to affect, the interest of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of the United States may regulate, limit, suspend, or prohibit such coming or residence, after giving timely notice of such regulation, limitation, suspension, or prohibition to the government of China; and the words 'Chinese laborers' are herein used to signify all immigration other than that for teaching, trade, travel, study, and curiosity hereinbefore referred to and authorized and provided for in existing treaties.

"Art. 3. But it is distinctly understood between the contracting parties that all Chinese subjects who, under the faith of existing treaties, have gone into or are now residing in the United States, shall be guarantied all the protection, rights, immunities, and exemptions to which they are now entitled under the provision of said treaties." Foreign Relations of the United States, 1881, p. 177.

On the 22d of October, 1880, the Chinese commissioners submitted to the commissioners of the United States a memorandum in reply, which, so far as it refers to article 2 of the proposition of the United States commissioners, is as follows:

"Section 2 declares that there are difficulties growing out of the immigration of Chinese laborers to the United States, and explains that the words 'Chinese laborers' are used to include all persons except such as go thither for the purpose of teaching, study, trade, travel, and curiosity. The separation of this class from the mass of the subjects of China in this manner is not in strict accord with the spirit of our treaties, and in practical operation would meet with many difficulties. But, bearing in mind the deep friendship between the two governments, in the event of embarrassments on either part, a solution must be sought in a spirit of mutual concession." Id. p. 178.

At a conference of the commissioners of the two countries, held October 23, 1880, the Chinese commissioners submitted to the United States commissioners the project of a treaty, article 2 of which was in these words:

"Chinese who may be desirous of proceeding to any other part of the United States for purposes of labor, excepting only the state of California, shall be allowed to go of their own free will and accord. Persons of all other classes, with the exception of actual Chinese laborers, whose immigration into California will be temporarily regulated and limited by the United

States, whether proceeding to California as teachers, students, travelers, traders, or artisans, as well as all Chinese laborers now in that state, will be allowed to go and come with entire freedom, and will not be included in the limiting regulations." Id. p. 186.

In reporting that conference to the secretary of state, Mr. Evarts, the United States commissioners, under date November 3, 1880, said, among other things, that, the proposition being in Chinese, "we could only gather its general purport from a rapid translation by Mr. Holcombe. Mr. Trescot, on behalf of the commissioners, informed the Chinese commissioners that we would take it into consideration, but that we could and ought to say at once that there were some points which were inadmissible, and could not be received by us even for consideration. The first was the limitation of the provisions of the treaty to Chinese immigration into California. To this the Chinese commissioners replied that such was not their intention, but, as they had been led to suppose from all they heard that objection to such immigration existed chiefly, if not only, in California, they had suggested this form, in order that its discussion might lead to a better understanding. * * * Another point was the exclusion of 'artisans' from the class of Chinese labor whose immigration was forbidden by the proposed provisions. In reference to this Mr. Trescot stated that it was an inadmissible limitation upon that definition of Chinese labor which had been suggested by the United States commissioners. It was deemed best by the United States commissioners," continues the report, "not to do more at this interview than signify their great disappointment at the scope and tenor of the Chinese project, and to reserve a full review of its provisions until it had been translated." Id. p. 182. Subsequently, the United States commissioners submitted to the Chinese commissioners a counter project, articles 1 and 2 of which are as follows:

"Article 1. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects, or threatens to affect, the interest of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of the United States may regulate, limit, or suspend such coming or residence; and the words 'Chinese laborers' are herein used to signify all immigration other than that for teaching, trade, travel, study, and curiosity.

"Art. 2. Chinese subjects, whether proceeding to the United States for purposes of teaching, study, travel, curiosity, or trade, with their body servants, shall be allowed to go and come with entire freedom." Id. p. 187.

The United States commissioners accompanied this last proposition with a memorandum, in which they said, among other things:

"The United States commissioners feel it their duty to insist upon their definition of 'Chinese laborers,' viz.: 'The words "Chinese laborers" are herein used to signify all immigration other than that for teaching, trade, travel, study, and curiosity, hereinbefore referred to, and provided for in existing treaties.' They cannot consent that artisans shall be excluded from the class of Chinese laborers, for it is this very competition of skilled labor in the cities where the Chinese labor immigration concentrates which has caused the embarrassment and popular discontent they wish to avoid. But

they are willing to adopt an article providing that the classes who are authorized to come to and reside in the United States shall bring the servants who are necessary to their convenience." Id. p. 188.

The respective commissioners subsequently agreed upon a treaty, which was afterwards signed and ratified by the respective governments, the articles of which relating to the question under consideration being as follows:

"Article 1. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects, or threatens to affect, the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend, such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers; other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Art. 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Treaties and Conventions, 1776–1887, p. 182.

The United States commissioners, in communicating, under date November 6, 1880, to the secretary of state, Mr. Evarts, their agreement with the Chinese commissioners upon the articles of the treaty, said, among other things:

"We desired, as you will see by the precis of the negotiation, to define with more precision exactly what all the negotiators on both sides understood by 'Chinese laborers;' but the Chinese government was very unwilling to be more precise than the absolute necessity called for, and they claimed that in article 2 they did by exclusion provide that nobody should be entitled to claim the benefit of the general provisions of the Burlingame treaty but those who went to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity. We have no doubt that an act of congress excluding all but these classes, using the words of the treaty, would be fully warranted by its provisions, and as this was a clear and sufficient modification of the sixth article of the Burlingame treaty, we did not feel authorized to risk such a concession by insisting upon language which would really mean no more, and which was entirely unacceptable to the Chinese commissioners. There is not in the treaty any language which modifies this concession, and there was not, as we think, the slightest intention on the part of the Chinese commissioners to diminish the full force of the discretion given to the United States." Id. p. 189.

As finally drafted and agreed upon, the words "Chinese laborers" were not defined; and so their true meaning in the treaty, as in the statute, is a matter for construction.

The history of the negotiations, as already detailed, leading up to the making of the treaty, clearly shows that throughout them the United States commissioners insisted that the words "Chinese laborers" should include all immigration other than that for teaching, trade, travel, study, and curiosity. The first proposal on the

part of the United States commissioners so to define them in the treaty itself met on the part of the Chinese commissioners, not a refusal, but with this response:

"The separation of this class from the mass of the subjects of China in this manner is not in strict accord with the spirit of our treaties, and in practical operation would meet with many difficulties. But, bearing in mind the deep friendship between the two nations, in the event of embarrassments on either part, a solution must be sought in a spirit of mutual concession."

This was followed by a proposal on the part of the Chinese commissioners of articles in which the word "actual" was inserted immediately before the words "Chinese laborers," and inserting the word "artisans" among the privileged classes. These suggestions met with distinct refusals on the part of the United States commissioners, and both of those words were omitted from the treaty as finally agreed upon, signed, and ratified. Their insertion would have given the words "Chinese laborers" the ordinary and popular meaning of laborers as defined by the lexicographers, to wit, those engaged in hard, manual work. Their omission, under the circumstances stated, clearly shows that it was intended that they should have a broader meaning. Moreover, had the intention been to confine the words "Chinese laborers" to those engaged in hard, manual work, the inhibition would have applied to none other, and there would have been no occasion to make a specific provision, as was done by article 2, for the coming to this country of teachers, students, merchants, or those for curiosity, together with their body and household servants. There was, therefore, good ground for the claim, reported by the United States commissioners to have been made by the Chinese commissioners, to the effect that article 2 of the treaty as agreed upon "did by exclusion provide that nobody should be entitled to claim the benefit of the general provisions of the Burlingame treaty but those who went to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity." And that such was also the understanding of the United States commissioners is distinctly declared in their report to the secretary of state, already quoted. Read, therefore, in the light of the accompanying proceedings, it is clear that the words "Chinese laborers" employed in the treaty of 1880 are not limited to those who do hard, manual work, but that they are broad enough in their true meaning and intent to include Chinese gamblers and "highbinders;" and, for the reasons already given, it is manifest that congress, in passing the act of May 5, 1892, did not use the words "Chinese laborers" in any narrower sense than were the same words in the treaty under which it was legislating.

It results that there must be findings for the government, and an order that the defendant be deported.

RIDER v. ADAMS et al.

(Circuit Court, W. D. Pennsylvania. July 3, 1893.)

No. 22.

PATENTS FOR INVENTIONS—VERTICAL TUBULAR CASTINGS—LIMITATION OF CLAIM—INFRINGEMENT.

Letters patent No. 159,533, granted February 9, 1875, to Leman P. Rider, for an improvement in casting tubular articles, as first applied for, claimed, (1) in casting tubular articles in vertical molds, the centering of the core by recesses formed in the opposite ends of the mold; (2) the cope formed in one piece with the core, and having pouring gates formed therein, so that in casting tubular articles the pouring may be done through the core. Only the second claim was allowed, omitting the words, "in casting tubular articles," and adding after "so that the pouring may be done through the core" the following words: "Without disturbing the relative position of the cope and mold." Vertical casting of hollow and tubular articles by the use of a core head in one piece with the cope, and adapted to centering it, was known to the prior art. *Held*, that the patent should be limited to a device for pouring in and through the core head of a cope made in one piece with the core head, thereby avoiding the disturbance of the relative position of the core and mold, and was not infringed by a device for making wagon boxes, wherein the core head is formed with the core and a print at the lower end, the cope being seated at the top and bottom of the mold, and the pouring not being done through the cope or core head.

At Law. Action of trespass on the case by Leman P. Rider against S. Jarvis Adams & Co. for infringement of letters patent. A jury trial was waived, and the case tried by the court. Judgment for defendants.

Joseph M. Swearingen, for plaintiff.

James I. Kay, for defendants.

BUFFINGTON, District Judge. On February 9, 1875, a patent (No. 159,533) for an improvement in casting tubular articles was granted to Leman P. Rider, the plaintiff. This action of trespass on the case was brought after the expiration of the patent for alleged infringement by the defendant firm of the first claim of said patent. Trial by jury was duly waived, and the case heard by the court. Two questions are involved, viz. patentability and infringement. The art involved is the casting of circular hollow articles. By the old method these were cast in a horizontal position. The mold was made in two parts; the lower known as the "drag," the upper as the "cope." The drag was first made in sand containing a part of the pattern, and the remaining part in sand in the cope. The "core," made of sand and other ingredients, and which forms the hollow part of the casting, was placed in the mold cavity in the drag horizontally, and secured at either end by core prints. This core, together with its head and base, was made in one piece. Upon the drag the cope was then placed, being directed to position by dowel pins, and secured by clamps. The molten metal was poured through a hole or pouring gate in the cope, and, reaching the mold cavity, formed the casting. One difficulty in the method was the failure of the core to center,—a thing caused by not packing the

sand evenly, by a jarring of the flask, and by the rising of the metal as poured. In the new method the cores are placed vertically in the mold, are kept in engagement with core prints or seats at each end, and the metal poured in from above. In this change, so far as metal casting generally is concerned, Rider was not a pioneer. It may be he was the first to cast axle boxes, but in doing so he drew very largely on the prior art, as shown in the casting of other articles. The art, prior to his application, showed a patent (No. 121,151) to Brodie and others for casting large iron pipe, in which a vertical metallic flask was used, and a metallic core inserted therein. It was centered at its lower end by engagement with core prints, and "a sand ring, provided with openings, which openings serve the purpose of pouring gates, is then placed over the upper end of the core, so as to fill up the space between the core and mold, and form the end portion of the mold for the bowl of the pipe." This ring formed an integral part of the core when finished, and through it the metal was poured. At McNeal's works, in Burlington, N. J., iron pipes were cast vertically. A large flask was placed in a pit, the pattern put therein and secured to place by a plate at the base, the sand rammed around, and the pattern then withdrawn. A hollow core, wrapped with hay rope, and plastered with a sand composition, was then turned to the desired size in a lathe. It was then placed in the mold cavity, centered at the top by a sand ring placed thereon, as shown in the Brodie patent. The length of the pipe was regulated by the "stopping-off" method; that is, at the length desired the cope was turned to the size of the pattern, so that it fitted closely into the mold, and served to keep the metal from rising higher, and also centered the core. In the mold cavity below the pipe was cast. Grooves or pouring gates were formed on the face of the enlarged head of the cope, through which the metal was poured. It is also shown that at Price & Sims' works, Pittsburgh, pipe balls—that is, tubes with a closed and rounded end—were vertically cast. The mold cavity was formed in the main mold. Cores with the cope or core head and the cope all in one piece, and pouring grooves on the outer surface, not through the head, were used. Hollow caps, with trefoil closed ends, and known as "Weigand Boiler Caps," were also cast vertically at the same place and in Philadelphia. The mold had a cope seat at its upper end. The core and core head formed one piece, and were adapted to fit in the cope seat. On the edge of the core head, and under the face, was a groove, through which the metal ran. It will be noted in the Brodie device the core and sand ring are made separately. In the McNeal the "stop-off" part of the core does not taper, nor does the mold cavity, so as to form a regular core head seat. That in the pipe balls and Weigand caps the ends are closed at the lower ends. That in all these devices, except the Brodie, in case the core head did not fit closely to the core seat on the side of the mold cavity, the metal in passing through the groove or pouring gate was free to enter this space, and move the cope from its central position, and spoil the casting.

In this state of the art, and with other devices in use which we do not deem it necessary to note, Rider applied for a patent. The file wrapper shows his first specification took broad ground, and the claims made are of a like kind. The specification said:

"My invention relates to the method of casting tubular articles, such as axle boxes, iron pipes, etc., and it consists—First, in forming the mold pattern and cope so that the cope will center itself accurately on the mold; secondly, in casting by pouring through the cope; and, third, in the flasks or core box used in forming the core."

The claims then made were: First, in casting tubular articles in vertical molds centering the core by recesses formed in the opposite ends of the mold, substantially as described; second, the cope or base of the core, extending over the edge of the cavity, and having the pouring gates in said cope, so that in casting tubular articles the pouring may be done through the core; and, third, for a box for molding cores, which was afterwards allowed substantially as claimed, and which is not alleged to be infringed. It was held that the patent of Brodie, supra, and of Benson, (No. 37,670,) substantially anticipated the alleged invention, and the application was rejected. The specification was then amended by inserting instead of the part quoted the following:

"My invention relates to the manner of forming molds for casting tubular articles; and it consists—First, in forming the cope with its pouring gates as a part of the cope proper, so that several parts shall at all times hold the same relative position, thus insuring the centering of the core and reducing the number of parts in the mold liable to displacement in pouring; and, secondly, in forming the core flask," etc.

The claim allowed was:

"The cope or base of the core formed in one piece with the core, to facilitate centering the same, and having the pouring gates formed therein, so that the pouring may be done through the cope, without disturbing the relative position of the cope and mold, substantially as specified."

The claim thus allowed was much narrower than the two first made. We notice an absence of the broad claim of centering the cope in vertical molding by recesses in the opposite ends of the mold. The elements "vertical" and "tubular," which are in the rejected claim, do not appear in the allowed one. As allowed, the claims are narrowed from two to one, and this one was limited to a cope or base of the core formed in one part,—this for the purpose of facilitating the centering of the cope,—but with the added limitation of having the pouring gates therein, and this so that the pouring might be done through the cope without disturbing the relative position of the cope and mold. To save the patent it must receive a narrow construction. It is not a pioneer. To give it the broad construction contended for would be to insure its destruction. Such was the case in the patent office. The broad claims made caused its rejection, as they would here, by anticipations shown. It is contended by plaintiff's counsel that pipe balls and Weigand boiler caps do not anticipate, because they are closed at the lower end, and are not tubular. Whether the word "tubular," as found in the specification, is to be confined exclusively to hollow articles,

open at both ends, and is not used in the sense "resembling a tube,"—that is, longitudinally hollow, and in the form of a tube,—may well be questioned; but suffice it to say we find no such word in the claim allowed. We find the word "tubular" in the claim as first made, and necessarily implied also, because a core centered above and below would cast nothing but a tube. We find both claim and word withdrawn, and in the substituted specification, instead of the words, "tubular articles, such as axle boxes, iron pipes, etc.," of the first specification, the words, "such as axle boxes, iron pipes, etc.," omitted. We are of opinion that the claim is not restricted to tubular articles in the sense of being open at both ends; that it is broad enough to cover, other points being waived, the casting of pipe balls, boiler caps, and articles whose core heads are part of the cope, and therefore serve to center it. Under the broad construction of the claim contended for it was clearly anticipated by the McNeal device, for we there find vertical casting, the core head in one piece with the core, and adapted to centering it. The mere fact that the head did not taper as shown in the drawing in Rider's patent is not material, for we find no such requirement in the specification or limitation in the claim. But we are of opinion the claim should not be so construed. Rider was the first one to make a pouring gate in and through the core head of a cope made in one piece with the core head. A careful study of the file wrapper shows the invention finally narrowed down to this: reducing the number of parts liable to displacement in vertical casting joined to pouring through the core head, so as to still further reduce the liability to displacement. On this construction the claim can stand, as no other covers it in view of the prior state of the art. With these limitations, the device of the defendants does not infringe. For making wagon boxes they employ a mold having a core head formed with the core, and a print at the lower end; the cope being seated at the top and bottom of the mold. These molds are formed in clusters in one flask, and surrounding a central basin, in which the molten metal is poured, and from which leaders extend to the sides of the several core heads. These latter are slightly flattened or recessed, to form a passage for the metal to the mold cavity. For molding pipe-welding balls they use molds of substantially the same construction. The pouring gate is not formed in the cope or base of core; the pouring is not through the cope or core head; so the device is liable to the very trouble Rider sought to escape and improve upon, viz. the disturbance "of the relative position of the core and mold." This pouring at the outer edge of the core head is not an equivalent of pouring through the core head,—is not a change of form to avoid the substance of the patent. It is a different method, and one which Rider sought to improve upon; for by it one incurs the risk of the metal running between the core head and the surrounding core print. Under all the facts we are of opinion that the plaintiff is not entitled to recover, and it is therefore ordered that judgment be entered against the plaintiff, Leman P. Rider, with costs of suit.

STONEMETZ PRINTERS' MACHINERY CO. v. BROWN FOLDING MACH. CO. et al.

(Circuit Court, W. D. Pennsylvania. July 18, 1893.)

No. 2.

1. PATENTS FOR INVENTIONS—PRINTING PRESS AND FOLDING MACHINE—CARRYING MECHANISM.
   Letters patent No. 343,677, granted June 15, 1886, to John A. Stonemetz for improvements in a mechanism for carrying sheets of paper from a printing press to a folding machine, said improved mechanism being so constructed that it may be folded when not in use upon the folding machine by means of holes in the carrying mechanism which engage with pins on the folding machine, are infringed, as to all the claims, by a device manufactured under letters patent No. 331,762, issued December 8, 1885, to R. T. Brown, for folding such a connecting mechanism upon the folding machine by means of hinges.
2. SAME—PRIORITY—PATENT AFFORDS PRESUMPTION OF.
   A patent is itself enough to afford a prima facie presumption that the patentee was the original and first inventor of the devices therein claimed, and to overthrow that presumption the evidence must be free from doubt.
3. SAME—DECISIONS OF PATENT OFFICE—WEIGHT.
   The concurrent judgment of the examiner of interferences, the board of examiners, and the commissioner of patents, although not conclusive on the question of priority of invention, is not without weight.
4. SAME—DISCLAIMER.
   A disclaimer filed by an inventor upon an interference declared by the patent office, and which limits his claims to a specific part of the invention in dispute, although it is not strictly an estoppel on an issue of priority subsequently raised between the rival inventors, bears strongly against the party filing it.
5. SAME—IMPROVEMENT—RIGHT TO USE OLD DEVICE.
   The inventor of a new patentable improvement upon an old patented device is not entitled to use the old device. Blake v. Robertson, 94 U. S. 728, followed.
6. SAME—INTERFERENCE—CLAIMS CONCLUSIVE.
   In a proceeding for relief under Rev. St. § 4918, the court cannot, upon the question of interference, go beyond the claims, and consider the two patents as a whole.

In Equity. Bill by the Stonemetz Printers' Machinery Company against the Brown Folding Machine Company and others for infringement of letters patent, and for relief on the ground of interference. A demurrer to the bill was overruled. 46 Fed. Rep. 72. A crossbill was filed, and thereafter stricken from the record. Id. 851. Decree for complainant as to infringement, but for defendant as to the interference.

J. C. Sturgeon, for plaintiff.
Hallock & Gallagher, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This suit is brought on letters patent No. 343,677, dated June 15, 1886, granted to John A. Stonemetz on an application filed March 14, 1883, for improvements in devices for connecting and operating together paper-folding machines and printing presses. The bill charges the defendants with infringe-

ment, and prays an injunction and an accounting, and also charges an interference between said patent and two letters patent granted to R. T. Brown, and now owned by the defendants, namely, No. 331,762, dated December 8, 1885, issued on an application filed May 28, 1883, and No. 322,344, dated July 14, 1885, issued on an application filed August 4, 1884, and seeks relief under section 4918, Rev. St. The invention in question relates to a sheet-conveying device connecting the paper folder to the printing press when the two machines are running together, but which, without disturbing the relative position of the machines, may be removed out of the way when communication between them is not desired. The nature of the invention is sufficiently indicated by the claims of the patent sued on, which we will now quote:

"(1) The combination with a printing press and a folding machine of a frame or table bearing sheet-conveying devices spanning the space between said machines, and adapted to be laid back upon the folding machine, substantially as and for the purpose set forth.

"(2) The combination with a printing press and a paper-folding machine, which are arranged with relation to each other substantially as shown, of a table or frame, A, consisting of two sections, a, a', hinged together, and bearing conveying tapes and tape-actuating rollers, which are operatively connected with the folding machine, which frame is adapted, as shown, to span the space between said machines, when desired, and convey the printed sheets to the folder from the press, and, when communication between said machines is not desired, can be folded back over the folder, as shown, and for the purposes mentioned.

"(3) The combination with a printing press and a paper-folding machine, which are arranged with relation to each other, substantially as shown, of the frame or table, A, composed of the jointed sections, a, a', the rollers, D and E, at the upper end of said frame, the rollers, D' and E', on the folder near the lower end of said frame, the pulleys, H, H', and belt, h, and the tapes, c and d, substantially as and for the purposes set forth.

"(4) The combination with a folding machine of a frame or table bearing sheet-conveying devices, and operatively connected with said machine, and adapted to be placed between the folding machine and a printing press, and removed from the printing press when not in use, substantially as and for the purpose set forth.

"(5) The combination with a printing press and a folding machine of a frame composed of jointed sections, rollers on said frame and on the folding machine supporting endless sheet-conveying tapes, and mechanism, substantially as described, for driving said tapes, as and for the purpose set forth."

Pending the application of Stonemetz, and Brown's application of May 28, 1883, the patent office declared an interference between them, the subjects-matter thereof being thus defined:

"(1) The combination with a folding machine of a sheet carrier hinged to, and adapted to be folded over upon, said machine, substantially as described.

"(2) The hinged carrier provided with the tape-carrying rollers and the tapes, in combination with a folding machine having suitable rollers for the reception of said tapes, and means, substantially as described, for driving the latter.

"(3) The combination with a folding machine of the jointed and hinged carrier, constructed and operating substantially as described and shown."

Upon the question of priority of invention, the decision of the examiner of interferences was in favor of Stonemetz; and upon appeal that judgment was affirmed by the board of examiners, whose

ruling, upon further appeal, was approved and affirmed by the commissioner of patents. Brown then filed a disclaimer, which was incorporated in his specification forming part of letters patent No. 331,762, in the words following:

"I do not claim, broadly, the combination with a folding machine of a sheet carrier hinged to, and adapted to be folded over upon, said machine; nor do I claim, broadly, the hinged carrier provided with the tape-carrying rollers and the tapes, in combination with a folding machine having suitable rollers for the reception of said tapes, and means for driving the latter; nor do I claim, broadly, the combination with a folding machine of the jointed and hinged carrier."

This patent (No. 331,762) contains a single claim, as follows:

"In a sheet-carrier attachment for folding machines, the combination, in the frame of said carrier, of the parts, B, B, and C, the hinges, b, joining the parts, B, B, together in a manner substantially as shown, whereby the two parts will fold with their under sides together; the hinges, C', C', joining the lower part, B, to the part, C, in a manner substantially as shown, whereby the parts, B, B, will fold over onto the part, C,—substantially as set forth."

The parts, B, B, are two sections of the carrier frame, which are united by the hinges, b, placed on the under side, so that the frame will fold together, with its upper side outermost. The part, C, is a piece securely fastened to the top of the folder, at a proper inclination, and to it the carrier frame is connected by the hinges, C', C'. In this latter particular consists the distinguishing difference between this device and the device shown in the Stonemetz patent, which describes a connection between the carrier table and the folding machine by means of holes in the lower end of the table which engage with pins on a bracket on the side or front of the folder. The defendants' alleged infringing device is constructed in accordance with the patent No. 331,762.

The defense which raises the principal question in the case is thus stated in the defendants' printed brief:

"(1) That Brown invented the device shown in his patent, No. 331,762, which is the alleged infringing device, before Stonemetz invented the device shown in the Stonemetz patent in suit, and communicated said invention to Stonemetz."

But it appears by reliable, and indeed uncontradicted, testimony that as early as February, 1882, before Brown's alleged invention of the device shown in his patent No. 331,762, Stonemetz had conceived and described to the witness Walter G. Bennett an attachment between a printing press and paper folder, consisting of a table bearing sheet-conveying devices, namely, tape-carrying rollers and the tapes, spanning the space between the two machines, and adapted to be laid back upon the folding machine when not in use; and such a device Stonemetz set up and put into operation at Somerville, Mass., in the month of June, 1882, at least four months before Brown's alleged conception of the invention. This Somerville attachment embodied the improvement here in question, except that the carrier table was not hinged in the middle, or to the folder. As respects the latter features of

the invention, the positive testimony upon the question of priority is conflicting, and is confined to Stonemetz, on the one side, and to Brown, on the other, as the case is presented to us. The testimony of Edelen, taken in the interference proceedings, and here offered by the plaintiff, clearly, is inadmissible. Richardson v. Stewart, 2 Serg. & R. 84; Clow v. Baker, 36 Fed. Rep. 692. So, also, are Edelen's ex parte affidavit and letters offered by the defendants. Edelen's threatening letter of November 29, 1887, addressed to Stonemetz, and his subsequent conduct, excused the plaintiff from putting him on the stand, and the defendants have not thought it proper to call him. There are, however, some circumstances tending to show the rightfulness of Stonemetz's claim to priority. The Somerville machine, which he undoubtedly devised, was the primary type of this invention. Then, Brown was a workman in the employ of the Stonemetz Printers' Machinery Company, acting under the general instructions of Stonemetz, who was an inventor in this line, and not until after Brown quit the service of that company did he set up claim to the invention.

But, at any rate, here the burden of clear, affirmative proof is upon the defendants. The Stonemetz patent itself affords a prima facie presumption that the patentee was the original and first inventor of the devices therein claimed, and to overthrow that presumption the evidence must be free from doubt. Rob. Pat. § 1023; Patterson v. Duff, 20 Fed. Rep. 641; Duffy v. Reynolds, 24 Fed. Rep. 855. Again the concurrent judgment of the examiner of interferences, the board of examiners, and the commissioner of patents, while by no means conclusive, is not without weight. Machine Co. v. Stevenson, 11 Fed. Rep. 155; Celluloid Manuf'g Co. v. Chrolithian Collar & Cuff Co., 24 Fed. Rep. 275; Kirk v. Du Bois, 33 Fed. Rep. 252, 254. Furthermore, Brown's subsequent disclaimer, upon the strength of which he obtained the allowance of the restricted claim of his patent No. 331,762, although not an estoppel, yet bears strongly against him in the present contest. It can, then, we think, be affirmed confidently that this defense is not clearly established. And, upon the whole case, our conclusion upon the question of priority here raised is with the plaintiff.

We find nothing in the English patent to Davies anticipatory of this invention, or suggestive of it. The defendants' own expert admits that the drawing of the English device is obscure. It certainly is so. Nor are we required, by reason of anything disclosed by that patent, or the American patents in evidence, or by the Milwaukee device, to read into the claims of the Stonemetz patent such precise limitations as would relieve the defendants from the charge of infringement. We think infringement is here shown of all the claims, upon any fair construction of them. And we need scarcely add that even if Brown's patent, No. 331,762, shows a patentable improvement, yet it affords the defendants no justification for their use of the original invention. Blake v. Robertson, 94 U. S. 728, 733. The plaintiff, therefore, is entitled to a decree for an injunction and an account.

But we think a case for relief under section 4918, Rev. St., has not been made out. In the statutory sense, patents interfere only when they claim the same invention, in whole or in part. Manufacturing Co. v. Craig, 49 Fed. Rep. 370. And in a proceeding under section 4918 the court cannot go beyond the claims, and consider generally the two patents as a whole. Id. It has been held that an interference does not exist, within the meaning of the statute, between a patent having a dominant broad claim and a junior patent having a subordinate specific claim. Morris v. Manufacturing Co., 20 Fed. Rep. 121; Pentlarge v. Bushing Co., Id. 314. Here the claim of Brown's patent, No. 331,762 is not coextensive with any of the claims of the Stonemetz patent, but is a very specific and subservient claim. Whether he shows patentable novelty to sustain his claim is a question not involved in this interference issue, (Rob. Pat. § 724,) and upon which we are not now called on to express any opinion. If there is no interference between the Stonemetz patent and No. 331,762, certainly none exists between it and No. 322,344, and, indeed, this particular part of the plaintiff's case has not been pressed.

A decree may be drawn in accordance with this opinion.

BUFFINGTON, District Judge, concurs.

ACCUMULATOR CO. v. JULIEN ELECTRIC CO. et al.

(Circuit Court, S. D. New York. July 18, 1893.)

1. PATENTS FOR INVENTIONS—DURATION OF RIGHT—PRIOR FOREIGN PATENT.
The tests of identity of invention for the purpose of causing a domestic patent to expire on the expiration of a foreign patent, as provided by Rev. St. § 4887, being collated from the leading cases of Siemens' Adm'r v. Sellers, 8 Sup. Ct. Rep. 117, 123 U. S. 276, and Commercial Manuf'g Co. v. Fairbank Canning Co., 10 Sup. Ct. Rep. 718, 135 U. S. 176, are: Is the principal invention of the domestic patent found in the foreign patent? Is the subject-matter of the one the same in all essential particulars as that of the other? Would a structure made pursuant to the foreign patent infringe the domestic patent? Could both patents have been granted in this country?

2. SAME.
The two patents need not be in identical garb, or employ identical forms of expression.

3. SAME.
Evidence of an intention to patent the same invention in the two patents is material and important.

4. SAME.
Admissions, express or implied, that the two patents are respectively for the same invention as a third and earlier patent, issued in a third country, are material and important.

5. SAME—EFFECT OF DISCLAIMER.
The comparison should be instituted with the domestic patent as it was issued, and not as it may afterwards exist, after being cut down

by a disclaimer and limited by the state of the art. If a patent, when granted, covers an invention which had been previously covered by a foreign patent, it expires with the foreign patent, notwithstanding the fact that it has subsequently been pared down to cover only one method of practicing the invention, or restricted to a single claim.

6. SAME—PROCESS AND PRODUCT PATENTS.
Though the domestic patent claim the product, and the foreign patent claim the process, still, where the process makes the product, and the product can be made only by the process, the product and the process constitute one discovery, and the patents are for the same invention. Mosler Safe & Lock Co. v. Mosler, 8 Sup. Ct. Rep. 1148, 127 U. S. 354, and Plummer v. Sargent, 7 Sup. Ct. Rep. 640, 120 U. S. 442, followed.

7. SAME.
The date of issue of the domestic patent is controlling, under Rev. St. § 4887, not the date of application therefor. Gramme Electrical Co. v. Arnoux & Hochhausen Electric Co., 17 Fed. Rep. 838, 21 Blatchf. 450, and Edison Electric Light Co. v. United States Electric Lighting Co., 35 Fed. Rep. 134, followed.

8. SAME—RIGHT TO EXTEND FOREIGN PATENT.
The right to obtain an extended term of the foreign patent on application within a time limited, if not availed of by actual application within such time, does not constitute such a potential term in the foreign patent as to prolong the domestic patent through or into such extended term. Consolidated Roller-Mill Co. v. Walker, 43 Fed. Rep. 575, 580, distinguished. Bate Refrigerating Co. v. Gillett, 31 Fed. Rep. 809, Bate Refrigerating Co. v. Hammond Co., 9 Sup. Ct. Rep. 225, 129 U. S. 151, and Huber v. Manufacturing Co., 38 Fed. Rep. 830, 63 O. G. 311, 13 Sup. Ct. Rep. 603, cited.

9. SAME—INTERNATIONAL CONVENTION.
The international convention of March 20, 1883, to which, among others, Spain, France and the United States are parties, has not the force of a statute in the United States.

10. SAME—SECONDARY BATTERY PATENTS.
Letters patent No. 252,002, issued to Camille A. Faure, on January 3, 1882, for an improvement in secondary or storage batteries, are for the same invention as Spanish letters patent granted to the said Faure on June 27, 1881, for the term of 10 years, and said United States letters patent expired on June 27, 1891, with the expiration of said Spanish letters patent. Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. Rep. 48, 55, distinguished. Brush Electric Co. v. Julien Electric Co., 41 Fed. Rep. 679, 683, 685, cited.

In Equity. Bill for infringement of a patent. On rehearing. Decree dissolving injunction.

The first claim of the patent granted to Camille A. Faure, January 3, 1882, as limited by a disclaimer to an electrode of a secondary battery to which the active layer is applied in the form of a paint, paste or cement, insoluble in the electrolytic liquid, was sustained by this court March 18, 1889. 38 Fed. Rep. 117. It was again sustained on rehearing. 39 Fed. Rep. 490. On the 19th of October, 1891, an order was made permitting the defendants to amend their answer by setting up the grant and expiration of a Spanish patent issued to Faure, June 27, 1881, for the term of 10 years. 47 Fed. Rep. 892. Proofs were taken on this new issue, and the cause now comes on for rehearing upon this issue alone.

Frederic H. Betts, for complainant.

C. E. Mitchell, William H. Kenyon, and Robert N. Kenyon, for defendants.

COXE, District Judge. It is proved beyond question that a Spanish patent was issued to Camille A. Faure June 27, 1881, for a term of 10 years, and that this patent expired June 27, 1891. If the Spanish patent was for the same invention as the patent in suit, it is manifest that the latter expired June 27, 1891. This is the only question: Was the Spanish patent for the same invention? Section 4887 of the Revised Statutes provides:

"But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent; or, if there be more than one at the same time, with the one having the shortest term."

In the leading cases of Siemens' Adm'r v. Sellers, 123 U. S. 276, 8 Sup. Ct. Rep. 117, and Commercial Manuf'g Co. v. Fairbank Canning Co., 135 U. S. 176, 10 Sup. Ct. Rep. 718, the supreme court has made the test of identity to depend upon the following propositions: Is the principal invention of the domestic patent found in the foreign patent? Is the subject-matter of the one the same in all essential particulars as that of the other? In other words, will a structure made pursuant to the foreign patent infringe the domestic patent? Could both the patents have been granted in this country?

Would a person skilled in the art, after reading the description of the invention covered by the Spanish patent, be able to construct the electrode described and claimed in the United States patent? In approaching the subject of identity, it should be remembered that Faure is a Frenchman, and that the first description of his invention was written in the French language. From this original it was translated into Spanish and English. Making allowance for philological differences, for errors and unavoidable changes in translation, and for dissimilarities in patent-office procedure, it could hardly be expected that the United States and Spanish patents would emerge from such an ordeal in identical garb, even though it were the avowed purpose of the inventor to make them the same. There seems to be no doubt that the application as filed in the patent office at Washington was almost an exact counterpart of the Spanish patent, and that both the patent and the application were translated from one and the same French original. "It is evident," says the complainant's brief, "that the original American application was very much like the Spanish patent. The claims were differently phrased, but it is quite possible that they were intended by the translator to cover the same subject-matter." Faure's invention was described by him in the same language, and was presented for their approval to the patent officials of three countries differing widely in their methods for the protection of inventors. If he had made any new discoveries between the date of the French patent and the dates, respectively, of his application in Spain and in the United States, he certainly failed to note the fact in either specification. The proof that he did make such discoveries is very unsatisfactory.

This being so, it precludes the idea that Faure had made many kindred inventions along the same lines, which he was desirous of protecting. Like Mr. Brush for instance. 47 Fed. Rep. 48, 51, 54. Clearly it was his intention to take out a patent for the same invention in the two countries. This is not disputed. One of the experts for the complainant says: "These patents [Faure's] intended to cover the same invention, differ widely."

Faure had taken an important step forward in the construction of secondary batteries, which may be broadly stated as an improvement on the method of Planté, by adding directly to the support the layer of active material which Planté produced by disintegration after weeks and months of effort. This invention Faure described; this invention he endeavored to have patented in France, Spain and the United States. It is now said that he failed in this undertaking; that he patented one invention in Spain, and another in France and in this country. It is argued that this result was accomplished because Faure failed to patent in Spain the invention in the form in which he had actually embodied it, and in which its success had been proved in France—the one form which makes it thoroughly practical and useful. In other words, that he failed to describe the most valuable part of his invention although fully known to him at the time. The inquiry naturally suggests itself, how can this be? How can such a result be reached—an attempt to patent one invention and the actual patenting of another—without the participation or knowledge of the inventor? It will be found on examination that the supposed differences, which are so greatly magnified, are differences of form and not of substance and grow out of different environments and forms of expression. The inventor has described several ways in which the active layer may be applied and it is not surprising that the officials of Spain should have given prominence to one way and those of this country to another way.

Again, there is an express admission that the United States and French patents are the same, the specification of the former stating that the invention was "patented in France, October 20, 1880," and in the oath attached to the application Faure swears that the invention "has been patented to him by letters patent of the French government." There is also an admission, at least, by implication, that the Spanish and French patents are the same. The Spanish law permitted a patent for 20 years, "if it has for its object new and original inventions," but if the inventor had obtained a patent therefor in one or more foreign countries the term was for 10 years only. The French patent had been granted, (October 20, 1880,) when the application for the Spanish patent was filed, (April 16, 1881.) The inventor asked for a 10 years' term in Spain presumably because he knew that he was not entitled to a 20 years' term, the invention having been patented in France.

Furthermore, the proceedings instituted on behalf of the complainant to reinstate the Spanish patent proceeded upon the theory

that the French and Spanish patents were for the same invention. A concession that the French and Spanish patents are the same, is also a concession that the United States and Spanish patents are the same. The latter two cannot both be like the French patent without being like each other also. The description of what Faure discovered was the same in both cases. If the domestic patent is for another invention, the patent should have been granted to the patent-office officials and not to Faure; the changes are theirs and not his. Not only are the two descriptions from the same source, but the drawings, except in a few unimportant details, are identical.

It is a mistake to start out with the hypothesis that the United States patent in terse and perspicuous language, describes the application of the active material in the form of paint, paste or cement, and stops there. It is a mistake to compare the Spanish patent with a patent thus assumed to be clear in language and limited in scope, for it will be found on examination that neither patent is free from ambiguity, and that the real invention of Faure is as plainly proclaimed in the one as in the other. The comparison should be instituted between the patents as they were issued, and not between the Spanish patent and the United States patent as it now exists after being cut down by a disclaimer, and limited by an art existing in this country, of which the inventor knew nothing. If a patent, when granted, covers an invention which has been previously covered by a foreign patent, it expires with the foreign patent, notwithstanding the fact that it has subsequently been pared down to cover only one method of practicing the invention, or restricted to a single claim. A disclaimer cannot add a new invention to the patent. Assume the case of a foreign patent and a United States patent subsequently granted in language precisely identical. Assume that, pursuant to the decision of the court or for other reason, the inventor has disclaimed all of the claims but one and that one is so restricted that it covers only one feature not made prominent in the original patent; can it be said that this proceeding wholly changes the scope and purport of the patent, making it, in fact, a patent for a different invention? If so, disclaimers will be put to new and important uses never dreamed of before. When it is remembered that Faure intended to claim broadly in both patents all described methods of adding the active material, giving no especial preference to any one, there will be less difficulty in perceiving that "the principal invention is in both."

But let it be assumed that the inquiry is: Was the invention of the United States patent, as now construed and limited, previously patented in Spain? Does the Spanish patent cover the method of constructing a secondary battery electrode to which the active material, insoluble in the electrolyte, has been mechanically applied in the form of a paint, paste or cement prior to immersion in the battery fluid, so as instantly to become porous? Does it cover that? If so, it must be conceded on all sides that

it is for the same invention. Both the Spanish and American patents relate to secondary batteries and to improvements upon the method of Gaston Planté. Other similarities and differences will best be appreciated by placing side by side the parts of the two patents which relate chiefly to the invention when limited as above stated.

SPANISH PATENT.

An unlimited power of accumulation is obtained and rapidly manufactured, first, *by covering with plaster* deposits or galvanic coatings, or coatings of a chemical precipitate, the elements of the secondary piles (of the inventor) with a spongy or porous coat of lead, of the thickness that may be deemed fit

The supporting surface is of lead or any other material, and is covered by either galvano-plastic process, or *by a deposit in the form of a paste of some matter, that may be minium;* or an oxide of lead, or any salt of lead whatever, insoluble in the liquid of the pile, or with one or more salts of metals capable of accumulating or storing electrical energy such as manganese and others.

The porosity of the lead (the reduced as well as the oxidized) can be increased by the incorporation of *inert matters, as, for example, coke, in the coating of the oxide or in that of the lead salt.*

For the partitions or compartments, the object of which is to prevent the separation and fall of the porous lead, felt, cloth, asbestos-board, linen or any other porous matter not susceptible of alteration in consequence of this use, may be used; the object of this porous matter, whatever it may be, is to hold fixed in its place against the support, the active composition. In fact, we could employ for the same purpose wire cloth of lead, or any other proper metal, but, in such case, it will be necessary to secure to the support this porous layer, for the purpose of holding the composition; different means can be adopted for securing it, and this will depend upon the nature of the support; for example, rivets of lead, or of any other convenient material; that is to say, a material such that the action of the liquid of the battery upon it may not cause the formation of injurious products.

Instead of rivets placed at different points, a continuous pressure may be obtained by means of threads of wool, placed across the whole.

Figure first represents a couple formed by two elements, A and B, each of

U. S. PATENT.

An unlimited accumulating power is obtained. The electrodes are made by the addition or application of a layer of an active material—metal, metallic oxide of salt—which layer is or at once becomes porous or spongy, to suitable plates or supports, which may be of suitable non-metallic substances as well as of metal. This active material may be applied in various ways, so as to obtain a layer of the desired depth, *as in the form of paint, paste or cement,* in the form of a deposit by galvanic action or chemical precipitation, or otherwise.

In order to render the active layer more porous, the material composing it has preferably *inert material—such, for example, as crushed coke—mixed with it.* The active layer is retained in position upon the support by means of an open-work, perforate or porous medium or partition, which, while allowing free percolation of the electrolytic liquid, prevents the active material from separating either spontaneously or by the slight jarring to which it is liable to be subjected. The retaining medium or partition is made of material which is not liable to be acted upon by the electrolyte used—for example, of felt, cloth, asbestos paper or board, netting of cane, gutta-percha, or caoutchouc, wire-cloth, of lead or other suitable metal, porous earthenware, and the like.

The fastening can be made by rivets, cement, or winding with woolen or cotton yarn, or otherwise.

Secondary batteries, like ordinary galvanic batteries, can be made with a series of cells side by side, or one above the other, with the intermediate walls common to the two adjacent cells. In making such batteries it is advantageous, and in some cases essential, to apply a non-porous partition of rubber or other suitable substance to the plates, so as to cut off all communication between the cells. This combination of non-porous diaphragms with the electrodes in such secondary batteries constitutes a portion of the invention.

Figures 1 and 2 are views in vertical section of single cells, the cell shown in Fig. 2 being provided with porous media for retaining the active layer on

which is formed by a thin plate of lead, covered with a porous metallic coating, and submerged in a rectangular vessel, containing water acidulated with sulphuric acid.

Figure second shows in vertical section a circular couple or cell, formed by an element of lead, A, and a rod or plate, B, of lead or carbon; C is a porous vessel, and D the external vessel containing the acidulated liquid.

An intimate mixture of coke and sulphate of lead is then prepared in such a way that it may be porous, and for this purpose may be used either crushed coke, sawdust, or any other similar substance that may be convenient; this mixture is placed between the vessel C and the element B, and also between C and the element A, but by making use of some proper device, such as a porous piece of earthenware, or in any other way it will be possible to hold together with the element A the coating of said mixture, leaving free the space required for the acidulated water.

The figures third and third *bis* represent a battery of many cells, connected in tension

The figures 4th in elevation and 5th in cross-section both represent a support *a* covered with a coating *b of a paste of minium*, which is maintained adherent to the support by a porous felt C held by some clamps *f*.

To prepare two elements we commence by establishing and securing a separation or partition, as will be hereinafter explained; after this is done, they are set up and mounted in couples, with a liquid, such as water mixed with sulphuric acid, and by submitting them afterwards to the action of an electric current, we obtain on one side a coating of peroxidated lead, and on the other a coating of reduced lead. The pair thus formed is converted into a real deposit or recipient, charged with disposable electricity, and while the discharge is made, the reduced lead becomes oxidized, and the peroxidated lead is reduced until the pair comes once more to an inert condition; that is, ready to receive a new charge of electricity.

Summing up, therefore, the various details already explained, the object of this invention is constituted by the improved batteries or secondary piles, which, having a small bulk and a very light weight, allow the storage or accumulation of a considerable quantity of electric energy, and its principal features are the following, to wit:

FIRST.—The new process, devised by the electrodes, and that in Fig. 1 being without such media.

The cell shown in Fig. 1 consists of two parts, A B, formed each of a thin plate of lead covered with a porous metallic coating, C, and placed in a rectangular vessel, D, containing an electrolytic liquid, F, of, say, sulphuric acid and water. The porous metallic coating may be made of lead, or an oxide or salt of lead applied to the lead plates in any suitable way. In Fig. 2 a circular cell is shown, one electrode being inclosed in the other. The rod B, of lead or carbon, is placed in a porous vessel, G, and is coated with the active accumulating or absorbing material, C, say sulphate of lead mixed thoroughly with coarse coke, sawdust, or other material adapted to make the mass more porous. The other electrode consists of a piece of lead, A, with its inner face covered by *a paste or mixture*, Z, of sulphate of lead and coke or equivalent material, which is held in place by a porous medium or partition, G'. A suitable space is left between the partition G' and the vessel G for the electrolytic liquid. D is the containing-vessel.

The battery shown in Figs. 3 and 3bis has a number of elements connected in tension.

The electrode shown in Figs. 4 and 5 consists of a support *a* covered on both sides with a layer of lead oxide *c*, held in place by sheets of felt *b*, fastened by rivets *f* of lead.

In charging, the electricity acts to produce a reduced mass of porous lead on one electrode and a mass of peroxide of lead on the other. When the battery is discharged the reduced lead becomes oxidized, and the peroxidized lead is reduced until the equilibrium is restored. When again connected with a source of electricity the oxidized lead on one electrode is again reduced and the lead on the other is again peroxidized, and the battery becomes charged ready to give out a current when required.

The oxides or salts of lead not soluble in the electrolytic liquid are deemed the most advantageous for covering the supports of the electrodes. The invention is not, however, limited to these, but includes generally substances capable of absorbing or storing electric energy in the manner described—for example, manganese or any salt the oxide of whose base is insoluble.

What I claim is:

1. As an improvement in secondary batteries, an electrode consisting of a

the inventor for obtaining rapidly and economically electrodes, able to retain and keep a large amount of electrical energy; a process which consists in covering the electrode or support with a coat of metallic substance, porous or spongy, formed and deposited with whatever thickness may be required, by galvanic process, chemical precipitation *or adherence.*

SECOND.—The devices already explained for covering the supports, made of lead or any other proper substance, with a thick or thin coating (at will) of a porous or spongy substance, capable of keeping the electrical energy at the disposal of whosoever may want to make use of it.

THIRD.—The new application of the borders, padding or garniture of India rubber, felt and other proper substances, to maintain and preserve adherent to the supporting plates, the *cement* or layers of metallic matters, such as lead, specially in a porous or spongy condition as above set forth; said metallic matter may besides be mixed or not with inert matter.

FOURTH.—The arrangements above stated are applicable to the case in which the secondary piles are constituted by single leaden sheets forming according to Mr. Plante's method.

FIFTH.—The arrangement of piles or combined elements of parallel faces, forming liquid tight compartments between each element, thus constituting piles, having as many couples as may be the number of elements less one.

SIXTH.—The arrangements and the means of construction described herein and represented in Figs. 4th, 5th and 6th of the annexed drawing, devices and arrangements which allow the inventor to store or accumulate electrical force, and this in a small bulk to be transported to any place that may be convenient; he being at liberty to employ these devices and arrangements either conjointly or severally.

support coated on one or more faces with an active layer of absorptive substance—such as metal or metallic compound applied thereto in the described condition—so as to be or instantly become spongy, and thus capable of receiving and discharging electricity, as stated, in contradistinction to a metallic plate itself rendered spongy by the disintegrating action of electricity, substantially as and for the purpose set forth.

2. In a secondary battery, an electrode having a plate or support coated with an active porous layer of metal or metallic compound, with inert material —such as crushed coke—mixed or incorporated therewith, substantially as described.

3. In combination with the plate or support of an electrode and active spongy layer thereon, an openwork, perforate, or porous medium for holding said layer on the plate or support of the electrode, substantially as described.

4. In a secondary battery, a series of cells, comprising each a pair of electrodes with an active spongy layer thereon, combined with non-porous partitions between adjacent cells, substantially as and for the purpose set forth.

5. An electrode for secondary batteries, comprising a support, an active spongy layer of metallic substance, and a holding medium through which the battery-fluids may pass, adapted to hold said layer on said support, said support, layer and holding medium being all fastened together, so as to be capable of transportation, substantially as described.

6. A battery comprising a series of plates clamped together with strips of rubber or like material placed between every two placed near the edges, so as to form the bottom and ends of narrow troughs or cells with open tops, the sides of the troughs or cells being formed by the plates, and the latter being clamped firmly, so that liquid-tight joints are formed, substantially as described, the projecting edges of the plates, when metallic, being protected by insulation, substantially as described.

The italics do not appear in the originals.

Without pausing to examine the various features of the Spanish patent relating to the porous holding media and the arrangement of the electrodes in a series of cells, which will be found in each instance to be similar to the United States patent, I proceed at once to consider whether or not what is now called the principal

invention is found in each. The use of a paste is not, it is true, recommended in the Spanish patent as the best way of applying the active material, but neither is it in the United States patent. It is suggested in both, but the language is rather more general in the latter than in the former. The United States patent says:

"This active material *may be applied in various ways*, so as to obtain a layer of the desired depth, as in the form of paint, paste or cement, in the form of a deposit by galvanic action or chemical precipitation *or otherwise.*"

No preference is here expressed for one way over another. The United States patent does not inform the public how the paint, paste or cement is prepared or applied. The use of sulphuric acid is not suggested as an ingredient, and the use of a spatula is not suggested for making the application. This is equally true of the Spanish patent. But if a man of ordinary intelligence would know that a paint, paste or cement of active material is not to be applied by galvanic or chemical processes he would know equally well that a plaster of active material or a paste of minium is not to be so applied. The Spanish patent certainly suggests the mechanically applied paste coating, and could be limited to such a coating by disclaimer as well as the United States patent. If the words "galvanic process, chemical precipitation or" were omitted from the first claim of the Spanish patent, and corresponding words were stricken from the description, the patent would protect the paint, paste or cement method as effectively as the United States patent.

The Spanish patent describes the supports as covered "by a deposit in the form of a paste of some matter that may be minium;" and, again, "with a coating *b* of a paste of minium, which is maintained adherent to the support by a porous felt C held by some clamps." To the ordinary mind this language seems perfectly clear; it means just what similar language means in the United States patent. To give to it a different signification the words must be wrested from their ordinary meaning, the improbable substituted for the probable, and incongruity for common sense. One of the criticisms made by the complainant's experts is that the language referred to is an appropriate description of coating by galvanic action or chemical precipitation. In order to meet this suggestion it is shown that a paste of minium, either by galvanoplastic action or by chemical precipitation, is, for all practical purposes, at least, out of the question; it can only be applied mechanically. The Spanish patent also speaks of covering the elements with "plaster coatings." The first claim is intended, inter alia, to secure the process of covering the electrode with a coat of active material by "adherence," and the third claim refers to "the cement or layers of metallic matters." If the language quoted from the Spanish patent does not convey to the mind as clear an idea of what Faure actually did as the phrase "in the form of paint, paste or cement," it is only because this expression did not occur to him or the solicitor who prepared the description of the Spanish patent. The phrase does not occur at all in the specification filed with the application for the United States patent or in the description

and claims as they originally went to the issue division. It seems to have originated with the solicitor who prepared the amended specification as the outcome of a fortunate accident.

In the Spanish patent "paste" is used, "cement" is used, and, if "paint" is omitted, its place is supplied by "plaster," which is an equally appropriate word. Sir William Thomson, in describing the Faure invention, used this word in preference to all others. He said: "The battery consisted of sheets of lead *plastered* over with a paste of moistened red-lead." If the Spanish patent had said that "the active material may be applied in the form of plaster, paste, or cement," it would probably be admitted that it contained the invention of the United States patent. But it does say exactly this, though not in precisely the same order—the idea is there; the information is the same. One skilled in the art could learn the mechanical application in the form of a paste equally well from both patents. The United States patent furnishes no information on the subject that is not found in equally clear language in the Spanish patent. It is true that the first claim of the former is for a product, and of the latter for a process, but the process makes the product, and the product can be made only by the process. It was the use of this process that was made free by the expiration of the Spanish patent. Where a product is produced by a certain process, and only so, it cannot be said that he who first discovers the process, and by it produces the product, has made two inventions. "The product and the process constitute one discovery." Mosler Safe & Lock Co. v. Mosler, 127 U. S. 354, 8 Sup. Ct. Rep. 1148; Plummer v. Sargent, 120 U. S. 442, 7 Sup. Ct. Rep. 640. An electrode made by the Spanish process would infringe the United States claim; and an electrode made in Spain pursuant to the United States method would infringe the Spanish claim. The same is true if both patents are limited to the paint, paste, cement or plaster method.

The second claim of the Spanish patent is not clear, but it was intended, apparently, to cover the described means of coating the electrodes with the porous or spongy mass. The fifth claim is designed to cover the same arrangement as the fourth claim of the United States patent. I am constrained to think, therefore, that the invention of the United States patent, even though construed as the complainant insists it should be, is covered by the Spanish patent. Few, if any, of the conditions are present here which differentiated the foreign from the domestic patent in Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. Rep. 48, 53. On the other hand, many of the reasons are present which induced the court to hold that "Case I" and "Case J" of Brush were for the same invention. Brush Electric Co. v. Julien Electric Co., 41 Fed. Rep. 679, 683, 685. It is thought that the principal invention of the United States patent is found in the Spanish patent; that an electrode made pursuant to the latter patent would infringe the former, and vice versa, and that the former could not have been granted in this country if the latter had previously been granted

here. The subject-matter is essentially the same in the two patents. An electrician, after reading one, would be as able to construct a mechanically coated Faure electrode as after reading the other.

It is argued that section 4887 is not applicable, for the reason that the United States patent was applied for before the Spanish patent was granted. This question is not an open one in this court. Gramme Electrical Co. v. Arnoux & Hochhausen Electric Co., 17 Fed. Rep. 838, 21 Blatchf. 450; Edison Electric Light Co. v. United States Electric Lighting Co., 35 Fed. Rep. 134. Whenever the able and interesting argument in support of the complainant's contention is presented to a tribunal which is at liberty to consider it, it will unquestionably receive the attention it deserves.

It is argued for the complainant that the Spanish patent has a potential term of 20 years. The patent was granted June 27, 1881, for a term of 10 years. It expired June 27, 1891. On August 31, 1891, it was declared extinct by the proper authority. On March 20, 1883, two years after the patent was issued, Spain and France entered into a convention by which, in certain circumstances, the terms of patents might be extended. To this convention the United States was a party. The director general of the Spanish department of agriculture, industry and commerce, which department has charge of all subjects relating to patents, decided that the provisions of this convention were retroactive. It is probable, therefore, that if application had been seasonably made the patent would have been extended till June 27, 1901. But the application was not made until March 26, 1892, long after the patent had lapsed, and after the expiration of the time within which an application could be made for an extension. On the 30th of March, 1892, the application was denied.

It is thought that this subsequent international convention, even if it had the force of a statute, and it had not, cannot be considered as prolonging the term of the United States patent. It is not necessary to consider what might have been the result if the Spanish patent had been extended. It was granted for 10 years; it expired in 10 years, and no effort was made to rehabilitate it until long after it had lapsed. This is not the case of a patent granted for a long term, but expiring because of the failure to observe some condition subsequent. Here the life of the patent was definitely fixed for 10 years, and it never had any other term. In Consolidated Roller-Mill Co. v. Walker, 43 Fed. Rep. 575, 580, the foreign law providing for a potential term was in force when the foreign and domestic patents were granted, and it was held that the patents were limited by the optional, and not the designated, term. This is not such a case. Bate Refrigerating Co. v. Gillett, 31 Fed. Rep. 809; Bate Refrigerating Co. v. Hammond Co., 129 U. S. 151, 9 Sup. Ct. Rep. 225; Opinion of Attorney General Miller, (April 5, 1889,) 47 O. G. 398; Huber v. Manufacturing Co., 63 O. G. 311, 13 Sup. Ct. Rep. 603, 38 Fed. Rep. 830.

For the reasons stated in Brush Electric Co. v. Electrical Accumulator Co., 47 Fed. Rep. 48, 55, this decision has been reached with reluctance. Those reasons do not, it is true, apply with the same force to an invention made abroad by a foreigner as to an invention made by one of our own citizens; but the statute in its practical operation has failed to remedy the supposed evil at which it was aimed, and the duty of overthrowing a valuable patent under its provisions is one that the court would naturally wish to avoid. But the question, do the patents cover the same invention? is fairly presented, and its decision cannot be avoided.

After giving the complainant the benefit of every reasonable doubt, the court is convinced that the question must be answered in the affirmative. The longer the record is studied, the more settled becomes the conviction that the invention which Faure patented in Spain and in the United States was the invention which he made and patented in France, that, so far as the inventor was concerned, the language was substantially identical and that the changes in phraseology made by the translators and patent-office officials, of which changes the inventor was ignorant, did not and could not operate to change the invention.

It follows that the defendants are entitled to a decree dissolving the injunction issued April 12, 1889.

EDISON ELECTRIC LIGHT CO. et al. v. ELECTRIC MANUF'G CO. et al.

(Circuit Court, E. D. Wisconsin. July 20, 1893.)

1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATIONS—PROOF OF NEW DEFENSE.

Where a patent has been sustained after protracted and expensive litigation, the right of the patent owner to a preliminary injunction against a new infringer can only be defeated by a new defense, which is sustained by such convincing proof as will raise a presumption that it would have defeated the patent, if produced at the original trial. This rule requires that every reasonable doubt shall be resolved against the new defense. Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. Rep. 678, followed, and Same v. Columbia Incandescent Lamp Co., 56 Fed. Rep. 496, disapproved.

2. SAME—INCANDESCENT ELECTRIC LAMPS.

On a motion for a preliminary injunction against the infringement of letters patent No. 223,898, issued January 27, 1880, to Thomas A. Edison, for an improved electric lamp, the proofs of an alleged anticipation by Henry Goebel in 1854, and subsequently, are insufficient to overcome the effect of the adjudications sustaining the patent, and the injunction should therefore issue. Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. Rep. 496, disapproved.

In Equity. Bill for the infringement of a patent. On motion for a preliminary injunction. Granted.

R. N. Dyer, C. E. Mitchell, F. P. Fish, W. G. Beale, and H. G. Underwood, for complainants.

W. C. Witter, W. H. Kenyon, A. P. Smith, and W. H. Webster, for defendants.

SEAMAN, District Judge. This is a motion for preliminary injunction. The complaint alleges infringement by defendants, manufacturers of electric lamps at Oconto, Wis., of the second claim of letters patent No. 223,898, issued to Thomas A. Edison January 27, 1880, and adjudged valid, after protracted contest, in the circuit court for the southern district of New York, affirmed by the circuit court of appeals of the second circuit. Edison Electric Light Co. v. United States Electric Lighting Co., 47 Fed. Rep. 454; Id., 3 C. C. A. 83, 52 Fed. Rep. 300. The defendants have answered, the original answer admitting infringement of said second claim, as construed in said decisions, but by an amended answer (allowed at the hearing) take issue upon such infringement, avowedly upon their proposed new showing as to the prior state of the art, through the alleged Goebel invention, and the narrower construction which should thereby be placed upon said second claim, and further setting up prior invention by one Henry Goebel, not litigated in the New York case. For and against the motion, voluminous records, affidavits, and depositions, with sundry exhibits, are presented, to which reference will be made.

It is shown that litigation in behalf of this patent has been actively carried on since May, 1885, both directly and collaterally; that after obtaining favorable decisions in other cases, wherein issues under this patent were involved, and defending successfully against the Sawyer & Mann patent, (Consolidated Electric Light Co. v. McKeesport Light Co., 40 Fed. Rep. 21,) judgment was obtained in July, 1891, in its action in the southern district of New York, against the United States Electric Lighting Company, sustaining the second claim of this patent, and decreeing injunction, (47 Fed. Rep. 454,) which was affirmed by the circuit court of appeals for the second circuit in October, 1892, (3 C. C. A. 83, 52 Fed. Rep. 300.) The defendant in that case having turned over to the Sawyer & Mann Electric Company the business of manufacturing, suit was brought against the latter, and injunction granted, and affirmed by the same circuit court of appeals, in December, 1892. 3 C. C. A. 605, 53 Fed. Rep. 592.

It further appears that injunctions have been granted against other infringers in this circuit and in various other circuits without serious contest, and that in the district of Massachusetts, in complainant's suit against the Beacon Vacuum Pump & Electrical Company, the motion for preliminary injunction was vigorously contested upon the grounds presented here, and in an exhaustive opinion handed down by Colt, J., February 18, 1893, the injunction was ordered. 54 Fed. Rep. 678. On the other hand, in a suit by complainant against Columbia Incandescent Lamp Company, in the eastern district of Missouri, upon similar motion and additional affidavits, an opinion was rendered April 21, 1893, by Hallett, J., refusing the injunction, if the defendants should give a bond. 56 Fed. Rep. 496. All of the records and affidavits before the courts, respectively, in the Beacon Case and in the Columbia Case, are here, and much additional testimony; that upon the

part of defendants, taken since such hearing, in rebuttal, under an order of this court, being in the form of depositions, and with cross-examination of witnesses. Therefore, this court has the benefit of the opinions handed down at those hearings, and the embarrassment, as well, of deciding here between apparent differences in views as to the measure of proof demanded.

In the opinion in the Beacon Case, the rule applicable to this defense against the motion is stated, citing a number of authorities, as follows: "The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him;" also, that "the presumption of novelty is not to be overcome, except upon clear and convincing proof." The showing there made is reviewed at length, and found insufficient to meet the requirements of the rule.

The opinion in the Columbia Case is not yet reported, but in a copy, furnished for this hearing, the views which controlled the decision are stated as follows: "There is not the measure of proof demanded by complainants' counsel, who maintain that the court should require proof of the fact beyond reasonable doubt. This degree of certainty is not often attained upon testimony in the form of affidavits when the issue is contested, and it is not reasonable to demand such certainty as to the defense. Complainants must show a clear right in support of a preliminary writ, and a defense which puts the case in doubt is sufficient to defeat the application;" and for its conclusions against the injunction holds: "It is enough to say that there is a fair preponderance of testimony in support of the Goebel claim."[1] Decisions of the supreme court have settled beyond controversy that, for the defense of anticipation and prior use against a patent, the proof must be "clear, satisfactory, and beyond a reasonable doubt." The Barbed-Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. Rep. 443, 450; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. Rep. 970; Coffin v. Ogden, 18 Wall. 120. And that has been the constant rule in this circuit. Smith v. Davis, 34 Fed. Rep. 783; Manufacturing Co. v. Haish, 4 Fed. Rep. 900, 10 Biss. 65; American Bell Tel. Co. v. American Cushman Tel. Co., 35 Fed. Rep. 739.

The decisions and text-books agree upon the general rule stated in the opinion of Judge Colt, (54 Fed. Rep. 679,) that an adjudication of the validity of his patent, after bona fide contest, and especially after long and expensive litigation, entitles the complainant to a preliminary injunction, in a suit against other infringers, and that the only question open upon his motion therefor is that of actual infringement by the defendant of the claim so adjudged valid. Other defenses are then reserved to final hearing, and injunction issues as of course in the same court and by comity in other courts. One exception to this rule is sometimes allowed, and that is where there is clear showing of a meritorious defense which was not before the court in the original suit, and which, had it entered into consid-

[1] 56 Fed. Rep. 496.

eration, would probably have defeated the patent or claim. It is under this exception that the defendants assert their right to oppose this motion, and their affidavits are directed to proving an invention and use by Henry Goebel prior to that of Edison. Although sundry other claims of priority have been set aside by the courts in the course of the litigation, this one was not presented, and the defendants have a right to their day in court for its hearing. The question here is whether there is such clear showing of merit for this claim now asserted that the defendants should be relieved from the general rule by denying in their case the usual injunctional order, and the primary inquiry is, what must be the measure of proof demanded? Must it be of the quality and quantity required to defeat the patent at final hearing,—"clear, convincing, and beyond reasonable doubt,"—as held by Judge Colt, or will it suffice, for denial of the motion, that it shows "a defense which puts the case in doubt," as held by Judge Hallett? It is clear that the presumptions must be in favor of the patent, and that it cannot be overthrown by a mere doubt. I think the true test for proof upon the motion is that it shall be sufficient to raise a presumption that it would have defeated the patent, had it been produced at the trial. This would demand, at least, the full measure required to overcome the presumptive force of the patent, and that every reasonable doubt be resolved against the defense, here as it would be there, as held by Judge Colt. In the eyes of the law, at this stage, the complainants stand upon their rights, with their letters patent confirmed after arduous contests, and entitled to preliminary injunctions against infringers; and the defendants must place themselves entirely within the exception to the rule, if they invoke the privileges of that exception, and would deprive the complainants of the fruits of their hard-earned victories. The rule held by Judge Colt will therefore be adopted here, and the following additional authorities are cited as supporting it: Macbeth v. Glass Co., 54 Fed. Rep. 173; Accumulator Co. v. Consolidated, etc., Co., 53 Fed. Rep. 795; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. Rep. 795; Seibert Cylinder Oil-Cup Co. v. Michigan Lubricator Co., Id. 33; Ladd v. Cameron, 25 Fed. Rep. 37; Hussey v. Whitely, 2 Fish. Pat. Cas. 120; Jones v. Merrill, 8 O. G. 401; Potter v. Fuller, 2 Fish. Pat. Cas. 262. I have examined with care each of the authorities cited in the opinion of Judge Hallett, and others noted by defendants' counsel, but they do not impress me as supporting the rule held in that opinion, or as modifying the rule pronounced in the cases above cited.

With the adoption of this rule, it is not necessary to review in this opinion the affidavits and exhibits which were before the court in Massachusetts, in the Beacon Case, as a careful examination has fully satisfied me with the review and criticisms contained in the opinion of Judge Colt, and the conclusions reached by him at that stage. And of the additional evidence introduced at St. Louis, in the Columbia Case, it might be sufficient to hold, in accordance with the view stated in the opinion of Judge Hallett, with which I agree,

that "there is not the measure of proof demanded" by this rule. Resting upon those conclusions, it would only be necessary to consider the new testimony which has been presented here, and determine whether it has cleared the doubts which have come from the former hearings, but an understanding of the conclusions reached requires for preface a statement of some of the doubts which have been impressed upon my mind by these records.

Edison's discovery was published late in 1879. It promised an incandescent electric lamp which would supply the great want of an operative commercial light, suitable for domestic uses, cheap and practical, and aroused great interest and excitement in commercial and scientific circles. Lighting by electricity had long been an accomplished fact, in arc lamps and various single burners, but the problem which had remained unsolved was a method of subdivision of the light, for which scientists in Europe and America were seeking, and which many of them pronounced impossible,—an ignis fatuus. It was the solution of this problem that Edison thus announced. As stated by Mr. Justice Bradley in the McKeesport Case, 40 Fed. Rep. 29–31:

"This was the real, the grand, discovery in the art of electric lighting, without which it could not have become a practical art for the purposes of general use in houses and cities. * * * We think we are not mistaken in saying that, but for this discovery, electric lighting would never have become a fact."

The invention claimed by Edison was a lamp which is "the embryo of the best lamps now in commercial use." The second claim of his patent, here involved, described it as follows:

"The combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth."

The thread or filament of carbon for a burner was the fundamental discovery to obtain this subdivision of electric light, for by its use he obtained the high resistance which was essential to the multiple arc system, and avoided the use of enormous conductors of the electric current, the cost of which were otherwise prohibitive of subdivision. He found that, for stability of this thin carbon, it was necessary to have a high vacuum, and remove all gases, to prevent what he calls "air washing." This led to the entire-glass receiver or chamber for the lamps, and finally to platinum leading-in wires sealed into the glass, because "the coefficient of expansion of glass and platinum was the same," and the high vacuum would be retained, while iron or copper wires would destroy it. This discovery was therefore in successive steps, and only as essentials for the great object of subdivision of light.

Each of the steps is claimed to have been discovered or taken by Henry Goebel many years before Edison. Against all the improbabilities of this claim, the story, as related by Goebel in his several affidavits with detailed confirmations by many witnesses, is interesting, circumstantial, and in many respects plausible, and

I do not wonder that it has attracted such earnest advocacy by able counsel contesting this patent.

Henry Goebel is now 75 years of age; a German; came to this country in 1848, and has every since resided in the city of New York. He appears to have been an excellent and ingenious mechanic, engaged in watchmaking, manufacturing barometers and thermometers and delicate instruments, and has shown much interest and aptitude in electrical appliances and experiments. He claims to have made incandescent electric lamps, identical with the Edison claim in all particulars, from about 1854, and that these lamps were operated by primary batteries of his own construction, and used at his store for show and lighting in various ways, and for some time had such lamps on a wagon traveling about the streets of New York, with a telescope, also of his own construction. He says he made many of these lamps each year prior to Edison's patent, all for his own use or gratification, but not so many after 1872 as before. In 1880, and later, he was engaged in making electric lamps for the American Electric Light Company, a rival of Edison's, and making similar lamps. This meager statement cannot fairly present his story, but must suffice, with mention that he was, before leaving Germany, very intimate with a Professor Munchausen, who had experimented with the production of arc and incandescent electric lights, and gave him the ideas which he carried out here. Goebel does not claim that he ever worked or thought in the line of subdivision of electric lights, and the history of that art presents strong reasoning against his anticipation. As to the improbabilities of this discovery so long undiscovered, it is sufficient to refer to the comments in the opinions in Telephone Cases, 126 U. S. 556, 8 Sup. Ct. Rep. 778, in American Bell Tel. Co. v. American Cushman Tel. Co., 35 Fed. Rep. 735, and in Same v. People's Tel. Co., 22 Fed. Rep. 309, as well applicable here. I will refer to some of the doubts raised, upon the defendants' showing, as to the actual components of these alleged Goebel lamps, remarking that the testimony of the numerous witnesses, however honest, speaking of such delicate structures seen by them many years ago, cannot justly be accepted as absolute verity.

1. This fundamental, thread-like carbon burner of Edison only became necessary as a means to subdivision of electric light, which was not contemplated by Goebel. The latter operated with a primary battery, for which the larger "pencil" form of carbon or other material would answer as well, would be much more stable, and more easily made. This filament is most delicate and difficult to make, and must have a high vacuum, or it will be instantly consumed. It seems unnecessary and undesirable for his purpose, and no satisfactory reason is given for its adoption by him.

2. The Goebel lamps are not shown to have had the high vacuum required for anticipation. His statement in his first affidavit that he exhausted his lamps by the Torricellian method in the years prior to 1879 must be accepted for this point, and I think it is abundantly shown, although not without some contradiction,

that such a method could not produce the vacuum necessary to prevent disintegration of the carbon; and it seems doubtful whether it could be employed at all with this delicate carbon in the receiver. If that vacuum was wanting, the claim fails.

3. No motive is shown for such constant manufacture of these lamps throughout the years from 1854 to 1880, involving so much of time and expense, and especially of great expense in maintaining the batteries for their use, and no attempt to dispose of even one, or to utilize them for domestic purposes, excepting in a few stray instances. It seems improbable that the constant practice here asserted, and so useful for the purposes of this defense, would have been kept up without clear object.

4. Why did he not apply for a patent? He was not ignorant of the patent laws, for in 1865 he is shown to have applied for a patent on a sewing-machine hammer, and in 1881 he is found applying for some minor improvements, one of them being a coil shown in his exhibit lamps.

5. The lamps which Goebel produced at Boston as original lamps, made in the early years, were four, called "Exhibits 1, 2, 3, and 4." The first three, only, were produced at the hearing with his original affidavit; the fourth being in the hands of counsel for defendants, but withheld because of doubts as to its authenticity, which doubts were afterwards cleared to their satisfaction, and this lamp then introduced by leave of court, with additional and explanatory proofs. The first three had copper and iron leading-in wires, were of what Goebel calls "fiddle-bow" or "meat-saw" pattern, and show no vacuum now, and, if fully proved, would not constitute anticipation of Edison. No. 4, called the "Hairpin" pattern, has the requisites, including a vacuum, although, probably, not the high vacuum. It is not now operative, by reason of some defect. Goebel swears that it was operated, but experts who have examined the defect swear that it has existed from its manufacture, and it could not have produced light. This lamp shows the highest excellence of the glass blowers' art, is stated by experts to be beyond the ability of any amateur, and many peculiarities are pointed out, in the perfect shape of the carbon, the glass bridge and position of leading-in wires, which seem to show adoption of methods which have been produced and developed from the experience of commercial manufacturers since Edison's invention. The statements as to its make, its keeping, or its having been operated, are not clear or convincing to the court, if they have been made so to counsel. Exhibit lamps No. 9 and 11, brought to St. Louis, are no more satisfactory than No. 4.

6. After Goebel's employment in lamp making by the American Company, his claim of anticipation received some attention, and he had negotiation with one Dreyer, in 1882, for arranging a company to exploit the claim. It failed because he was then, apparently, unable to produce an original lamp. Later, it was investigated by eminent patent lawyers at various times, and apparently with great care and interest, to employ it in defenses against this

patent, and also by one in behalf of the complainant, and all rejected it as not well founded. Prof. Thomson, of the Thomson-Houston Company, investigated it in 1882,—when it would have been of vital interest to his company to make use of it against this patent, if tenable,—and, after visiting Goebel, rejected its consideration. Dr. O. A. Moses, an inventor, with similar object, visited Goebel frequently, but came to the same conclusion, and says he was unable to produce any lamps. These are potent circumstances to raise doubt.

Coming to the new testimony produced for this hearing, and which I have carefully considered, I find that the depositions in behalf of the defendants are mostly cumulative, (or in rebuttal of certain new affidavits produced by the complainants, and not here considered,) but I cannot find that they remove any of the doubts above noted.

On the other hand, affidavits now produced by complainants tend to show an admission by defendants' witness Henry Goebel, Jr., (a son of the claimant,) that he manufactured exhibit lamps Nos. 1, 2, and 3, in 1892, for the purposes of this case. There is no denial of this, but it is claimed that this son is venal, and has deserted the defense to favor the complainants. One Hager, a glass blower, swears that he made for Goebel, while working with him, "in the early eighties," lamps similar to No. 4, and he thinks he made this one at that time. As to a planer which was produced by Goebel as made by him at an early day to cut bamboo for his carbon burners, one Korwan (who is corroborated by Hager) swears that it was actually made by him in 1883. This is contradicted as to date by an affidavit produced by defendants.

Upon the whole showing, I am satisfied that the complainants are legally entitled to preliminary injunction, and that it is the duty of the court to grant it without evasion. As stated by Judge Colt, and often held, a bond by defendant is not the equivalent of the injunction which the law gives for the protection of the inventor in the exclusive privileges promised by his patent.

The fact that the defendant company only organized and commenced manufacture of its lamps after the decisions sustaining the patent is an important consideration for this view.

Injunction will therefore issue, but with leave to defendants to move for requirement of a bond by complainants to indemnify the defendants for any damages they may suffer if it shall be finally held that the patent is invalid.

AMERICAN PATENTS CO. et al. v. DE BEER.

(Circuit Court, N. D. New York. July 21, 1893.)

No. 5,955.

1. PATENTS FOR INVENTIONS—INVENTION—BALL MACHINES.

Claim 1 of letters patent No. 216,305, issued June 10, 1879, to Samuel Brown, for a machine for making balls out of leather scraps or other

similar material, and which consists of two dies, between which the material is compressed, each die having a cavity somewhat less than a hemisphere, so that the expansion of the material after compression will form a true sphere, is void as being the product of mere mechanical skill.

2. SAME.

Claims 2 and 3, which cover, respectively, an airhole in the dies, and a bell-mouthed cylinder, in which the dies work, are likewise void for want of invention.

In Equity. Suit by the American Patents Company and others against Jacob de Beer for infringement of a patent. Bill dismissed.

Alfred W. Kiddle, for complainants.
Andrew J. Nellis, for defendant.

COXE, District Judge. This is an action of infringement founded upon letters patent, No. 216,305, granted to Samuel Brown, June 10, 1879, for a machine for making balls out of leather scraps and similar material by pressure. "The object of the invention is to produce a ball of accurate and uniform shape with great rapidity and ease of manipulation." The scraps to be pressed are placed in a bell-mouthed vertical cylinder in which move two closely fitting dies having a cavity which is somewhat less than a hemisphere. Of these the patentee says:

"The dies A and A' are preferably made of steel, and fit very accurately in the cylinder C. Their edges are sharp, and the cavity in each, though a portion of a true sphere, is somewhat less than a hemisphere, so that when the two are brought in contact, the mold formed by them nearly resembles in shape an oblate spheroid. This is an important feature of my improvement, since the expansion of the material when the pressure is released tends to loosen and throw out the ball, instead of binding it tightly within the die, as is the case when the cavity in each is a true hemisphere."

When pressure is applied the material is compressed in the mold formed by the two dies into the shape of an oblate spheroid. The upper die is then lifted and the ball is forced up and out of the cylinder by raising the lower die. After the pressure has been removed the elasticity of the material makes the ball assume a spherical shape. In short, the leather scraps are put into a cylinder and pressed between dies into the desired shape. This is all.

The claims involved are as follows:

"(1) In a machine for making balls from scraps or other elastic material by pressure, a die having its cavity substantially of the form specified and shown, whereby the expansion of the material on the removal of pressure frees the ball from the die. (2) In a machine for making balls from scraps or other elastic material by pressure, a die having airholes, substantially as for the purpose set forth. (3) In combination with the dies, closely fitting therein, the cylinder C, having a beveled or flaring mouth, substantially as described and shown."

The defenses are want of novelty and patentability, noninfringement and insufficiency of the specification.

If the record were not full of machines operating on principles similar to the patented machine the court would take judicial knowledge of the fact that the process of pressing material to be molded, between two dies of the desired shape, is old. It is un-

necessary to consider these machines for it was conceded at the argument that the precise structure shown and described would be devoid of patentability if the cavity formed by the dies, when brought together, were a true sphere. This concession is in exact accordance with the proof. The simple question is: Did it require invention to make a cup-shaped die—a die with a cavity "somewhat less than a hemisphere?" This is not a patent for a process or a product, but for a die. Patentability must be found, therefore, if at all, in the die or mold. Soap or wax or celluloid could be molded in the patented machine with perfect impunity. If this identical machine had been used for pressing such materials —and similar machines did exist—could Brown have obtained a patent for it simply because he used it to press leather instead of wax? Assuredly not. A chemist may make a new and useful compound in a mortar a century old, but he is not entitled to a patent for the mortar. There is nothing new about the machine of the patent. It operates in precisely the same way whether it presses clay or pulp, wax or leather. If the theory of the complainant is correct the next person who uses such a machine, on discovering that the material which he has occasion to compress contracts on the line of pressure, may make the dies "somewhat 'more' than a hemisphere" and have a patent for that. There was no invention in making a cup-shaped mold. But it is urged that in the art of ball making, the object being to produce a round ball, the mechanic would naturally make a round mold in which to compress the material; that such a mold would not operate successfully, because when the pressure is taken off, the material expands into an elongated ball; and that it required invention to make a mold which produced a perfectly round ball. Conceding that such an argument can be legitimately applied to a claim which is not for a ball or for a process of making balls, but is limited to a die of designated conformation, the conclusion by no means follows. Would it not occur to the ordinary workman, after he had removed the ball from the round mold and had observed that it expanded on the line of pressure, that the proper thing to do would be to compress it into a space less than a sphere so that the resiliency of the material would cause it to expand into a perfect ball? When he had discovered that the round mold would not squeeze the material tight enough the perfectly obvious thing for him to do was to squeeze it tighter. This could only be done by making the dies shallower. The court is of the opinion that the first claim is void for want of patentable novelty. Butler v. Steckel, 137 U. S. 21, 11 Sup. Ct. Rep. 25; Baumer v. Will, 53 Fed. Rep. 373; Bush v. Fox, 38 Eng. Law & Eq. Rep. 1; Hailes v. Stove Co., 8 Sup. Ct. Rep. 262; Marchand v. Emken, 132 U. S. 195, 10 Sup. Ct. Rep. 65.

The second claim is for an airhole and the third is for a bell-mouthed cylinder in combination with the dies. Of course there is no invention in making an airhole or a cylinder with a flaring mouth. The bill is dismissed.

SMEAD WARMING & VENTILATING CO. v. FULLER & WARREN CO. et al.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. PATENTS FOR INVENTIONS—DRY CLOSETS—NOVELTY.
Patent No. 314,884, granted March 31, 1885, to Isaac D. Smead, for a dry closet in which warm air drawn by ventilating pipes from the rooms of a building is used to desiccate fecal matter by passing the air through a vault made in the form of a tube, and so arranged as to receive deposits distributed along its surface in comparatively small quantities at any given place, is not without novelty, in view of patent No. 264,586, granted September 19, 1882, to William S. Ross, for a vault which is placed between a furnace and a smoke flue, and in which fecal deposits are received on a shelf, over and around which products of combustion are made to pass.

2. SAME—ENLARGING CLAIM.
As Smead did not originate the idea of utilizing the warm air which was drawn from a room, or the means by which the air was introduced to the vault, but took the ventilating ducts, the gathering chamber, and the vent shaft of the Ruttan system, and simply improved the vault, he cannot omit the ventilating ducts, and claim that his patent includes any openings or apertures which perform the office of ventilating pipes, and introduce air into the vault.

3. SAME—INFRINGEMENT.
Where a flue is constructed from a urinal to a vault room, in which there is a grate, and the foul air from the urinal is drawn through the flue into the vault, and then out of doors through a chimney, the flue infringes the Smead patent, as it conveys a portion of warm air into the vault, and tends to produce desiccation.

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. Bill by the Smead Warming & Ventilating Company against Fuller & Warren Company and the Fuller & Warren Warming & Ventilating Company for infringement of letters patent No. 314,884, granted March 31, 1885, to Isaac D. Smead, for a dry closet. The bill was dismissed in the court below, and complainant appeals. Reversed.

John W. Munday and Lysander Hill, for complainant.
Esek Cowen, for defendants.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the northern district of New York, which dismissed the complainant's bill in equity for an alleged infringement of letters patent of the United States No. 314,884, dated March 31, 1885, to Isaac D. Smead, for a dry closet.

This patent had previously been the subject of examination in the same court in the case of Smead v. School Dist., 44 Fed. Rep. 614. The opinion of Judge Wallace in that case contained the following careful description of the invention:

"The dry closet of the patent is one in which air is used to desiccate fecal deposits, render them innocuous, and remove the foul odors from the building. The treatment of such deposits in buildings where a large number

of persons use the closets is a problem which architects and sanitary engineers have attempted to solve in various ways. Water-closets, with their sewer connections, involve the well-known danger of the generation of disease germs, as well as the expense and annoyance commonly incident to plumbing. Earth closets smother the foul odors, and do not thoroughly dry the deposits, and the absorbing material so soon becomes charged with the odors that the closets become offensive if they are not frequently and carefully cleansed; and it would seem manifest that they could not be practically employed for the use of several hundred persons in a single building. The dry closet, in which the deposits are desiccated by an air current constantly forced into contact with them, is especially adapted for use in buildings where the general system of heating and of ventilation can be utilized to furnish the air current, and convey it out of the building. The present invention is more especially designed for use in such buildings. The invention described in the specification and shown in the drawings consists of a system of foul-air ducts, a gathering room, a deposit vault, and a vent shaft, so constructed and arranged in relation to each other that the air drawn from the various rooms in the building to ventilate them shall be delivered at one end of the vault, and pass horizontally through it to and out of the vent shaft. The foul-air ducts leading from the several apartments may be constructed so that each one will ventilate several rooms, or only a single room. They are connected with the rooms, preferably by a register, and are connected by intermediate ducts with the gathering chamber, so as to concentrate there the entire volume of air drawn from the building. The gathering room is located at one end of and opens into the vault. The vault is a horizontal tube, which serves as an air duct between the gathering room and the vent shaft. It is oblong in form, and is of sufficient length to receive the fecal deposits from a series of closets located side by side above it. The vent shaft, or exit shaft, extends from the base of the vault to and above the roof of the building. It opens into the vault, and is provided with means for creating a strong draught through the vault from the gathering room. The specification states that the location of the closets in the building will be governed by circumstances, and it is immaterial where they are located, so long as the vault is so arranged that the air from the building will be conducted through it, and from thence into the outer atmosphere at such a point that it will not be wafted back into the building through the doors or windows. The specification implies that buildings like those in which the dry closets will be employed are usually heated by a furnace or furnaces; and in that case the means described for securing the necessary draught for the vent shaft are provided by building the furnace flue alongside the vent shaft, and heating the vent shaft by the smoke and gases which escape from the furnace; and when the furnace is not in use a heater of any suitable kind, located within the shaft, is employed; or 'any of the known appliances in use may be availed of to increase the draught,' in case it should be found necessary to do so. The specification contains this summary of the invention: 'From the foregoing description it will be seen that the gist of my invention consists in so arranging the closets in relation to the exhaust ducts and ventilating shaft or shafts as to cause the foul air which is drawn from the rooms to pass through the vault which receives the fecal deposits, and desiccate the same, and at the same time take up and carry off all foul odors. As the air leaves the rooms at a temperature of about 65 degrees, it will readily be seen that it is in a condition to rapidly absorb moisture and produce a drying effect upon any matter with which it may be brought in contact. By this method the fecal matter is quickly desiccated and greatly reduced in volume, so that its removal is easily and quickly accomplished. If desired, a small amount of plaster, dry earth, or other absorbent material, may be from time to time thrown into the vault; but, in practice, I have not found this necessary or advisable, because of the rapidity with which the deposits in the vault were dried up by the passage through it of such a large volume of warm air. By this method I am enabled to avoid all the serious difficulties or objections which have heretofore existed in reference to closets, especially when located within buildings, the

closets themselves being as free from offensive odors as are the ordinary rooms of the building.'

"The claims of the patent are as follows: '(1) The combination and arrangement of one or more ducts for the removal of the foul air from a room or rooms of a building; a vault for receiving and retaining the fecal deposits, connected with said duct or ducts; and a ventilating or exit shaft, connected with said vault, whereby the warm air from within the building is made to desiccate or dry the deposit in the vault, and remove all odors therefrom to the outer air, as set forth. (2) The combination in a building of a series of foul-air ducts, B, a gathering room, C, a vault, D, and a ventilating or exit shaft, E, with means, substantially such as described, for creating a draught through the same, substantially as and for the purposes set forth. (3) A dry closet arranged in relation to the ducts which convey the air from the room or rooms in a building, and the ventilating or exit shaft, substantially as shown and described, whereby the foul and warm air from the room or rooms is made to pass through said dry closet, and thence out through the ventilating shaft, as and for the purposes set forth.' "

In 1862, Henry Ruttan, of Canada, published a valuable book upon the ventilation and warming of buildings, which described a ventilating and heating system which has been extensively and successfully used in public buildings and private residences in this country. He also described in the same book a closet to be used in connection with his ventilating system, which, for the reason hereinafter mentioned, proved unsuccessful, and an attempt which was made to introduce it into private residences was soon abandoned. It had the vent shaft of his ventilating system and a single basin, not a tube or an air duct, in which all the deposits from the various closets were collected, and which was placed in front of an opening into the vent shaft. The air current, whatever it was, reached only the top of the deposits, and did not thoroughly dry them. It might take away odors, but there was no desiccation. Smead, who was connected with the corporation which was introducing to the public the Ruttan ventilating system, thought that an operative dry closet might be made, and, instead of a single basin, inserted a tubular vault between the gathering chamber and the vent shaft. This tube received the deposits distributed in small quantities along its length, and was a conductor for an air current. The deposits, when thus thoroughly under the influence of a continuous and large current of warm air, were thoroughly and rapidly dried, and made odorless. It is indispensable that the air should have been warmed. The introduction of air from the outside of the building is ineffectual. The closet of Smead, thus made successful, is largely used, and is of great benefit in buildings having a large number of occupants. His first claim, although his vault differed radically from Ruttan's basin, was broad enough to include a vault of any description and was therefore, if literally construed, anticipated by Ruttan, and, as the result of the Wellsville Case, was disclaimed. The second claim specifies the actual invention of Smead as described in the specification. The third claim is for the elements of the second claim, except that the ducts are not called a "series," and the gathering chamber is omitted,—an element not essential, and which can be omitted without impairing the beneficial character of the closet.

The defendants in this case rely to a certain extent, as did the defendant in the Wellsville Case, upon a patent to William S. Ross, No. 264,586, dated September 19, 1882. The invention therein described consisted in mounting the ordinary privy box over a metallic frame and a horizontal furnace with a chamber for the deposits. It was, as stated by Judge Wallace, "a furnace for baking or burning fecal deposits by heat." The vault is between the furnace and the smoke flue; the deposits are received upon a shelf within the vault, and the products of combustion pass over and around the shelf. This patent has no relation to the Smead device.

The question of infringement is the important one in this case, and arises upon the construction of two dry closets in a public schoolhouse in Somerville, Mass. They were made by one or both of the defendants in accordance with the plan or system advertised by the Fuller & Warren Company. The first and second stories of the Somerville building were ventilated without any connection with the basement. Two closets, one for the boys and another for the girls, were placed in the basement, which was subdivided by arches and openings into separate rooms, not closed by doors. The two closets were constructed alike, except that the girls' closet did not have the duct which led into the boys' closet from the urinal, and which will be described hereafter. A description of the boys' closet will be sufficient. The deposits in the Fuller & Warren vault are destroyed by cremation. Those in the Smead vault are, after the drying process is completed, removed in baskets. At one end of the vault in the Somerville closet is a vent shaft. At the other end, in the wall which separates the vault room from the janitor's room, is an opening, about 20 inches wide and from 16 to 20 inches high, in which is a grate, used exclusively for drying the air which enters the vault through the opening. The persons in charge of the building are instructed by the printed directions for operating the system to make a fire in the grate once each week, to thoroughly dry the solid and evaporate the liquid matter in the vault. The fire in the grate increases the evaporating power of the air, and dries the fecal matter, so that it may be burned without offensive odor. Such a fire must be used in cold or damp weather, for warm air is a necessity. It is probably true that in warm weather a fire may be dispensed with. A supply of air constantly enters the vault from the opening, is drawn through the vault, serves to ventilate the room in the basement in which is the opening, and this air, when sufficiently warm, dries the deposits. An opening or a slot along the length of the urinal in the room in the basement known as the "boys' play room," when it reaches the end of the urinal slab, is closed circumferentially, and becomes a flue, which curves around the end of the closet, and delivers the air it has accumulated into a little space at the end of the vault in which is the opening. The air in the urinal is drawn through the closet vault to the chimney. This duct or flue was made for the purpose of ventilating the urinal, and successfully accomplishes that object. The holes or apertures are not pipes, as the ducts of the

Smead specification are, but the air in the basement is drawn into them, and this air, when it is sufficiently heated, and passes through the vault, accomplishes the desiccating work which the foul warm air conveyed through the ventilating ducts of the Smead system also accomplishes.

As the construction of the two closets in the Somerville house is not the same, the question of infringement by the girls' closet, in which apertures only are used, will be first considered. The complainant contends that an aperture is a short duct, and that it is of no importance whether the duct of the patent is long or short, and that, if an aperture accomplishes the result of the invention, it is the duct of the patent. This statement evades the question, which is whether the ducts of the claims of the patent must not be construed, in the light of the specification and of the history of the invention, to be ducts which are the pipes of the ventilating system; in other words, whether the combination in the claims is not limited to a combination of ventilating pipes and the other elements. The circuit judge, in considering this question, came to the reluctant conclusion that "the ducts of the patent are something more than an aperture in a wall between one room and another." The court said:

"The whole description shows that the term is used in the common sense of a tube or canal by which a fluid or other substance is conducted or conveyed. The duct of the patent is designed for air in a system of ventilation, to conduct the air taken out for ventilation from a series of rooms or a single room to the entrance of the dry closet, for use there in desiccating or drying the deposits. The patent speaks of the ducts as 'foul-air shafts,' which convey the air from the room, built in the walls or partitions, so as to not occupy the space in the room, or alongside of the walls in the sides or in the corners of the rooms, where they will afford the least obstruction."

This language truthfully expresses the obvious idea which the patentee had of his ducts, which were, in his mind, the pipes which contained, in the language of the specification, "the foul warm air which is taken out of the rooms for ventilation." Although this is true, if the invention had been a broad one, the patentee would be entitled to a broad construction of his patent, and a court would be at liberty to give latitude to the language of the claims. The inventor took the ventilating ducts, the gathering chamber, and the vent shaft of the Ruttan book, discarded the single basin, and lengthened the vault, so that the current of air might have free access to the deposits, and thereby made a good closet, but his invention was not a primary one. He did not originate the idea of utilizing the warm air which was drawn from a room, or the means by which the air is introduced into the vault, and he did not apparently have in his mind, or suggest in the specifications, any other means. The construction to be given to his patent must correspond with the extent of his invention. The actual invention, if in conformity with the language of the claims, should control in the construction of patents. A strict construction should not be resorted to if it becomes a limitation upon the actual invention, unless such construction is required by the claim, it being understood that the

construction should not go beyond and enlarge the limitations of the claim. Merrill v. Yeomans, 94 U. S. 568; Railroad Co. v. Mellon, 104 U. S. 117. In this case Smead's improvement upon Ruttan was in the vault, and not in any of the other elements, and to permit him to omit the pipes and include any openings, although they perform the office of pipes, by which air is introduced into the vault, would give him a larger invention than he made. Railway Co. v. Sayles, 97 U. S. 554. We concur with the circuit court that the patent is not infringed by the use of the girls' closet.

The boys' closet has an additional element in its construction. The flue from the urinal in the play room was conducted into the end of the vault in which the grate was placed for the purpose of ventilating the urinal; the foul air was drawn through the flue into the vault, and out of doors through the chimney, and thereby ventilation was successfully accomplished. The testimony of the defendants' witnesses makes it apparent that this flue is a duct in the exact sense in which the word is used in the patent. It conveys a portion, though probably a small portion, of warm air into the vault, and tends to produce a desiccating result. If no other means was used, this flue would be insufficient, but by its use the defendants have intruded upon the territory covered by the Smead patent, and have infringed its third claim. The patent cannot justly be construed to have reference only to a series of ducts leading from different stories of a building. It is not compulsory that in a building of more than one story the invention should be used in all the stories, or in all the rooms, or in more than one room of a single story. The third claim indicates that the foul-air ducts may convey the air from a single room.

The decree of the circuit court is reversed, with costs, and the cause is remanded to that court, with instructions to enter a decree for injunction against the infringement of the third claim of the patent, and for an accounting and for costs.

FEATHERSTONE v. GEORGE R. BIDWELL CYCLE CO.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.)

1. PATENTS FOR INVENTIONS—REISSUE—VALIDITY—PNEUMATIC TIRES.
   The fourth claim of reissued patent No. 11,153, granted March 24, 1891, to John Boyd Dunlop, which covers the combination with the rim of a cycle wheel, and an inflated, expansible tire, of a tubular, nonexpansible confining envelope surrounding said tire, and provided with flaps or free edges turned over and cemented to the inner face of the rim, is invalid, because it seeks to broaden the invention of the original patent of September 9, 1890, by omitting from the combination an element clearly described in the specifications, and included in the claim, namely protective strips of caoutchouc interposed between the edges of the rim and the strengthening folds. 53 Fed. Rep. 113, reversed.

2. SAME—OMISSION OF ELEMENTS.
   The omission from the claims of a reissued patent of an element of the combination which is clearly a part of the invention described and claimed in the original, and obviously constitutes an efficient and valuable member thereof, will render the reissue invalid, although such element is not indis-

pensable to the device, and its omission would not render the same inoperative.

8. SAME—PROVINCE OF COURTS—REVIEWING COMMISSIONER'S DECISIONS.
The courts should not hesitate to review a decision of the commissioner of patents that there has been inadvertence, accident, or mistake justifying a reissue, when the invention claimed in the original is obviously the same as that described in the original application, and when the application for the reissue discloses no explanatory facts adequate to account for the alleged mistakes which are sought to be corrected.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by Alfred Featherstone against the George R. Bidwell Cycle Company for infringement of letters patent. The circuit court rendered a decree for complainant. 53 Fed. Rep. 113. Respondent appeals. Reversed.

Francis I. Chambers, for appellant.
Saml. A. Duncan, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. By the decree of the circuit court, it was adjudged that the fourth claim of the reissued patent No. 11,153, granted to John Boyd Dunlop for an improved wheel tire for cycles, was valid, and had been infringed by the defendant. The defendant contended, and now insists, that the fourth claim of the reissue is void, because it is for a different invention than that covered by the original patent to Dunlop, and because the original patent was surrendered, and the reissue obtained, not to correct a mistake, but merely for the purpose of securing by that claim a patent for a broader invention.

The original patent was for an invention which Dunlop had patented in England March 8, 1889, and embodying an improvement upon an invention patented by him in England in 1888. It was applied for in this country March 11, 1890, and, as appears by the file wrapper, was allowed by the patent office April 7, 1890, in the form asked for, without any amendment to the description or claim recited in the application. The final fee was not paid, however, for several months thereafter, and the patent was issued September 9, 1890. The patent relates to pneumatic wheel tires for vehicles, especially bicycles, consisting essentially of an annular air cushion, which is secured to the rim of the wheel. Prior to the application for the patent, as appears from earlier patents and publications, tires formed of elastic tubes filled with compressed air, and secured in a variety of ways to the rims or fellies of ordinary wheels, both of bicycles and other vehicles, were old. The tires had been composed of an interior, expansible tube of rubber, inclosed in a nonexpansible strengthening and confining envelope of canvas, both inclosed in an outer envelope, and the tire, as a whole, had been attached to the rim or felly of the wheel in various ways. The invention of the original patent consisted in a new organization of parts which were old in previous pneumatic tires, whereby two improvements were effected,—one in the tire itself,

and the other in securing the tire to the rim or felly of the wheel in a more advantageous way than had been done previously. The latter improvement was accomplished by (1) covering the steel rim of the wheel with canvas; (2) surrounding the edges of this covered rim with strips of caoutchouc, or other elastic substance; and (3) inclosing the rim thus covered and protected in a canvas fold forming part of the nonexpansible envelope of the pneumatic tire. This canvas envelope was made of two folds or layers, one of which was cemented to the inside of the outer inclosing envelope, and the other was cemented to the first layer, and the ends of the latter were made to encircle the edge protectors and rim, and were cemented to the canvas covering of the rim. The nearest approach to this method of fastening is found in one of several United States patents issued to Amos W. Thomas in March, 1889, wherein, as described, the tire is fastened to the rim by bands which surround the tire and rim, and are cemented thereto.

The specification of the original patent describes the invention as follows:

"In carrying out my invention, I employ an external covering, A, composed of a layer or fold of India rubber, which is thickened at that portion which comes in contact with the ground. An inner expansible tube, B, also of India rubber, contains the air or gas under pressure. C is the metallic rim of the wheel, which is somewhat flattened to obtain a large bearing surface, and enveloped with a protective strip, a, of canvas, cloth, linen, or the like. Strips, D, of caoutchouc or other elastic substance, are interposed between the edges of the rim, C, and the folds or layers, b, c, of canvas or linen, hereinafter more particularly referred to, so as to protect the latter from being cut by the edges of said rim, C. A strengthening fold or layer, b, of cloth, linen, or canvas, which is cemented or otherwise affixed to the inner surface of the external covering, A, envelops the inner tube, B, and the rim, C, to which latter it is cemented, or otherwise securely fastened, so as to retain the tire thereon in an efficient manner; a strengthening fold or layer, c, of linen or canvas, being attached to the inner surface of the before-mentioned layer, b, and cemented to the linen or canvas layer, a, encircling the metallic rim, C. The enveloping folds or layers of canvas, b, c, effectually resist any undue pressure that may be exerted by the contained air or gas at any particular point, and thus prevent deformation of the tire. The said folds or layers, moreover, serve to effectually maintain the tire in the desired position on the metallic rim, C, of the wheel."

The claim of the original patent was as follows:

"In hollow, air-inflated wheel tires for cycles and other vehicles, the combination with an inner expansible tube, B, and outer protective covering, A, of strengthening folds or layers, b, c, of cloth, canvas, or linen, and protective strips, D, of caoutchouc, interposed between the edges of the rim, C, and strengthening fold or layer, b, substantially as and for the purposes herein set forth."

After the patent was granted, and in October, 1890, a corporation, the Thomas Inflatable Tire Company, was organized in this country for the purpose of acquiring certain United States patents for pneumatic tires which had been granted to Amos W. Thomas in March, 1889. Before the application was made for the reissue of the complainant's patent, this corporation had been advertising its rights under the Thomas patents, and warning the public against infringements, and insisting that the pneumatic tires made under the Dunlop patent were infringements; and this was

known to the complainant, who was then about to acquire the Dunlop patent, and he had entered into negotiations with that corporation looking to a purchase of its patents, or some arrangement with it by which any conflicting interests might be united. Pending these negotiations, and in December, 1890, a patent solicitor was employed in behalf of the owner of the Dunlop patents to examine the Thomas patent and other patents, and advise relative to obtaining a reissue. He made an investigation of the records of the patent office, and after doing so prepared, and caused to be forwarded to Dunlop, the application and accompanying papers upon which the reissue was granted. The oath accompanying this application sets forth, in general terms, that the original patent was inoperative and invalid, for the reason that the specification was defective and insufficient; that such defect and insufficiency consisted in the inaccuracies and omissions more particularly pointed out in the statement and specification of errors thereunto annexed; and that the errors arose from accidents and mistakes. In the accompanying statement and specification of errors, the inaccuracies and omissions pointed out in the specification consist wholly of unimportant particulars, but the petitioner states that the claim "does not describe correctly any part of the invention, and does not conform to the specification;" "that he did not examine the specification with such care as to detect the inaccuracies and defects therein;" and "that said inaccuracies and defects, through such inadvertence, entirely escaped his attention." The application for the reissue was filed January 26, 1891, and the reissue was granted March 24, 1891, the new description and claim recited in the application being allowed without any modification by the patent office. Although there are formal changes in the descriptive part of the specification of the reissue, none of them are of any consequence, as they neither omit nor add anything which materially alters the specification of the original. In the place of a single claim in the original patent, the reissue has seven claims. Some of these claims are for inventions which Dunlop was not entitled to patent. The first claim is for his earliest invention in pneumatic tires, which he had patented in England in 1888. The seventh claim, notwithstanding a verbal change, is substantially identical with the claim of the original patent, and, as the parts were described in the original by letters of reference to the drawings, the change was unnecessary.

At the hearing in the circuit court the complainant abandoned any charge of infringement by the machines of the defendant, except as to the fourth and fifth claims, and the court adjudged that the fifth claim was void for want of novelty.

The fourth claim of the reissue is as follows:

"The combination, with the rim of a cycle wheel and an inflated, expansible, tubular tire, of a tubular, nonexpansible confining envelope surrounding the said tire, and formed or provided with flaps or free edges turned over and cemented to the inner face of the rim, as set forth."

It is obvious that the protective strips which are incorporated into the claim of the original patent, but which are omitted in the

fourth claim of the reissue, are not an indispensable part of operative fastening devices for securing a pneumatic tire to the rim of the wheel. It is also obvious that they can be omitted from the fastening devices of Dunlop without rendering the other devices inoperative. Yet it is equally obvious that they are an efficient and valuable member of his fastening devices. They prolong the life of the canvas covering of the rim and of the encircling folds, and they prevent the air tube from "nipping" when it is not sufficiently inflated. So far as can be gathered from the description of his invention, he regarded them as a substantive part of his improvements. If he did not, he failed to indicate it, for certainly neither the terms nor the drawing afford any room for such a suggestion. The claim which he asked for and obtained embodied the parts which the description treated as substantive and valuable, and only those parts. The protective strips were incorporated in it so explicitly and so prominently that no one, even reading it in the most casual manner, could fail to understand that they were a part of it. It is hardly conceivable that he should have misapprehended the meaning of the claim when he made the oath to his original application. Moreover, it appears that the protective strips were a part of his invention as it was patented in England, and that the English patent would not have been infringed by any method or manner of securing a tubular tire to the rim of the wheel in which they were omitted; and it also appears that they were always inserted in the pneumatic tires made under the patent, until after the reissue was granted.

There are cases in which the description of an invention, and the claims sought to be founded upon it, by the applicant for a patent, are so plain and unequivocal upon the face of the application itself that the judicial mind cannot be convinced that he intended to describe and claim any other invention than that for which the patent was granted; and in such cases the courts ought not to hesitate to review the decision of the commissioner upon the question of inadvertence, accident, or mistake, and should refuse to be bound by it, when the record upon the application for the reissue discloses that no explanatory facts or circumstances, adequate to account for the error, were brought to his attention. This seems to be such a case, and the reissue record itself leaves little, if any, room to doubt that there was no error on the part of the patentee to necessitate the surrender of the original patent. But when the fact is recalled that the English patent, the foundation of the original and the reissue, was not for any invention claimed in the reissue which was not secured by the original, and when the circumstances attending the origin and preparation of the application for the reissue are recalled, it seems difficult to escape the conclusion that the original was surrendered, not to correct a mistake, but to obtain a new patent, covering inventions to which the patentee had no right, and which could be used as a sword and a shield in the business competition of rival patent owners.

If, in the description of the invention, the patentee had indicated

that he regarded the protective strips merely as a desirable or preferential feature of his devices, it is not open to doubt that it would have been the appropriate office of a reissue to correct the claim of the original patent by eliminating them from it. But, as is said by a recent commentator, (Rob. Pat. § 562,) the statute which authorizes a reissue is not a remedy for a mistake by the patentee "in his choice and judgment as to what he should attempt to cover" by his original patent. When it can be seen from the description in the original patent that the claim has restricted the invention of the patentee by making that a part of it which he himself only regarded as an incidental or superfluous or an unimportant part of his invention, a case arises for the application of the reissue statute. Where the patent is for a combination in the strict sense, it is sometimes evident that some one of the several devices which are described has no important function in the coaction of the parts, but is merely accessorial and subordinate; and in such a case there is no difficulty in differentiating the parts which the inventor regarded as material from those which he regarded as merely subsidiary, and if the device is specified in the claim as a part of the combination with the others the inference of mistake is clear. In such case it is apparent that the patentee has not, by the claim, secured the real invention of the patent. But in the present case the invention described consisted in assembling several devices, some old and some new, each of which had its office in producing the new and useful result contemplated by the inventor, and the claim corresponding with the description. A patent in which one of those devices is eliminated from the claim is one for a different invention. It has been repeatedly declared by the supreme court that a reissue cannot be permitted to secure any invention which was not described in the original patent; it is confined to securing one which was not only described, but which it was the intention of the patentee, manifest upon the face of the patent itself, to secure thereby. In other words, it must appear by the description in the original patent that it was the purpose of the patentee to secure the thing specified in the claim of the reissue, and a patent cannot be lawfully reissued unless there has been a clear mistake, inadvertently committed, in the wording of the claim. Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 99, 8 Sup. Ct. Rep. 38; Hoskin v. Fisher, 125 U. S. 223, 8 Sup. Ct. Rep. 834; Flower v. Detroit, 127 U. S. 571, 8 Sup. Ct. Rep. 1291; Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451. In the language of one of the more recent adjudications of the supreme court upon this question, it is said:

"A reissue must be for the same invention intended to be embraced in the original patent, and the specification cannot be substantially changed, either by the addition of new matter, or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed." Plow Co. v. Kingman, 129 U. S. 299, 9 Sup. Ct. Rep. 259.

We are unable to entertain any doubt that the patentee intended to claim originally just what he did claim; that there was no

mistake in the wording of the original claim; and that the reissue was obtained because, upon further consultation and advice, it was concluded that he had erred in judgment in not attempting to make a different and broader claim than the one he conceived to be expedient. He patented what he intended to, and by the reissue sought to patent a broader invention. Applying the settled doctrine of the adjudications of the court of last resort, we must adjudge the claim of the reissue to be void.

The decree of the circuit court is reversed, with costs, and the cause remanded to the circuit court, with instructions to dismiss the bill.

HARMON et al. v. STRUTHERS et al.

(Circuit Court, W. D. Pennsylvania. September 4, 1893.)

No. 2.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MECHANICAL EQUIVALENTS—REVERSING GEAR FOR STEAM ENGINES.
Letters patent No. 248,277, granted to Frank L. Bliss, October 18, 1881, for an improvement in reversing gear for steam engines, by which the vibration produced by the movement of the reversing link is prevented from being transmitted to the elbow lever by means of a slot formed in the upper end of the lifting bar at its connection with the link, are for an invention of a primary character; and a device which accomplishes the same result by elongating the ordinary slot of the reversing link, so that when the elbow lever is at rest on its stop there is a slot in the reversing link itself above the valve-stem pin, infringes the Bliss patent by the substitution of mechanical equivalents.

2. SAME—PUBLIC USE.
More than two years before his application for a patent, an inventor, without profit to himself, and for the sole purpose of testing the efficiency of his invention by practical use, placed his device on engines manufactured by his employers, who sold them with a view to experimental use. *Held*, that there was no public use or sale, within the meaning of the patent law.

In Equity. Bill to restrain infringement of patent. Decree for complainants.

For prior report, see 48 Fed. Rep. 260.

W. Bakewell & Sons and A. Wentworth, for complainants.

D. F. Patterson and James C. Boyce, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This suit is upon letters patent No. 248,277, granted October 18, 1881, to Frank L. Bliss, for an improvement in reversing gear for steam engines, in which the claim is:

"The elbow lever and link having a slotted connection, as described, for adjusting the link, D, in combination with the stop or set screw for relieving the lever from the vibration due to the movement of said link, D, substantially as described."

We had occasion to consider this patent in a previous suit between these same parties. Harmon v. Struthers, 43 Fed. Rep. 437. We there held that Bliss was the original and first inventor of the device described in his patent; that the invention was highly meritorious, and of a primary character; and that the reversing gear which the defendants were then manufacturing was substantially the patented device,—the apparent difference being structural, and involving the mere substitution by the defendants of equivalent mechanical expedients. For our views upon these points, together with an explanation of the nature of the invention and a statement of the prior state of the art, we refer to the opinion in that case. To those views we adhere, notwithstanding the additional proofs in the present record.

After the decision in the former suit the defendants abandoned the use of the specific device which the court had there enjoined, and made a change in the method of accomplishing the desired result, which they insist has freed them from the imputation of infringement. But that change is simply this: In Bliss' device the vibration produced by the movement of the reversing link is prevented from being transmitted to the elbow lever by means of a slot, which, as illustrated by his patent drawing, is formed in the upper end of the lifting bar at its connection with the link, whereas in the defendants' present device the slot to effect that purpose is formed by elongating the ordinary slot of the reversing link, so that when the elbow lever is at rest upon its stop there is a slot in the reversing link itself above the valve-stem pin. The defendants' apparatus, then, has a slotted connection formed by the elongated link slot and the pin on the valve stem which fits therein, in combination with the stop for relieving the elbow lever from vibration. Mr. Heisler, the plaintiffs' expert, upon this subject, testifies thus:

"I find in the defendants' device all the elements of the Bliss claim, that is, the elbow lever, slotted connection, and stop, performing the same work in substantially the same way, and doing a special and peculiar work, (reversing an oil engine quickly and positively from a distant point, remote and independent of the engine and its foundation,) which could not have been done successfully by any device known before Bliss' invention. The only change the defendants have made is a mere change in location of the slot, but this is a change merely in position. It does not change the result, or the principle of the operation, for in both the defendants' and Bliss' device the principle is that of a slotted connection slidingly pivoted on a suitable pin for the purpose of preventing the vibration of an elbow lever."

These views, we think, are correct, and it seems to us that the Bliss device and the defendants' apparatus accomplish the same identical result in substantially the same way; that they both alike differ, in the same respects, from the prior state of the art; and that, in so far as there is any variance between the two devices, it is in the employment by the defendants of known mechanical equivalents.

Now, where the invention, as here, is one of a primary character, and the mechanical functions performed by the device are,

as a whole, entirely new, the established rule is that all subsequent machines which employ substantially the same means to accomplish the same result are infringements. Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. Rep. 513; Morley Sewing-Mach. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. Rep. 299. Hence, in Royer v. Belting Co., 135 U. S. 319, 324, 10 Sup. Ct. Rep. 833, where the specification of a patent for a machine for converting raw hides into leather described an upright slotted shaft and compressing weights, and the claim was: "The vertical shaft, B, with a slot, B^1, and set screws, b, b, b, said shaft having a forward and back motion, substantially as and for the purpose described,"—and in the defendants' apparatus there was a horizontal cylinder, in which was a horizontal revolving shaft, without weights, compression being accomplished by screw mechanism, it was held that, if the patented invention was in fact "one of a primary character," (within the ruling in Morley Sewing-Mach. Co. v. Lancaster, supra,) these differences in construction were not conclusive upon the question of infringement. In Winans v. Denmead, 15 How. 330, 342, the rule is thus laid down:

"It is generally true, when a patentee describes a machine, and then claims it as described, he is understood to intend to claim, and does by law actually cover, not only the precise forms he has prescribed, but all other forms which embody his invention, it being a familiar rule that to copy the principle or mode of operation described is an infringement, though such copy should be totally unlike the original in form or proportions."

This rule was enforced in the recent case of Hoyt v. Horne, 145 U. S. 302, 308, 12 Sup. Ct. Rep. 922, where the court said:

"It is insisted by the defendant in this connection that there is no infringement of the first claim of the Hoyt patent, since the pulp is not circulated in vertical planes, nor is it delivered by the beater roll into the upper section of the vat, as specified in that claim. Literally it is not. A technical reading of the specification undoubtedly required that the mid-feather should run horizontally instead of vertically; but the object of this was that the pulp should be received and delivered by the beater roll along its entire length, viz. across the entire width of the tub, and this is accomplished in the same way in both devices. * * * The substitution of a vertical for a horizontal mid-feather at the inoperative end of the tub is merely the use of an old and well-known mechanical equivalent, and obviously intended to evade the wording of the claims of the Hoyt patent."

We hold, then, and are well warranted by the cited authorities in so doing, that the reversing gear which the defendants are now manufacturing comes within the claim of the patent in suit.

The defendants, however, allege, and earnestly press as a defense, that Bliss' patented device was in public use and on sale more than two years before his application for a patent, which was filed March 8, 1881. This defense was set up in the other suit, and was overruled. In so far as the present defense rests upon the "push reverse," the transactions with respect to which we found to have been wholly of an experimental nature, and the device itself a failure when subjected to practical test, we here reassert our former conclusion, referring to the opinion of the court in the prior case (43 Fed. Rep. 437) for our reasons for such determination.

But the additional and fuller proofs now before us show that the witnesses, when testifying in the first suit, fell into some mistakes as to dates, and otherwise, and it now appears that some engines equipped with Bliss' pull reverse—i. e. his device in the form in which it was eventually patented—went out from the shop of Harmon, Gibbs & Co. into the oil field more than two years before the application for a patent; that is, before March 8, 1879. The earliest instance of this is an engine, No. 14, which was sold and delivered to E. A. Culver on May 20, 1878. Mr. Culver states that he bought this engine from George H. Gibbs, through George Sheffield, and that it was "a straight purchase, without any condition whatever." Gibbs having died a few months afterwards, we are without his testimony. Sheffield cannot remember what occurred between himself and Culver, but says, "I was anxious to sell the engine, and get it out on trial."

James W. Ford, who had charge of the Culver wells, states:

"After the engine came upon the lease, and before it was set up, Mr. Culver came up there, and we looked the engine over, and talked about it. It had a pull reverse attached to it. This was something new in oil-well engines. I was afraid of it. I told him I did not like the looks of it, and was afraid it would not do the work. Mr. Culver told me he saw Mr. Gibbs on the train as he was going home a few days before to get a new engine. He said he had taken the engine of Mr. Gibbs, *subject to approval.* He told me to set it up and *give it a good trial.* I did set it up at this No. 1 well, and we used it *a couple of days* in pulling the well. The link broke while we were pulling it, and I took the link to a machine shop at Summit city, and had it fixed. We drilled upon that lease three other wells, but this engine remained at No. 1 until some time in April, 1879, when we moved it, and commenced drilling No. 3 with it. We finished No. 3 May 25, 1879. No. 1 flowed, and this engine did no work from the time it pulled the well, as I have mentioned, until we commenced drilling this No. 3. While drilling this No. 3 the link broke several times, and I finally went to Harmon, Gibbs & Co.'s shop, and got a new link. The elbow lever on this engine also broke near the knuckle or place where it was attached to the lug while drilling this well. I repaired it by putting a brace across from the long to the short arm of the lever. * * * But we had difficulty. Before breaking, the lever would spring, and, after the brace was put across, the lever would still spring when the link started hard. I think the spring of the lever is what caused the link to break. When the link did start, it went quick, and struck hard on the roller or block, as it came up. There was so much delay and trouble with this reverse gear that I had difficulty with the men drilling the well. They kept kicking about it. As the well was being drilled by contract, they complained at the delay they were put to. The engine worked well. The difficulty was with this reverse gear. * * * When this first engine came upon the lease, it attracted considerable attention with this new reverse. Quite a number of people engaged in the oil business, and putting down and operating oil wells, came to see it. There was a general expression of doubt about its working successfully,—the reverse gear,—and considerable fun was made of it. We were the first ones in our locality that had the sand to try it. I understood Mr. J. J. Carter was going to give it a test, or was then testing it, and with that exception I knew of none that were in the field."

The direct testimony, as a whole, taken in connection with all the surrounding circumstances, would quite justify the conclusion that, as between the immediate parties to the transaction, the sale to Culver was for the purpose of test.

Between the date of George H. Gibbs' death, in September, 1878, and March 8, 1879, 10 other engines equipped with Bliss' pull reverse went out from the shop of Harmon, Gibbs & Co. into the oil field, but the evidence, we think, shows that they were all sold to J. J. Carter, the brother of George H. Gibbs' widow, or through him to friends, out of the ordinary course of trade, upon special terms, and with a view to experimental use. But, at any rate, so far as Frank L. Bliss himself was concerned, all these transactions were purely experimental. He was not a vendor of these engines or of the reversing gear. He merely allowed his device to be put on the engines for the sole purpose of testing it. Of this the proof is positive and convincing. He was not a member of the firm of Harmon, Gibbs & Co., nor was he pecuniarily interested in the sales or business of that firm. He was simply an employe in their shop; nor had the firm any right to, or pecuniary interest in, the invention at that time. The situation was as thus stated by Bliss:

"I had no means except my day wages in the shop, and I had a family to support. I could not have tested it or patented it myself. Harmon, Gibbs & Co. furnished the money to procure the patent for me. I had no shop. I had no engines upon which I could put them for trial or experiment. I had no oil well at which I could give them a trial. I had no means of testing the reverse gear, except as they were put upon the complainants' engines and those of George H. Gibbs."

It clearly appears that Bliss' device could only be tested by practical work in the oil field. Then, again, the device was a mere appendage to the engine, which was complete without it. It was not the principal subject-matter of sale, but a mere incident. Furthermore, it is shown that Bliss derived no profit whatever from the use of his device, or from any sales of engines made prior to the grant of his patent. This, then, is the case: Bliss' device could only be tested by putting it on his employers' engines, and sending it out into the oil field for practical use, and this his employers permitted him to do, without profit to him. Did he thereby forfeit his invention? It would be a hard thing so to hold. We do not think the law demands such a conclusion.

The experimental use of an invention by the inventor or by persons under his direction, if made in good faith, solely in order to test its qualities, has never been regarded as a public use. Elizabeth v. Pavement Co., 97 U. S. 126, 135. In Winans v. Railroad Co., 4 Fish. Pat. Cas. 1, 10, Mr. Justice Nelson charged the jury thus:

"If the use be experimental, to ascertain the value, or the utility or the success of the thing invented, by putting it into practice by trial, such use will not deprive the patentee of his right to the product of his genius. The plaintiff, therefore, in this case, had a right to use his cars on the Baltimore and Ohio Railroad by way of trial and experiment, and to enter into stipulations with the directors of the road for this purpose, without any forfeiture of his rights."

It has been held that, if necessary in making tests, an inventor may sell a machine on trial so as to get it fully and fairly tested by practical use by the class of persons for whose use it is intended, and such sale or use, even for more than two years, if made for the

purpose of practical test, will not invalidate the patent. Graham v. McCormick, (per Drummond, C. J.,) 10 Biss. 39, 43, 11 Fed. Rep. 859; Graham v. Geneva, etc., Manuf'g Co., (per Dyer, J.,) 11 Fed. Rep. 138. In Smith & Griggs Manuf'g Co. v. Sprague, 123 U. S. 249, 256, 8 Sup. Ct. Rep. 122, it is said:

"A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character, but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for the purpose of experiment."

The saving principle of these decisions, we think, is justly applicable to the case in hand, where the acts of the inventor were without any profit to him, and for the single purpose of testing the practicability of his invention by needed trial and experiment. It is very certain that, if Bliss could not safely make the test in the manner in which he did, he could not have made it at all.

The evidence clearly satisfies us that the test, both as respects the number of engines employed and the duration of the use, was altogether reasonable. During the years 1878 and 1879 numerous complaints of the reversing gear were made at the shop of Harmon, Gibbs & Co., and Mr. Shave, a machinist there, testifies that "Mr. Bliss kept changing it to overcome these alleged defects." Mr. Bagley, then an employe at the shop, states:

"Mr. Bliss continued during 1878 and 1879 in experimenting and making changes to overcome the defects, as they became known, and to make the reverse gear effective. He was diligent in his efforts to accomplish that result."

It was not before late in the fall of 1879 that the practically operative success of the device was demonstrated.

Upon the whole, we are of opinion that the plaintiffs are entitled to a decree.

BUFFINGTON, District Judge, concurs.

EDISON ELECTRIC LIGHT CO. et al. v. MT. MORRIS ELECTRIC LIGHT CO. et al.

SAME v. UNITED ELECTRIC LIGHT & POWER CO.

(Circuit Court, S. D. New York. September 19, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—LACHES—INJUNCTION.
The test case involving the validity of the Edison patent for incandescent electric lamps (No. 223,898) was brought in May, 1885, and prosecuted with all due diligence. After its determination the present suit was begun against defendant corporations which were not organized until a year or two after the commencement of the test suit, and did not begin active operations in incandescent lighting until three years after

that date. *Held*, that plaintiffs had not been guilty of such unreasonable delay or laches in commencing suit as to deprive them of the right to a preliminary injunction.

2. SAME—MANUFACTURERS OF INFRINGING ARTICLE—USERS.
Corporations organized during the pendency of the test suit involving the validity of the Edison patent for incandescent electric lamps, whose sole business is the furnishing of electric light to others, and who use infringing lamps for the purpose of competing in that business with the licensee of the patentee, are to be regarded rather as manufacturers than as mere users, who are entitled to protection because they have supplied themselves with electric lighting plants before the decisions of the courts sustaining the patent, and at a time when judicial decisions in foreign countries were in conflict.

3. SAME—EQUITIES—COMPETING CORPORATIONS.
On a motion for a preliminary injunction in a suit for infringing the Edison patent for incandescent electric lamps, defendants claimed that they were mere users, who installed plants prior to the decision establishing the validity of the patent, and were misled by the obscurity of the patent, and the conflict of foreign decisions, into investing large sums of money in their plants, and asked that complainants be compelled to supply lamps on reasonable terms, on the ground that otherwise defendants' plants would be rendered valueless. The business of defendants was the furnishing of incandescent electric lighting to consumers. *Held*, that the equities of defendants were not superior to those of the patentees, who had engaged in a similar business relying on the patent, and had strenuously attempted to enforce their rights by suit, and ultimately succeeded, and that a preliminary injunction should issue, especially in view of the fact that defendants had failed to show that they could not obtain incandescent lamps which did not infringe the patent.

In Equity. Bills by the Edison Electric Light Company and the Edison Illuminating Company of New York against the Mt. Morris Electric Light Company and others and the United Electric Light & Power Company to enjoin the defendants from infringing letters patent No. 223,898, issued to Thomas A. Edison, for incandescent electric lamps. On motion for a preliminary injunction. Granted.

Dyer & Seely and Eaton & Lewis, (R. N. Dyer, Eugene H. Lewis, and C. E. Mitchell, of counsel,) for complainants.

Cravath & Houston, (Paul D. Cravath and B. H. Bristow, of counsel,) for defendants.

Before WALLACE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This is an application for a preliminary injunction to restrain the use by defendants of incandescent electric lamps which are infringements of letters patent No. 223,898, issued to Thomas A. Edison January 27, 1880. The first-named complainant is the owner of the patent, the second is the sole and exclusive licensee of the right to use and vend incandescent electric lamps under such patent in and for the city of New York, for that portion of said city lying below Seventieth street, and it seems not to be disputed that the lamps used by defendants are so used within that portion of the city. Prior litigation touching this patent has been of such a character that the application now under consideration may be looked upon as made rather at the close of the case than at its beginning. The validity of the pat-

ent, and the question whether or not lamps of the kind used by defendants are infringements thereof, has been decided, after most protracted and exhaustive trial and argument, by the circuit court in this district, and by the circuit court of appeals. Validity and infringement, therefore, are not disputed here.

The right of the owner of a patent to fix arbitrarily the terms on which he will allow others to use it, or to wholly refuse assent to such use, was considered by this court in Campbell Printing-Press, etc., Co. v. Manhattan Ry. Co., 49 Fed. Rep. 930, where it was held that there was no warrant for the proposition that, if he so refused, the monoply which the statute gives him might be destroyed by order of the court, and the right to use the invention sold to any one who wished to purchase it, on terms to be fixed by the court. That a patentee may dispose of his invention, or hold it to his sole use, as he chooses, see, also, Rob. Pat. § 31, and cases cited.

Although the owner of a patent may not thus, without assent on his part, be deprived of his monopoly, he may, of course, so conduct himself as to be no longer entitled to the aid of a court of equity in maintaining it. And it is insisted, as a ground for refusing the injunction prayed for, that complainants' delay in instituting and prosecuting suits to prevent infringement has been such that the court should refuse them that relief, as against these defendants, who, during the period intermediate the granting of the patent and the decision of this court sustaining its validity, invested large sums of money in the belief that such patent could not be sustained, or would not be construed so as to cover the lamps defendants used. It is not denied that defendants knew there was a patent, which the owners insisted was a valid one, and which they claimed covered incandescent electric lights, such as defendants use.

This defense of laches or delay on the part of the owners of the patent was urged upon the court of appeals at very great length, upon most voluminous evidence, in Edison Electric Light Co. v. United States Electric Lighting Co., 3 C. C. A. 83, 52 Fed. Rep. 300; and that court decided that no case was shown to authorize the refusal of an injunction on any theory of laches or equitable estoppel, by reason of undue delay in bringing suit, or acquiescence in known infringement. Subsequently, the same point was urged upon the same court, again at great length, in Edison Electric Light Co. v. Sawyer-Man Electric Co., 3 C. C. A. 605, 53 Fed. Rep. 592, and the same opinion expressed. The facts presented here do not change the situation, so far as the complainants are concerned. The same measure of delay is shown, and the same excuse for that delay is also shown. Twice has the court of appeals held that the original test suit (that against the United States Electric Lighting Company) was timely begun, and pressed with proper diligence. It has also held that, such suit proceeding with due diligence, no other infringers of the patent can be heard to complain, with reason, that separate suit was not brought against them. Further discussion of the same facts in this court

is unnecessary, and out of place. The situation is not changed by the circumstance that these are different infringers, with a different history from that of the defendants in the earlier suits. No doubt, in determining whether, in any particular case, there has been such delay or laches as will affect a party's right to the aid of a court of equity, there are always two things to be considered, —the delay of the one party, and the effect of that delay upon the other; and, where a person has unreasonably delayed taking some particular action, that delay is sometimes not charged against him, where it is shown it operated in no way to the other's prejudice. Where, however, the court holds that there has been no unreasonable delay, but due diligence shown by the one party, I am not aware of any authorities which support the contention that he must be denied relief because he was not quite diligent enough to prevent the other party from making investments which have proved improvident. As the circuit court of appeals has held that other infringers cannot complain because only one test suit —that against the United States Company—was brought, and has further twice held that that suit was prosecuted with due diligence, and as the defendants here were not even organized till a year or two after the institution of that suit, in May, 1885, and did not begin active operations in incandescent lighting till three years after that date, there seems to be nothing left for this court to decide on that branch of the case.

Irrespective, however, of any question of laches on the part of complainants or of the owners of the patent, there was a claim to consideration advanced to the court of appeals in the Sawyer-Man Case, supra, growing out of the obscurity of the patent, and the fact that, prior to the decision of the federal court (in this circuit) sustaining and construing it, there were conflicting decisions upon it in foreign countries. Commenting upon this, that court recognized three classes of infringers, and referred to them as follows:

"Every one of the manufacturing corporations, the competitors of the Edison companies, commenced their operations with a knowledge of the existence of the patent in suit. They were controlled by business men of intelligence and experience. Their promoters and managers may have believed, and probably did, that the patent could not be successfully maintained. But they entered upon the business with an understanding of its risks, and of the consequences which would befall them as infringers, if the patent should be sustained. None of them can now be justly heard to say that an injunction which is essential, if not indispensable, to the protection of the owners of the patent and the licensees, ought not to be granted because of the great pecuniary loss which may result. If, in consequence of being deprived of the use of the lamps, their investments in other electrical apparatus will be greatly depreciated, they must take the consequences." (2) "The users who have supplied themselves with electric lighting plants from the infringers, which required for their operation lamps of the patent, are of course infringers. But those who did so before the decision of the circuit court sustaining the patent, and at a time when judicial decisions in foreign countries interpreting the patent were in conflict, and who are now willing to accept their lamps from the complainants upon reasonable terms, have much stronger equities than the manufacturing infringers. These equities the court will not disregard. But what would be reasonable terms, if an application were made to the court

on behalf of these users, is a question which can only be determined in each case upon its particular circumstances." (3) "Those users, however, who have acquired these plants subsequent to the decision of the circuit court, if they are deprived of the use of the lamps, and as a consequence the value of their plants may be greatly impaired, must accept the result as a consequence of their own imprudence."

The defendants insist that they are within the second of these categories, and entitled to the consideration which that court intimated would be extended to persons so situated. I do not so understand the opinion of the court of appeals. It is only the users of the lamp for the purpose of availing of its light who seem to fall within the terms or reason of the exception,—the unskilled public, who, with no knowledge of electricity, of patents, or of controversies and litigation as to inventions, bought something which they found on sale in the open market. The defendants, whose sole business is the furnishing of electric light to others; who use the lamps for the purpose of competing in that business with the complainant the illuminating company, continually adding to the number of their customers and enlarging their plants, and using the very lamps they ask complainants to supply to them in such way that even new consumers, who would otherwise purchase their illumination from the holders and licensees of the patent, may be induced to purchase it from defendants, to the latters' gain and the complainants' loss,—are more properly within the first category. Still, the language used by the court of appeals is perhaps not so positive as fairly to preclude discussion as to its meaning, and this motion may best be disposed of by conceding defendants' contention that they are to be considered as users, who installed plants prior to the decision establishing the validity of the patent. And they protest that they are willing to accept their lamps from the complainants upon reasonable terms. All that the court of appeals determined, as to such defendants, was that they had much stronger equities than manufacturing infringers, and that the court would not disregard those equities. But that court wisely left each case to be determined when it came up, "upon its own particular circumstances." In the case at bar, however, there are conflicting equities. On the one side are the defendants, who, misled by the obscurity of the patent and the conflict of foreign decision, invested large sums of money, supposing the patent would, in some way or other, be so disposed of that it would not interfere with their business. On the other side, there is, not only the owner of the patent, but the Edison Illuminating Company, which has relied upon the letters patent, believing that the Edison invention was, as it claimed to be, a most important advance in the art of incandescent electric lighting, and confiding in the validity of the grant by which the United States undertook to secure to that inventor, his assignees and licensees, a monopoly of his valuable discovery. Trusting that the patent and the law would, to the extent of its license, relieve it from competition in such mode of lighting as could only be practiced by the use of the particular lamp that patent covered, it also invested large sums of money, not only in the purchase of an exclu-

sive license, but also in the construction and equipment of electric lighting plants in which the lamp was an essential feature. And for years it has been compelled to conduct its business in the face, not only of competition with other systems using other lamps, which was to be expected, but also with infringers who have made and sold and used the very lamp which the letters patent and the contract of license made the exclusive property of their licensor and themselves. When, therefore, complainants ask that, for the few remaining years of that patent, infringement of it shall be stopped by the court, they certainly show equities which are as much entitled to consideration as are those submitted by the defendants. Both sides have been confident of success. Both have made large investments. Each is exposed to serious pecuniary loss, whichever way the court decides. And, where the equities are thus balanced, it seems the duty of the court to so decide in favor of those who hold the legal title to the property, and to whose protection, in the language of the circuit court of appeals, "an injunction is essential, if not indispensable."

The defendants' case, moreover, is not as fully stated as it should be, upon a point of much importance. The affidavits of the complainants assert that the peculiar lamp of this patent is indispensable to any successful system of electric lighting. This is a familiar assertion in this court, but the measure of credit to be given to it is problematical. That other incandescent lamps, which are not infringements of the integral vacuum chamber carbon-filament lamp of Edison would also give light, has been repeatedly asserted; and in the Sawyer-Man Case, which was referred to on the argument and in the notice of motion, that assertion was fortified with strong affidavits. Upon this point the defendants' papers are significantly silent. While it was suggested in argument that without the lamp covered by the patent their plants were valueless, and that injunction against the use of such lamps would practically destroy their entire investment, the defendants' affidavits do not support such contention. It is not shown what efforts they have made to supply themselves with lamps not infringements of the Edison. It is not shown that no other lamp will serve their purpose, perhaps not so efficiently, perhaps at greater cost to themselves, but yet sufficiently to enable them still to use their existing plants to furnish light to their customers. If this be the case, if injunction will leave them, even during the life of the patent, still competitors of the complainant the illuminating company, although competitors whose lamps may not be so good, and who may find it more expensive to supply and operate them,—in other words, competitors under the conditions which were to be expected with such a patent in existence,—it would be difficult to see where they have any equities at all. Where the defendants' main contention is that injunction will utterly destroy their investments, and force them out of the business of incandescent lighting altogether, they should support that contention by proof.

The motion for preliminary injunction is therefore granted; order to be settled on notice, when suggestions as to suspension for a reasonable time to adapt fixtures to receive new lamps will be entertained. As at present advised, I am not inclined to enjoin the use of infringing lamps now in situ.

HEATON BUTTON-FASTENER CO. v. MACDONALD et al.

(Circuit Court, N. D. New York. August 15, 1893.)

No. 5,650.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ACTION TO RECOVER PROFITS.
   Defendant sold and leased machines infringing plaintiff's letters patent No. 310,934, granted to Joseph F. C. Dick January 20, 1885, for improvements in button-attaching machines, and also sold staples adapted for use in such infringing machine, but which could likewise be used in other machines. *Held*, in an action to recover defendant's profits, that the plaintiff was not entitled thereto, as the proof was vague, shadowy, and uncertain, and failed to show the kind of staples sold, or the quantity used in the infringing machine.
2. SAME—MEASURE OF DAMAGES.
   The master to whom the cause was referred having reported that the entire market value of the infringing machine was due to the use of complainant's inventions, complainant was entitled, as damages, to the profits made on the whole machine. Manufacturing Co. v. Cowing, 105 U. S. 253; Hurlbut v. Schillinger, 9 Sup. Ct. Rep. 584, 130 U. S. 456,—followed.

In Equity. Action by the Heaton Button-Fastener Company against John A. Macdonald, Albert W. Ham, and Arthur M. Wright to recover profits derived from the sale of button-attaching machines alleged to infringe letters patent No. 310,934, granted to Joseph F. C. Dick January 20, 1885, and from the sale of fasteners to be used therein. There was a decree for plaintiff, and the cause was referred to a master to take and state the account of damages and profits. Both parties excepted to the master's report, allowing damages for the sale of the machines, but disallowing them as to the fasteners. Report confirmed.

For prior litigation involving this patent, see 52 Fed. Rep. 667; 55 Fed. Rep. 23.

Statement by COXE, District Judge:

On the 12th of March, 1890, the complainant obtained a decree declaring letters patent No. 310,934, granted to Joseph F. C. Dick January 20, 1885, for improvements in button-attaching machines, valid, and adjudging that the defendants had infringed the fifth claim thereof. The fifth claim is as follows: "(5) The combination of the stationary head mounted upon a standard and containing a stationary button-holding jaw which is provided with a slot, and button-lifting springs on each side of said slot, the race way attached to said head and having a slot communicating with the slot in the holding jaw, the button stop in said race way, the vibrating feeding finger for carrying the buttons one by one from the button stop to the button-lifting springs, the pivoted clinching jaw and the treadle for imparting motion to said clinching jaw and feeding finger substantially as described." On the

25th of August, 1891, the cause was referred to a master to take and state the account of damages and profits. On the 25th of February, 1893, the master filed his report in which he finds that the value of the infringing machine is attributable to the combination described in the fifth claim, and that the complainant is entitled, for that reason, to the entire profits derived by the defendants from the sale and leasing of the 2,500 machines put out by them, amounting in the aggregate to $294.18. He also found that the complainant was not entitled to recover any part of the profits made by the defendants upon staples sold by them to the users of the infringing machines. All claims for damages were waived by the complainant.

The complainant excepts to that part of the report which refuses to allow the profits derived from the sale of staples, and the defendants except to that part of the report which allows the entire profits on the infringing machine.

James H. Lange, Odin B. Roberts, and F. G. Fincke, for complainant.

N. Davenport, for defendants.

COXE, District Judge, (after stating the facts.) The doctrine of contributory infringement is usually enforced by injunction; the theory being, that although the defendant has not completed the wrong, he has done an act, which, in connection with some other act, sure to follow, will necessarily result in a consummated infringement. He is, therefore, particeps fraudis. An injunction strikes the conspiracy in its inception. But when the complainant seeks to recover the defendant's profits proof of a different character is required. He must show, with accuracy, not only the amount of the profits, but also that they are attributable directly to the invention.

Where the contributory infringer deals in a very inferior part of a patented combination of old elements, it is manifest that the task of proving that the profits he receives are due to the patent, is a difficult one, and especially so when it appears that he receives no higher price for his goods than when sold for other, and legitimate, uses. The patentee of a sewing machine would hardly recover the profits of one who sold thread and needles to the possessor of an infringing structure. Can it be said that one who sells staples, or buttons, adapted for use in an infringing button-attaching machine, must surrender his entire profits to the owner of the patent? If a third party had sold staples to a holder of a Trojan machine, could the complainant recover the entire profits made by him? If so, patents of little or no value may be made the instruments of extorting immense sums, in no way attributable to the patent, from those who have sold supplies to infringers.

A staple is not an element of the fifth claim of the Dick patent, defendants had a perfect right to sell staples for use in other machines, and there is no adequate proof that the entire profits from the sale of staples was due to the combination of the fifth claim; there is no proof as to the number of staples used in machines embodying that combination. The proof before the master shows that the defendants themselves sold between 3,000 and 4,000 hand machines in which the staples in question could be used. Where

a contributory infringer is held for profits it must be on proof that they were derived from something which is a part of, or indispensable to, the patented combination, and, if capable of innocent use, that it was actually used in the infringing combination. The fact that the defendants sold or leased infringing machines to the same parties to whom they sold staples, does not aid the complainant, at least as to those machines not held under written lease. About 1,455 infringing machines were transferred under an agreement by the terms of which the licensee agreed to purchase of the defendants all the staples used with said machine. It is insisted by the complainant, that the profits on the staples are, under this agreement, only another name for royalties or license fees.

Even were this position tenable it would still be necessary to show what proportion of the profits was derived from staples actually used in licensed machines. The testimony fails to show this. The master finds as follows:

"The testimony fails to show whether the staples sold to parties signing the contracts were foot-power staples or hand-power staples or both; it fails to show how they were used or how many were used in the infringing machines. These staples may have been used in other machines, the hand tool of defendants for example, of which a large number were sold, or they may not have been used at all."

To compel the defendants to pay a judgment amounting to over $20,000 based upon such inadequate proof would be running counter to all the adjudicated cases upon this subject. The testimony is vague, shadowy and uncertain and depends too much upon conjecture and speculation. The complainant's exceptions are overruled.

The master finds that the machines sold by the defendants embodied the combination of the fifth claim of the complainant's patent and that its entire market value was due to the invention. He says:

"The value of the infringing machine is attributable to the combination described in the fifth claim of the patent in suit, and the complainant is entitled to the profits made on the whole machine."

There is nothing in the record now before the court to dispute the correctness of this finding, and the case is therefore within the rule laid down in Manufacturing Co. v. Cowing, 105 U. S. 253, and Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. Rep. 584. The exceptions of the defendants are overruled.

The report of the master is confirmed without costs; the expense of printing the record is to be divided equally between the parties.

BURNHAM & DUGGAN RAILWAY APPLIANCE CO. v. NAUMKEAG ST. RY. CO.

(Circuit Court, D. Massachusetts. August 22, 1893.)

No. 2,900.

1. PATENTS FOR INVENTIONS—BRACKETS FOR ELECTRIC CONDUCTORS.
The fourth claim of letters patent No. 418,704, issued January 7, 1880, to John A. Duggan, for improvements in brackets for electric conductors, for "an adjustable collar, provided with means to support guard wire," possesses no element of patentable invention.

2. SAME—OVERCOMING PRESUMPTION OF NOVELTY.
While a patent is prima facie evidence of novelty and utility, and also of patentable invention, yet this presumption may be overcome by the court's application of the ordinary knowledge and experience required to settle issues of fact.

In Equity. Bill by Burnham & Duggan Railway Appliance Company against Naumkeag Street-Railway Company for infringement of letters patent No. 418,704, issued January 7, 1890, to John A. Duggan, for improvements in supporting electric conductors. Bill dismissed.

Charles H. Drew, for complainant.

George R. Blodgett, (Bentley & Blodgett, on the brief,) for defendant.

PUTNAM, Circuit Judge. This case turns on the fourth claim of the patent in suit, which is in the following language: "The adjustable collar, g, provided with means to support guard wire, substantially as above described." We find "guard wire" in the singular. This is undoubtedly a clerical error for the plural, and the court so accepts it. The claim is briefly expressed, and, so far as the letter is concerned, is very deficient. Undoubtedly there may be read into it so much of the specifications as shows that the adjustable collar carries a loop, or its equivalent, for the suspension of electric conductors, including trolleys, in connection with systems of electric railways. In this particular the claim seems to fall within that class where reference may be made to the specifications to supply in a claim what it is plain to every one the claim assumes as existing, rather than within the ordinary class in which it is held that a claim clearly deficient of itself cannot be made good from other parts of the patent. Seymour v. Osborne, 11 Wall. 516, 547; Day v. Railway Co., 132 U. S. 98, 102, 10 Sup. Ct. Rep. 11.

A portion of the argument proceeds on the theory that the claim embraces as a novelty the device of two guard wires, to be carried in such position over the electric conductor as to protect it; but there is no foundation for this. All that is said touching the guard wires is incidental. The specifications state that the invention relates to an improvement in brackets for electric conductors, and nothing found in the claim broadens beyond this.

But while the guard wires in no part contribute to the claimed novelty for which the patent was issued, yet, were it otherwise, the result of the case, for the reasons hereafter stated, would be the same. It may be well to add, however, that if the matter of the guard wires was an important function, the claim would perhaps be held invalid for duplicity.

The history of the alleged invention is given by the patentee, Mr. John A. Duggan, substantially as follows: He states that in 1887 or 1888 he conceived the idea of an electric street railway in the town of Quincy, Mass.; that in the progress of the work it was necessary to obtain permission from local authorities to use the overhead trolley system, and then the projectors met with opposition, based on the claim that injury would result from a contact between the then existing telephone wires and the trolley; that for economical reasons the projectors were obliged to use ordinary crooked poles to support the trolley, instead of straight sawn timber; and that, therefore, it became necessary to design a bracket to meet this condition of things. He further states that, "in order to meet the objections of the telephone company, so far as telephone wires making contact with the trolley wires was concerned, it occurred to me that the trolley wires should be protected by means of guard wires supported by arms on the collar;" and he continues: "For this reason the Quincy brackets, or collars of the brackets, were provided with means for carrying one or more of the guard wires, although the guard wires were never put up." Out of this grew the patent in this case, so far, at least, as concerns the claim in question. The crooked posts were the ordinary resource of economy, and the guard wires the plain result of the necessity of overcoming the opposition described by Mr. Duggan. A collar with a set screw, movable backward and forward on a bracket, is such a common mechanical instrumentality, with such innumerable and varied applications in every department of life, that the court cannot be surprised by the fact that its use occurred to Mr. Duggan when the necessity therefor arose, as it would certainly have occurred to any constructor of ordinary skill. And the same is true with reference to the means of carrying the guard wires, and of moving them to and fro with the trolley wire. For the reasons already stated the court is not called upon to decide whether there was any novelty in the use of two guard wires, or in the determination of their position; but, assuming this to be settled, the court does not hesitate to find that any projector like Mr. Duggan, after selecting the adjustable collar, would also, quite as a matter of course, so support the guard wires that they would move to and fro with the trolley wire, and that a method of effecting this, either in the way which he adopted or in some other, would readily suggest itself to him, or to any other constructor of ordinary skill. Any one curious in that direction will find in Manufacturing Co. v. Cary, 147 U. S. 623, 637, 13 Sup. Ct. Rep. 472, a mass of cases illustrating that there is no inventive faculty in applying such old and well-known devices as are here under con-

sideration to new but analogous uses, where such application would be so readily suggested as in the case at bar.

The court is unable to perceive any element of patentable invention in any thing which this claim properly brings to its attention. While it is aware, as claimed by the complainant, that a patent is prima facie evidence of novelty anl utility, and also of patentable invention, yet the case at bar is one among a great mass of instances constantly coming up for judicial determination, which demonstrate that the presumption which this rule affords is sometimes slight, and sometimes renders but little assistance. Certainly it is easily overcome in the case at bar, which the court is called on to determine on bill, answer, and proofs, and to which, therefore, it is authorized to apply the same ordinary knowledge and ordinary experience as may all tribunals, whether juries or judges, required to settle issues of fact. Bill dismissed, with costs for the respondent.

SAWYER SPINDLE CO. v. W. G. & A. R. MORRISON CO.

(Circuit Court, D. Connecticut. September 18, 1893.)

No. 735.

1. PATENTS FOR INVENTIONS—ANTICIPATION—SPINDLE BEARINGS.
The invention described in letters patent No. 253,572, issued February 14, 1882, to John E. Atwood, which cover, in substance, a live spinning spindle, supported within a supporting tube containing step and bolster bearings for the spindle, which tube is flexibly mounted with relation to the rail of the spinning machine, was not anticipated by the Rabbeth spindle, which is described in letters patent No. 227,129. Sawyer Spindle Co. v. Morrison Co., 52 Fed. Rep. 590, reaffirmed.

2. SAME—INVENTION.
The Atwood spindle was not deprived of patentable invention by anything shown in the Rabbeth device, or by the pre-existing "hydro-extractors" or centrifugal machines, an example of which is shown in patent No. 82,049, issued September 8, 1868, to D. M. Weston, wherein the shaft revolves in a box at its base, having an easily yielding spring of rubber or other elastic material around its outer circumference, and within a stationary bushing, which is firmly secured to the cross timbers below.

3. SAME—INFRINGEMENT.
The second and third claims of the Atwood patent are infringed by a spindle in which the spring surrounding the supporting tube, which contains both step and bolster bearings, is interposed between a shoulder on the tube and a shoulder on the base piece, so as to press the former on the latter, the latter being a separate nut which screws into the upper end of the base piece; for this is a mere change in the location of the nut which operates the spiral spring in the patented device.

4. SAME.
The patent is also infringed by a spindle which has its supporting tube divided transversely into two parts, the lower part resting upon the bottom of the oil cup, and acting as the step bearing of the spindle, with the spring surrounding the part of the tube that contains the bolster bearing; it appearing that the two parts move together laterally in all directions during the self-adjustment of the spindle, substantially as if the supporting tube consisted of a single piece.

In Equity. Suit by the Sawyer Spindle Company against the W. G. & A. R. Morrison Company for infringement of a patent. A motion for a preliminary injunction was heretofore granted in part. 54 Fed. Rep. 693. The case is now on final hearing. Decree for complainant.

Frederick P. Fish and W. K. Richardson, for complainant.
Wm. E. Simonds and Charles L. Burdett, for defendant.

SHIPMAN, Circuit Judge. Letters patent to John E. Atwood, No. 253,572, dated February 14, 1882, for an improved support for spindles in spinning machines, were the subject in a bill in equity in this court between the parties in this case, and were adjudicated upon in a decision which was filed September 26, 1892, (52 Fed. Rep. 590,) and in which the second, third, and fifth claims of the patent were held to be valid, and to have been infringed upon by the defendant's spindle, known in the case as the "Morrison Spindle." Subsequently the present bill was brought to prevent the manufacture and sale by the defendant of the spindles known as the "Hammond and Dady Spindles," and which were a modification of the device the manufacture of which had been enjoined. Upon a motion for preliminary injunction, the use of the Hammond spindle only was enjoined. 54 Fed. Rep. 693. The opinions which have been already written in this litigation state the history and the distinctive features of the invention, and contain the conclusions of the court in regard to the patentable character and scope and the proper construction of the claims of the patent.

The characteristic feature of the Atwood invention was truly said in the specification of the patent to be "a supporting tube, which is flexibly mounted with relation to the spindle rail, and contains the step and bolster bearings for the spindle, so that the latter and said tube may move together laterally in all directions during the self-adjustment of the spindle while carrying an unequally balanced bobbin and its yarn, instead of relying upon the movement of the spindle and its bearings within and independently of the supporting tube, as heretofore in this class of spindles." In the prior suit, the Rabbeth spindle support, which was patented by letters patent No. 227,129, and which was admitted to have priority over the Atwood invention, was relied upon as an anticipation of the Atwood patent. The Rabbeth structure was described in the opinion as follows: It "had a supporting tube rigidly connected with the rail; a bolster bearing, which was a thin tube, affording a lateral bearing surface for the spindle; a yielding cushion between the bolster bearing and the supporting tube, and a step bearing within the supporting tube. This tube may constitute the step bearing, but the step bearing and the bolster bearing are separate pieces, and consequently the spindle and the bolster bearing can vibrate in all directions." The important features of the patented device were said in the same

opinion to be "the supporting tube, within which are formed both the step bearing and the bolster bearing, and flexibly mounted upon or in relation to the supporting rail, the tube moving out of position under the influence of the vibration of the spindle; together with the manner in which the tube is secured to the rail, so that graduated pressure can be given, and strength can be secured." It was further said that the flexible support of the Atwood tube below the rail is far more than a change of the position of the Rabbeth cushion from the inside of his tube, and that the result was to cushion, but the method by which the cushioning is produced is very different. It is insisted in the argument of the present case that the foregoing description of the Rabbeth device is not universally true, but that the patent also describes a method of construction in which both step bearing and bolster bearing are parts of the same thin tube, which the patent designates as a vertical bearing. Two of the three claims of the Rabbeth patent call for a bolster bearing which is capable of yielding laterally with equal freedom in all directions, and a step within this supporting tube, which permits the foot to move in the same manner. These requirements are not expressed in the third claim, but the whole drift of the specification is that the bolster and the foot of the spindle each has equal freedom of motion in every direction, and that the foot of the spindle is not confined laterally, but is in an unsocketed or loosely fitting bearing. For example, it is said:

"In operation it will be seen that the entire bearing, f, [the vertical bearing,] being capable of more or less lateral movement in all directions, and the foot of the spindle being also equally free to move in any direction, the spindle can readily assume any position which an unevenly balanced bobbin would cause it to assume."

The position of the defendant is based upon the clause of the specification, which says, in substance, that when the bottom of the supporting tube is fitted for a plain step bearing the vertical bearing is open at its bottom, and when it is desired that the bottom of the spindle be elevated above the bottom of the supporting tube the vertical bearing is mounted upon a base tube, which rests upon the bottom of the supporting tube, and the step bearing is provided for either by means of a head inserted in the bottom of the vertical bearing or in the top of the base tube. The defendant naturally supposes that "inserted" means fixed in the bottom of the bearing. I think that this is true, and that the thin tube can in one proposed method of construction contain both bearings, and to that extent the previous description of the Rabbeth device requires modification.

This fact does not change the patentable relation of the two devices to each other. It is admitted by the learned expert for the defendant that he does not find in any structure before Atwood's a live spinning spindle supported within a supporting tube, containing step and bolster bearings for the spindle, which tube is flexibly mounted with relation to the rail of the spinning ma-

chine. The flexible attachment, with relation to the rail, of this supporting tube, is the gist of the Atwood device, and was its substantial improvement upon the rigidly held supporting tube of the Rabbeth spindle, and its cushion interposed between the supporting tube and the thin tube which constituted the bolster bearing.

The next question is whether the Atwood combination possesses patentable character in view of the Rabbeth spindle support, and the hydro-extractors or centrifugal machines described in the D. M. Weston patent, No. 82,049, of September 8, 1868, and the W. H. Tolhurst patent, No. 199,125, of January 8, 1878, and in the Weston English patent of 1874. The theory of the defendants is that, a cushion being old, the particular cushioning device of the Atwood spindle support was anticipated by the centrifugal machines, or so plainly suggested by them as to deprive Atwood of the character of an inventor. The heavy machine of the Weston patent of 1868, which in its main features is like all the "centrifugal machines," is thus briefly described in the decision upon the motion for a preliminary injunction: It "consisted of a revolving cylinder, which was to contain wet sugar, or some other semi-liquid material, to be freed from water, and which was firmly attached to the top of a perpendicular shaft, which shaft revolved in a box at its base. To this shaft power was applied by means of a driving belt attached to a pulley. A flexible, easily yielding spring, made of rubber or other elastic material, was placed around the outer circumference of the box, and within a stationary bushing, which was firmly secured to the cross timbers below. The improvement described in the patent consisted in mounting the machine so as to have a flexible pivot bearing at the base, rather than to suspend it upon bearings at the top of the upright shaft." Upon this hearing the defendant has placed great stress upon this class of machines, and has insisted that by them Atwood was told how to make a flexible attachment of his supporting tube to the rail, and that his invention was a double use of an old flexible support. The supposed analogies between these two classes of machines seem to me fanciful. "The needs of the respective machines are different, and call for a different character and location of pivot bearings; and therefore the box at the bottom of the shaft of the Weston machine has no patentable relation to the tube around the Atwood spindle, which supports both steps and bolster bearings." The centrifugal machines, with their lurching movement, neither need nor possess bolster bearings or supporting tubes in any proper sense in which those terms are used with reference to spinning spindles. But, if they are not an anticipation, the defendant thinks that they prevented the exercise of invention by Atwood, whose work was simply to mechanically adapt the pivot of the shaft of a hydro-extractor to a spindle for spinning silk. If they gave a suggestion of being capable of such adaptation, the history in the record shows that the work was that of an inventor.

Upon the question of infringement, the effort upon the part of the defendant being to confine the Atwood invention to narrow limits, the contention is that its patentability is substantially limited to a spring so placed that it surrounds the lower end of the supporting tube, is below the rail, and is accessible without disturbing the spindle. It is therefore insisted that the spring of the Hammond spindle, which is interposed between a shoulder on the tube and a shoulder on the base piece, this last-named shoulder being a separate nut which screws into the upper end of the base piece, is not an infringement. The patentable character of the Atwood invention does not depend upon the precise position with respect to the rail of the flexible attachment, and for the reasons stated in the opinion upon the motion the Hammond spindle is an infringement of the second and third claims of the patent.

The Dady spindle presents a question which did not exist in the prior suit. The construction of the tube, and the doubts which were caused thereby, were stated as follows in the opinion upon the motion:

"The Dady spindle differs from the Hammond spindle because its supporting tube is transversely divided into two parts. The lower part, which is about 13-16ths of an inch in height, and which rests upon the bottom of the oil cup, receives the step of the spindle, and is its step bearing. The spring surrounds that part of the tube which contains the bolster bearing. The difference is that one supporting tube or piece of metal does not contain both bearings, but the complainants earnestly contend that the spindle and the two parts of the tube have the same working relation to each other as if the tube was made in one piece, and that the several parts are so held in fact as to operate as if they were firmly united together. I have no doubt that the Dady spindle is not the Rabbeth spindle, in which the supporting tube was rigidly connected with the rail, and could not adapt itself to the movements of the spindle, and the spindle and bolster bearing moved 'within and independently of the supporting tube.' Neither part of the supporting tube of the Dady spindle is rigidly connected with the rail, and each part moves to a certain extent with the spindle during its vibrations. My doubt is whether the two parts of the tube and the spindle 'move together laterally in all directions during the self-adjustment of the spindle,' as required by the letters patent; in other words, whether the two parts move in line with each other, so that there is no independent movement of the step bearing. I do not now clearly see why the socket which forms the step bearing, and rests upon the bottom of the oil cup, may not move laterally, and, to a certain extent, independently of that part of the tube which contains the bolster bearing."

The effect which resulted from the fact that the two bearings were in a tube made of one piece of metal was frequently pointed out in the opinion in the prior suit, and the use of this language in regard to the tube led the defendant into the belief that such a method of construction was vital. It is vital if it was demanded in the claims of the patent, or if the transverse severance creates a substantial change in the mode of operation of the supporting tube. In the second claim the bearings are called a "combined bolster and step," and the tube is called, in the third claim, a "supporting tube." The claims do not require that the tube shall be one piece of metal, but it must act as one tube; and if the severed

parts are so bound together by the spindle which rests in the socketed step bearing that they act as one tube, the requirements of the claims would seem to be complied with. The testimony on the part of the complainant was to the effect that the two pieces of the Dady tube were so combined, by means of the spindle, that both the upper lateral bearing and the lower bearing of the spindle move with it in the same manner, substantially, as in the Hammond spindle, and that the parts move together laterally in all directions during the self-adjustment of the spindle. It cannot be said that there is an absolute unity of motion in the two bearings, because from the fact of severance absolute unity will not probably exist; but the complainant's testimony is to the effect that there is no substantial independent movement of the step bearing. This testimony was not denied or controverted by the defendant company, which showed no disposition to neglect any attackable point in the complainant's case. I therefore conclude that it could not be successfully attacked, and that the doubt which I expressed was not well founded.

Let there be a decree for the complainant for an injunction against the infringement of the second and third claims, and for an accounting.

INTERNATIONAL POSTAL SUPPLY CO. v. GROTH et al.

(Circuit Court, S. D. New York. September 15, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—STAMPING MACHINE.

Letters patent Nos. 341,380 and 388,366, for mail-stamping apparatus, consisting of a bolt or rollers carrying the mail matter, a piece at a time, under or opposite to the face of a stamp out of its path, and against a supporting bed, to be caught momentarily by fingers which are moved forward by it, forming an electric connection which moves the stamp against, and stamps, the piece, and releases it, to be carried along again by the carrier to a receptacle, are infringed by an apparatus which draws to the place of stamping by pneumatic tubes, where each piece, when still, releases a constantly moving stamp, giving it a longer motion by becoming a barrier to the motion of an arm, and shunting a detent, whereby the stamp is brought against it, and it is thereby stamped, and left to be carried along by the carrier to a receptacle; the whole arrangement of the patented invention being new, and the whole machine being covered by the letters patent, which are infringed by the taking of any substantial part of the machine.

In Equity. Bill by the International Postal Supply Company against William Groth and others to enjoin the defendants from infringing letters patent Nos. 341,380 and 388,366. Decree for plaintiff.

George W. Hey, for plaintiff.
Rowland Cox, for defendants.

WHEELER, District Judge. This suit is brought upon patents 341,380, dated May 4, 1886, and 388,366, dated August 21, 1888, and granted to George W. Hey and Emil Laass, for mail-stamping ap

paratus, consisting of a bolt or rollers carrying the mail matter, a piece at a time, under or opposite to the face of a stamp out of its path, and against a supporting bed, to be caught momentarily by fingers which are moved forward by it, forming an electric connection which moves the stamp against, and stamps, the piece, and releases it, to be carried along again by the carrier to a receptacle. The stamp does not move otherwise. The claims relied upon in 341,380 are:

"(2) An automatic marking or stamping apparatus, comprising a bed for supporting the article to be marked, a marking stamp supported opposite said bed, an actuating barrier or selecting feeler, arranged to be encountered by the article passing over said bed, and transmitting motion to the marking stamp, substantially as set forth." "(4) In combination with a letter supporting bed, a carrier for moving the letter over the bed, a stamp or marker, and a mechanical engaging finger to engage the moving letter, and transmit motion to the stamp or marker, substantially as described."

And in 388,366 are:

"(1) In a machine for stamping or marking mail matter, the combination, with the supporting feed bed, of a stamp normally out of the path of movement of the mail matter, and a stamp tripper or releaser normally in said path." "(3) In a machine for marking or stamping mail matter, the combination, with the supporting feed bed, of a stamp normally out of the path of the movement of the mail matter, and a stamp tipper or releaser normally in said path, and opposite the letter bed, substantially as specified."

The defendants' apparatus draws the matter to the place of stamping by pneumatic tubes, where each piece, when still, releases a constantly moving stamp, giving it longer motion by becoming a barrier to the motion of an arm, and shunting a detent, whereby the stamp is brought against it, and it is thereby stamped, and left to be carried along by the carrier to a receptacle.

The principal question made is whether the defendants infringe. If the patents were for that part of the machine moving the stamp only, the defendants would not infringe, for their contrivances for this purpose are entirely different. Railway Co. v. Sayles, 97 U. S. 554. But if they cover the whole machine they are not avoided by making some of its parts differently. Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. Rep. 299. The exclusive right is as extensive as the patented invention, and is infringed by the taking of any substantial part of it. Nothing existing before the applications narrowed this field for invention. The whole arrangement was new, and was patented. The parts covered by these claims, other than the mechanism for moving the stamp, are all found in the same relation, and do the same things in substantially the same way, in the defendants' as in the patented machine, and in each the piece to be stamped brings the stamp to place,—in the patented machine, by moving it from at rest; in the defendants', by extending its motion. In each the stamp is out of the path of, and inoperative without the presence of, the piece; the object being to prevent inking the bed, and smearing the opposite side of the piece. The arm in the defendants' machine is the feeler, finger, tripper, or releaser, as variously called, of these claims; and, as the defendants' machine has all the other elements of the claims, it embodies the patented invention.

It may have improvements upon the patented machine. If so, it has also the theory and parts of it improved upon, and still appears to be substantially the same. Therefore, it appears to infringe.

Let a decree be entered for the plaintiff.

HOLLIDAY & SONS, Limited, v. SCHULTZEBERGE et al.

(Circuit Court, S. D. New York. September 29, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COMMISSION TO EXAMINE EXPERTS.

In a suit for infringing a patent, a commission to examine witnesses abroad will, in a proper case, be granted for the purpose of obtaining expert testimony; and such commission should be granted in the case of a patent involving the chemistry of coloring compounds, when it is asserted by the moving party, and denied by the opposing party, that the art is so little practiced here that the best expert testimony can only be obtained by a commission.

In Equity. Bill by Paul Holliday & Sons, Limited, against Paul Schultzeberge and others to enjoin the infringement of letters patent. Motion for a commission to examine witnesses. Granted.

Cowen, Dickerson, Nicoll & Brown, for complainant.
Goepel & Raegener, for defendant.

LACOMBE, Circuit Judge. This court is practically asked in this case to prescribe a new rule of procedure, to the effect that in patent cases commissions to examine witnesses abroad should not be granted for the purpose of eliciting merely expert testimony. It is urged that such an examination can rarely, if at all, be conducted upon written interrogatories, and that the issuing of open commissions for such purpose entails a very heavy expense upon litigants. There is much force in the argument. The cost of such litigation is already great, and, where equally competent experts can be found in this country, it would be desirable, in most cases, to confine the expert testimony to such as might be elicited from them; but it is hard to see how the court can make any general regulation upon the subject. It would seem unwise for it to undertake to decide in advance whether the experts who can best inform it as to the prior state of the art are to be found here or abroad. Upon the argument of this motion it was asserted, and the assertion disputed, that within the field of the patent, viz. the chemistry of coloring compounds, the art was so little practiced here that the best expert testimony could only be secured by a commission. The interrogatories are therefore allowed, under the arrangement as to method of taking proof before the commissioner, which was suggested by the court, and apparently assented to by counsel.

AMERICAN BELL TEL. CO. et al. v. McKEESPORT TEL. CO. et al.

(Circuit Court, W. D. Pennsylvania. August 21, 1893.)

No. 20.

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—EFFECT OF DECISION OF SUPREME COURT OF UNITED STATES.

A decision of the supreme court of the United States, sustaining a patent, must be regarded as conclusive, upon a motion for preliminary injunction.

In Equity. Suit for infringement of letters patent. On motion for preliminary injunction. Granted.

J. J. Storrow and J. I. Kay, for complainants.
W. Bakewell and John McDonald, for defendants.

ACHESON, Circuit Judge. Alexander Graham Bell's second patent, No. 186,787, dated January 30, 1877, here sued on, was sustained by the supreme court of the United States in The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. Rep. 778, as to the 3d, 5th, 6th, 7th, and 8th claims. Now that decision must be regarded as conclusive, upon the present motion for a preliminary injunction. Purifier Co. v. Christian, 3 Ban. & A. 42, 51; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. Rep. 795. Infringement by the defendants of said claims is, I think, clearly shown. Indeed, in the affidavits submitted on the part of the defendants, it is not alleged that the telephones used by them differ materially, as respects the features here complained of, from the telephones which were adjudged by the supreme court to infringe the patent. A preliminary injunction, therefore, must be granted against the McKeesport Telephone Company and the other defendants who are citizens of Pennsylvania.

THE GOLDEN GATE.

ATLANTIC COAST STEAMBOAT CO. v. THE GOLDEN GATE.

(District Court, D. New Jersey. July 13, 1893.)

1. SALVAGE—WHAT AMOUNTS TO SALVAGE SERVICE.

The steamer Golden Gate, while proceeding to her wharf at Atlantic City, having become disabled by the breaking of her rudderhead, at about 2 o'clock P. M., cast anchor, and signaled for help. The sea at the time was rough, and the wind blowing from the northeast at the rate of 20 or 25 miles an hour. The steamer Atlantic City, then lying at her wharf, about a mile distant, in response to the signals, proceeded to the assistance of the disabled vessel, and, after several attempts to tow her, cast loose, and left her in her original position. *Held*, that the assisting vessel, having failed to render any successful service, was not entitled to salvage.

2. SAME—TOWAGE SERVICE—STALE CLAIM.

Subsequently, at the request of the owner of the disabled vessel, the Atlantic City again proceeded to the assistance of the Golden Gate, which

was not then in peril, the sea then having become quite calm, and the wind having moderated, and, after towing the Golden Gate about one-half or three-quarters of a mile, noticing the approach of a sister steamer of the disabled vessel, belonging to the same owner, the towing steamer cast off, and rendered no further service. No claim for service was then made, but, a difficulty having arisen between the owners of the two vessels about a year thereafter, the owner of the Atlantic City claimed $500 for salvage. *Held*, that while the claim did not commend itself as a just and fair demand, yet the owner of the Atlantic City was entitled to be paid for towage service, the amount of which, if the parties failed to agree as to the same, should be ascertained by a reference.

In Admiralty. Libel by the Atlantic Coast Steamboat Company against the steamer Golden Gate for salvage service. Decree for libelant.

H. H. Voorhees, for libelant.
A. Hugg, for claimant.

GREEN, District Judge. From the evidence in this cause it appears that the steamer Golden Gate, on the 27th June, 1891, at about 2 o'clock in the afternoon, while proceeding to her wharf at Atlantic City, N. J., had the misfortune to break her rudderhead, and so rendered her rudder unmanageable and useless. At the time the sea was quite rough, and the wind was blowing from the northeast at the rate of 20 or 25 miles per hour. As soon as the accident occurred she let go her anchor in about 12 or 14 feet of water, and was immediately brought to. She anchored about 25 yards away from a sand bar, which lies nearly opposite the channel buoy. As soon as she was brought to by the anchor, she either blew her whistle frequently, as testified by some of the witnesses, or hoisted her flag, as testified by other witnesses, as a signal that she needed assistance. The whistles were heard or the signal was seen by the Atlantic City, a steamer lying at one of the wharves at Atlantic City, and about a mile distant from the Golden Gate. She immediately went to the assistance of the Golden Gate, and after some effort succeeded in getting a hawser to her; but for some reason, concerning which there are contradictory statements, she was unable to tow her. After one or two trials the hawser was cast loose, and the Atlantic City returned to her wharf, leaving the Golden Gate where she found her, and without rendering any assistance. Later in the afternoon the owner of the Golden Gate made a special request of the captain of the Atlantic City to tow his disabled vessel up to her wharf. By this time the sea had become quite calm, and the wind had greatly moderated. The Atlantic City again went to the Golden Gate, without difficulty passed a line to her, and then towed her about one-half or three-quarters of a mile towards her wharf, when, noticing that the Florence, a sister steamer to the Golden Gate, and belonging to the same owner, was coming down to tow the Golden Gate, the Atlantic City cast off the towing hawser, and rendered no further service. At the time no claim for service rendered was made by the Atlantic City, but 12 months after, a difficulty having arisen between the

owners of the two steamers, the Atlantic City made a claim of $500 in the nature of salvage.

It will be noticed that the first effort to assist the Golden Gate was a failure. The Atlantic City, from some cause, was unable to tow her to her wharf. At the time this effort was made the Atlantic City was a volunteer, and, had it been attended with success, it would have been the basis of a claim for salvage, assuming that the Golden Gate was within reasonable apprehension of danger. But an indispensable ingredient of a salvage claim is that the service rendered has contributed immediately to the rescue or preservation of the property in peril. Salvage compensation will not be decreed unless the vessel in fact was saved by those who make the claim. While attempts at rescue are meritorious, and to be highly commended, yet, unless success follow the attempt, no claim for salvage can be allowed. These principles, well established, seem to bar this claim so far as the first attempt of the Atlantic City is concerned. Admittedly, that attempt to render assistance to the disabled vessel was a failure, hence for that no salvage can be granted.

It has been assumed that the Golden Gate was in reasonable apprehension of danger at this time, but the evidence is not satisfactory on this point. The burden of proof is on the libelant, and it can hardly be said that it has been properly met. The opinion of witnesses on the part of the libelant are purely speculative, and in opposition thereto the naked fact remains that the Golden Gate laid for hours where she was hove to, securely held by her anchor, without encountering any peril other than the ordinary peril of the sea. But it is not necessary to express a positive opinion upon this part of the case. It is immaterial on the view which has been taken of the facts.

The second attempt to assist the Golden Gate was made under different circumstances. The Atlantic City was not in this instance a volunteer. She was expressly engaged by the owner of the Golden Gate to tow his disabled vessel to her wharf. Success is no longer a criterion for the allowance of salvage compensation; and, besides, it is admitted that this effort was partially successful. But the difficulty with the libelant's case is that there is not a particle of evidence that at the time of rendering this partial service the Golden Gate was in the slightest peril. The sea was quite calm; the wind greatly moderated; no danger was apparently hovering around the disabled vessel; she might be said to have been almost in her home port; her situation visible to all; no alarm felt by any one, least of all by those on board. Such circumstances would not justify a claim for salvage compensation. The services rendered by the Atlantic City were simply towage services. For such service she is entitled to fair compensation, but beyond that nothing.

It is proper to add that this is very nearly in the category of a stale claim. No demand was made until a year after the rendition of the alleged service, and even then seems to have been resurrected as a sort of counterclaim to a demand previously made upon the

owner of the Atlantic City by the owner of the Golden Gate. Evidently the service rendered was not regarded by the Atlantic City as especially meritorious, or entitled to salvage compensation, until pressed for the payment of a debt alleged to be due, as stated. It does not commend itself as a just and fair demand, under the circumstances.

If the parties cannot agree upon the amount to be paid for towage service, let there be the usual reference to ascertain what it ought to be.

LIGHTERS NOS. 27 AND 28.

S. H. HARMON LUMBER CO. v. LIGHTERS NOS. 27 AND 28 et al.

(Circuit Court of Appeals, Ninth Circuit. August 15, 1893.)

No. 87.

MARITIME LIENS—STATE STATUTES—ADMIRALTY JURISDICTION.

A maritime lien against a vessel for supplies, created by a state statute, will not be enforced by the United States courts unless the supplies were furnished on the credit of the vessel. The Samuel Marshall, 54 Fed. Rep. 396, followed.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel by the S. H. Harmon Lumber Co. against Lighters Nos. 27 and 28 (John E. Whitney, claimant) for materials furnished to the lighters. The district court dismissed the libel. Libelant appeals. Affirmed.

H. A. Powell, for appellant.

Andros & Frank, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an appeal from the decree of the district court for the northern district of California, dismissing the libel against Lighters Nos. 27 and 28 for the price of lumber furnished in the construction of bunkers on said lighters, on the ground that there was not sufficient evidence in the case to show that the lumber was furnished on the credit of the vessels.

From the record it appears, among other things, that John E. Whitney, the owner of the lighters, (claimant and appellee herein,) chartered them to Leale & Shirley; that one Sheerin had a contract with Owens Bros., who were building a sea wall, to furnish them with rock; that Leale & Shirley had a subcontract with Sheerin for the transportation of the rock; that they used the lighters in the transportation of rock from San Quentin to the sea wall at San Francisco under this contract; that the owner of the vessels had no interest in this matter; that the Owens Bros., under their contract, discharged the rock from the lighters, and

in order to facilitate their work they built the bunkers; that Whitney, the owner, made no objections to the building of the bunkers; that appellant, at the request of Owens Bros., furnished the lumber for the construction of the bunkers on the lighters; that the bunkers were not used for the general transportation of merchandise or material to be discharged upon a wharf or upon other boats, but were constructed and available only for the special use and purpose of facilitating the discharging of rock, by dropping it into the water.

Mr. Leale, a witness on behalf of appellant, testified that "rock is frequently carried on these lighters without any bunkers at all, and in this very work on the sea wall. We can only use these bunkers until we have filled in to a certain depth. Then we have to take the bunkers off, and discharge the lighters through the flat of the deck. It is only for the purpose of letting the rock slide off the lighters without shoveling it that these bunkers are put on. These lighters are usually used on the waters here without bunkers to carry rock. At the time I received these lighters, they had no bunkers on; that is, when I agreed to take them." He further testified that he received a letter from Mr. Whitney, dated March 11, 1891, "demanding his charter money on these lighters, and also that the lighters be returned, and that the bunkers which now obstruct them be removed."

Mr. Harmon testified that he sold the lumber on what he considered the credit of James V. Owens, of Owens Bros.; that at the time of selling the lumber he did not make any effort to find out who was the owner of the lighters, and did not make any inquiry as to the relationship that Owens Bros. bore to the lighters; that the Owens Bros. were recommended to him by John Center, and for that reason he did not make further inquiry. It appears from his testimony that Owens Bros. were also buying lumber from appellant for the erection of sidewalks in the city. With reference to the recommendation of Mr. Center, and the sale of the lumber to Owens Bros. for building the bunkers, he testified that he was driving along in a buggy with Mr. Center, who said:

" 'Here is Mr. Owens, of Owens Bros. He wants some sidewalk planking.' Of course, I was anxious to sell him the stuff, and I then sold him the lumber, and * * * some time afterwards his brother Frank came to the office with the first order. He says, 'You have furnished my brother with lumber.' He said he would like to get this, and I said, 'All right.' He said, 'It is for my brother and myself.' * * * I did not know anything about them, except from Mr. Center, who had recommended them, and I said, 'I will let you have it.' Question. Then you sold it on what you consider the credit of James V. Owens? Answer. Yes, sir."

He further testified that the lumber was all delivered to the scows before appellant knew that Owens Bros. were not good pay, and, against the objection of appellee, that he had not in any manner released any lien that appellant might have on the scows.

Upon this evidence, we are of opinion that the court did not err in dismissing the libel. The lighters were domestic vessels owned

in San Francisco, and, under the maritime law, material men have no lien for materials or supplies furnished to domestic vessels. The Edith, 94 U. S. 518; The Lottawanna, 21 Wall. 559. But it is claimed by appellant that a lien exists by virtue of the provisions of section 813 of the Code of Civil Procedure of the state of California, which provides that "all steamers, vessels, and boats are liable, * * * (3) for work done or materials furnished in this state for their construction, repair, or equipment," and that "demands for these several causes constitute liens upon all steamers, vessels, and boats." In the view we take of this case, it becomes unnecessary to discuss the question whether or not appellant would, under any circumstances, be entitled to a lien under the provisions of this statute. It may, for the purpose of this opinion, be conceded that the word "equipment," as found in the statute, is susceptible of being so construed as to include the bunkers. But this would not benefit appellant, because the facts are that the lumber sold by appellant for the construction of the bunkers was furnished upon the credit of Owens Bros., and not upon the credit of the vessels. Under the decisions upon this point, it is now, we think, well settled that no lien exists unless the materials are furnished on the credit of the vessel. This is true whether the vessel is foreign or domestic, for courts of admiralty have no jurisdiction to enforce liens, except as admiralty liens, and the provisions of the state law should always be considered and construed with reference to the limitations ordinarily attaching to admiralty liens.

In The Samuel Marshall the court of appeals, sixth circuit, (54 Fed. Rep. 396,) directly overrule the decision of Judge Hammond in The Illinois White and Cheek, 2 Flip. 383, which is the leading case in opposition to the views herein expressed, and is cited and relied upon by appellant in this case, and, after a careful, elaborate, and able discussion of the questions, and a review of the authorities of The Lottawanna, 21 Wall. 579; The Young Mechanic, 2 Curt. 404; The General Smith, 4 Wheat. 443; and The Guiding Star, 18 Fed. Rep. 263,—in conclusion says:

"It follows from these authorities that the courts of admiralty will not enforce a maritime lien against a vessel for supplies created by a state statute, unless the supplies were furnished on the credit of the vessel, for that is indispensable to the existence of maritime liens of this class."

The decree of the district court is affirmed, with costs.

THE A. R. ROBINSON.

LANE v. THE A. R. ROBINSON.

(District Court, D. Washington, N. D. July 1, 1893.)

1. TOWAGE—TUG NOT A COMMON CARRIER—NEGLIGENCE.
The contract of towage does not subject a tug to the liability of a common carrier. She only undertakes to exercise ordinary care and skill.

2. SAME—LOSS—PRESUMPTION OF NEGLIGENCE.
Proof of a loss suffered by a tow does not raise a presumption of negligence against the tug in the absence of additional affirmative evidence. The Webb, 14 Wall. 406, followed.

In Admiralty. Suit in rem by J. H. Lane against the steamer A. R. Robinson to recover the value of part of a raft of piles lost while being towed by said steamer. Dismissed for failure of proof to establish negligence.

Preston, Carr & Preston, for libelant.
Allen & Powell, for claimant.

HANFORD, District Judge. That there was a contract to tow a raft of piles from Brown's Bay to Seattle; that the steamer did tow said raft; and that more than one-half of the piles that were in the raft when it started escaped therefrom, and were lost, during the passage,—are facts in this case. The claim of the libelant against the tug for damages is based upon a charge that by hauling too suddenly at starting, by running too rapidly, by venturing to cross Puget sound when the weather was threatening, and by failure of the master to exercise good judgment in going ahead towards his destination after being caught by a strong wind and choppy sea, instead of changing his course and running for shelter, the loss was caused by negligence or want of care and skill on the part of the master of the steamer. But to sustain this charge in either of the particulars mentioned by a fair preponderance of the evidence the libelant has failed. The proof is not sufficient to show with any degree of clearness the real cause of the loss.

The authorities which I have consulted require me to hold that by a contract for towage service the tug does not become chargeable with the liability of a common carrier. She only undertakes to exercise ordinary care and skill in performing the service. Proof of a loss does not raise a presumption of negligence or want of ordinary care and skill, so as to entitle the injured party to damages, without additional affirmative evidence. The Webb, 14 Wall. 406. Libel dismissed.

SCHERMACHER et al. v. YATES et al.[1]

(District Court, E. D. New York. July 28, 1893.)

1. SEAMEN'S WAGES—TERMINATION OF VOYAGE—PORT OF REFUGE.
In order to effect the termination of a voyage at a port of refuge, there must be some other act than the discharge of the crew.

2. SAME—FINAL PORT OF DISCHARGE—WHAT IS.
Seamen shipped for an outward voyage, "and back to a final port of discharge in the United States." The vessel was returning in ballast, bound for New York, when she became disabled in a gale, and bore away for Key West. There she discharged her crew, made temporary repairs, shipped another crew, and proceeded to New York. No cargo was loaded or ballast unloaded at Key West. *Held*, that New York, and not Key West, was her final port of discharge, and the original crew were entitled to recover against the vessel the cost of their passage from Key West to New York.

In Admiralty. Libel for seamen's wages.

Alexander & Ash, for libelants.
Edward B. Merrill, for respondents.

BENEDICT, District Judge. This is an action on the part of the crew of the American bark Liberia against the owners of that vessel to recover a balance of wages, and the cost of a passage from Key West to New York, for each of the men. The crew signed articles at New York on the 26th of September, 1892, for a voyage described as follows:

"From the port of New York to Monrovia, Liberia, and such other ports and places in any part of the world as the master may direct, and back to a final port of discharge in the United States, for a term not exceeding twelve calendar months."

The vessel proceeded from New York to Sierra Leone, and thence to Kingston, Jamaica. On the 24th day of January she left Jamaica, bound for New York, in ballast. When about 600 miles out from Jamaica, she met with a storm, by which she lost her foremast, and everything attached to it, her mainmast, and everything above that, and broke her bowsprit. The master thereupon determined that it was not safe, at that time of the year, to come on the coast in that condition, and so bore away for Key West, where she arrived in about 10 days. There the crew were discharged before the shipping commissioner, and wages up to the time of the discharge were paid each man. The men demanded payment of the expenses of their passage for New York, which was refused. The bark remained at Key West six weeks, during which time she was rigged up with a jury mast, and then she sailed without cargo to New York, where she arrived on the 20th day of February, 1893. The seamen now claim that they were improperly discharged in Key West, and are entitled to wages up to the time of the arrival of the bark in New York, together with the sum paid for the passage from Key West to New York.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

By the terms of the articles, the crew could only be discharged at "a final port of discharge in the United States." These words should be construed in view of the language employed in section 4530 of the Revised Statutes, where it is provided that a seaman is entitled to his wages "as soon as the voyage is ended and the cargo and ballast fully discharged at the last port of delivery." So construed, the last port of delivery where either cargo or ballast was discharged, if within the United States, would be a final port of discharge, within the meaning of the articles signed by the libelants. In this case the vessel, after leaving Jamaica, changed her port of destination from New York to Key West, but that change did not make Key West the final port of discharge. "Port of destination" and "port of discharge" are not equivalent terms. Story, J., says: "To constitute a port of destination a port of discharge, some goods must be unladen there, or some act done to terminate the voyage there." United States v. Barker, 5 Mason, 404. In my opinion, in order to make Key West the final port of discharge, either cargo or ballast must have been discharged, or some other act done which, in effect, terminated the voyage there. This vessel had no cargo, and therefore no cargo was discharged in Key West. She did have ballast, but, so far as appears, that was not unloaded in Key West. All that was done, besides repairing the vessel, was to discharge the old crew, and ship another crew for the original port of destination, New York.

There must be some other act besides the discharge of the crew, in order to effect a termination of the voyage at a port of refuge. Key West was simply a port of refuge. It was treated as such by the owners, and not otherwise. So far as appears, no effort was made to obtain cargo there. Nothing was done indicating an intention to undertake a new voyage there. The old crew were not discharged until their discharge was ordered by telegraph from the owners in New York after it was learned that new spars could not be obtained in Key West, and the vessel was to be delayed while repairing the old spars and rigging a jury mast; and as soon as this was done the vessel proceeded with her ballast, but without cargo, to New York. Under such circumstances, in my opinion, New York, and not Key West, was her port of final discharge. In this view, when the seamen were discharged in Key West they should have been paid the cost of their passage to New York. Evidently, they were willing to be discharged there, provided they were paid the cost of a passage to New York, but not otherwise. Having consented to a discharge at Key West, justice will be done by awarding each of them the price paid for the passage home, which was $22.

Let a decree to this effect be entered.

THE PILGRIM.

MANHATTAN LIGHTERAGE CO. v. THE PILGRIM.[1]

(District Court, E. D. New York. August 2, 1893.)

SHIPPING—NEGLIGENCE—STEAMER'S SWELLS—EVIDENCE.

A lighter in tow alongside a tug dumped her deck load in the East river, and brought suit for damages against the steamer Pilgrim, alleging that the swells of the steamer caused the accident. It appeared by the evidence that the Pilgrim was not moving at a dangerous rate of speed at the time, nor did she pass unusually close to the lighter; that the tow met the swells head-on, and that no one on these boats anticipated danger on seeing the swells approach; that the heeling of the lighter onto her beam ends was one continuous movement, she never righting at all after the first swell struck her; and that she was a vessel cut down from a sharp, deep brig. *Held*, that it was not shown that the accident was due to the swells of the Pilgrim, and the libel should be dismissed.

In Admiralty. Libel for damages alleged to have been caused by steamer's swells. Dismissed.

Carpenter & Mosher, for libelants.
Shipman, Larocque & Choate, for claimants.

BENEDICT, District Judge. This action is brought by the owners of the lighter Alfred to recover of the owners of the Sound steamboat Pilgrim the damages arising from a dumping by the lighter Alfred of her cargo of iron rails into the east river on the occasion mentioned in the libel. The libel alleges that the dumping in question was the result of the swell of the Pilgrim, caused by her fault in passing the lighter at an improper rate of speed, and an improper proximity to the lighter. The accident occurred as the Pilgrim passed the lighter somewhere between a drill at the time moored on Diamond reef and the New York piers; the lighter being bound to Brooklyn, and being towed alongside the tug Howard, and the Pilgrim being bound from the eastward to her pier in the North river.

As regards the speed with which the Pilgrim was moving at the time she approached and passed the lighter, the evidence introduced in behalf of the defendants seems to prove that the Pilgrim's speed did not exceed eight miles an hour, which cannot be held to be a dangerous rate of speed at the place in question. In regard to the distance from the lighter at which the Pilgrim passed, the testimony from those navigating the Pilgrim is that she passed at her usual distance from the New York piers; and upon the evidence it must be held that this course of the Pilgrim was proper, under the circumstances, unless it can be found that it carried her dangerously near to the lighter, seen by her to be approaching from the westward in tow of the tug Howard. The witnesses from on board the Pilgrim declare that the distance between the lighter and the Pilgrim, as she passed, was entirely

[1]Reported by E. G. Benedict, Esq., of the New York bar.

safe. The lighter had been seen, signals had been exchanged between the Howard and the Pilgrim, the navigation of the vessels was not embarrassed by other vessels, and no reason is assigned why the Pilgrim should have passed dangerously near to the lighter. The distance between the two vessels is variously estimated from 300 to 1,200 feet; but, whatever the distance was, it was at the time deemed safe, not only by those on the Pilgrim, but also by the master of the tug, who was watching the Pilgrim as she approached. This witness was responsible for the lighter. He saw the swells as they came towards him. He turned his boat to head them, and stopped his engines. His actions, as narrated, very clearly indicate to me that, as the Pilgrim approached, he judged that neither her speed nor her course involved danger to his tug or his tow. He says, distinctly, that he had no fear of trouble from the swells. The man in charge of the lighter, who was seated on the forward bitts of the lighter, evidently was of the same opinion. He saw the swells coming, and he left the bitts, not because of threatening danger, but, as he says, simply to avoid getting wet. It is plain from his testimony that he judged that neither the speed nor the course of the Pilgrim was dangerous to his vessel. This testimony produced in behalf of the libelant shows that the swells seen to be approaching the tug and her tow were no greater than are ordinarily to be expected, and were not such as to create alarm. The deck hand of the tug describes the swells as "tidal waves," but exaggeration is to be expected from this witness; he having been knocked overboard by the lighter's mast, and compelled to swim for his life. The fact is that the waves that caused the lighter to dump her cargo were not considered dangerous by any of the experienced persons who saw them approaching. When the waves struck the lighter, however, she heeled over towards the tug, so far that her entire deck load of rails slid off into the sea between the tug and the lighter, carrying with it the lighter's rail, the plankshear on the starboard side, starting off three or four of the outside plank on that side about the length of 85 to 90 feet, taking the mast out of her, and tearing up her deck in the wake of the mast for 20 feet, and carrying over the mast, breaking the partners, and the deck beams on the deck forward. How this occurred, is stated by the mate of the lighter, in charge at the time. He says, when the swells came, the lighter heeled over, and he moved to the other side, from fear of getting wet. The swells kept on, and the lighter heeled more all the time, and finally, when the lighter's starboard rail was under water, the whole of the cargo went off at once, the lighter's deck then standing at an angle of 80 degrees. This witness makes it plain that the lighter began to heel as soon as the swell struck her, and that she never righted at all, but kept heeling over, until, when about on her beam end, she dumped all her cargo, and this notwithstanding she had been headed nearly head-on to the waves.

An attentive perusal of the testimony of the witnesses from the tug and the lighter conveys to my mind the impression that the effect produced by the waves upon the lighter was an effect wholly unexpected. And this fact at once gives rise to the conjecture that the dumping of the lighter's cargo is to be attributed to some other cause than waves of a dangerous character that fell upon her. Evidence given in regard to the construction of the lighter shows this conjecture to be well founded. She was a brig originally built to carry cargo below deck. She was cut down to be a lighter, and thereafter used to carry all her cargo on deck. The brig was a very sharp vessel. One witness says she was sharper than any other vessel he had ever seen put to such a business, and two witnesses declare her unsafe for such a cargo as she had on this occasion, because of her form. That she had often carried heavy cargoes on deck in safety, appears. She had frequently been loaded with rails as heavy, and heavier, than those she dumped on this occasion. She had never before dumped her cargo. Such evidence is, of course, deserving of consideration, but it is not conclusive, because the circumstances may have been different. It does not overthrow the fact, proved here, that the lighter dumped her cargo when meeting, nearly head-on, waves that were not considered dangerous by experienced persons who were observing them with care. She was a keel vessel, and might have been affected by tides and currents which did not appear on the surface. The presence of the drill might have caused eddies which affected her. Of this there is no evidence. But, as it seems to me, there is proof that the waves which caused the lighter to dump her cargo were not of a dangerous character, and were not such as to cause a properly constructed lighter, properly loaded, to dump her cargo as this lighter did.

This finding compels a dismissal of the libel.

ILWACO RY. & NAV. CO. v. OREGON SHORT LINE & U. N. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. July 17, 1893.)

No. 77.

CARRIERS—INTERSTATE COMMERCE ACT—CONNECTING LINES—DISCRIMINATION.

A transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the third section of the interstate commerce act, to permit the boats of a competitor to land at such wharf.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

In Equity. Bill by the Oregon Short Line & Utah Northern Railway Company against the Ilwaco Railway & Navigation Company for violation of the interstate commerce act. A decree was rendered for complainant. 51 Fed. Rep. 611. Respondent appeals. Reversed.

Thomas N. Strong, (C. W. Fulton and C. A. Dolph, on the brief,) for appellant.

W. W. Cotton, (Zera Snow, on the brief,) for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. The plaintiff contends that defendant, by preventing it from landing its boats at a wharf owned and used by defendant, discriminates against it, contrary to section 3 of the interstate commerce act.

The facts are as follows:

That prior to the month of August, 1888, the defendant was named the Ilwaco Steam Navigation Company, but in that month it filed supplemental articles of incorporation, changing its name to Ilwaco Railway & Navigation Company, and proceeded to construct a line of railway from a point at or near the town of Ilwaco on the Pacific ocean, in the state of Washington, to a point on the navigable waters of Shoal Water bay, in Pacific county. That the construction of said railway was commenced before, but completed after, the filing of said supplemental articles. That prior to the construction of said railroad line the defendant owned and operated a line of steamboats between the town of Astoria, Or., and the town of Ilwaco. That the shores of the Pacific ocean in that vicinity were popular summer resorts during the months of July and August and the first week of September. That prior to 1888 the Oregon Railway & Navigation Company owned the boats and line between Astoria and Portland, Or., which plaintiff now owns, and carried passengers from Portland to Astoria, which were then transferred to plaintiff's boats, and carried to Ilwaco, from whence they went to the ocean beach in wagons. That in the summer season of the years 1888, 1889, 1890, and 1891 the Oregon Railway & Navigation Company asked and obtained permission to land its passengers on the wharf at Ilwaco, paying a compensa-

tion therefor. That complainant only ran its boats during said summer months, and only while people were traveling to said summer resorts. Said town of Portland, Or., is situated on the Willamette river, about 100 miles inland, easterly from the said city of Astoria, which latter city is situated on the left bank of the Columbia river, and about 12 miles inland from the ocean; and the town of Ilwaco is situated on the right bank of the Columbia river, at a part thereof known as "Baker's Bay," and about 15 miles distant, in a northwesterly direction, from said city of Astoria. That in the year 1892 complainant desired the same privileges, but respondent refused.

When defendant constructed its said railway, leading from its said wharf to a point on Shoal Water bay, it made the said wharf the southern terminus of such line of railway, and there arranged and provided its terminal facilities for its said railway line, and also provided for landing its own boats thereat, but made no provision for landing any other boats; and said wharf ever since has been, and is, the southern terminus, and the principal terminus, of said line, and the principal office of the defendant is at said town of Ilwaco. That when the complainant and its said lessor commenced running its boats during said summer seasons, and continued so doing, as aforesaid, it commenced and continued carrying passengers from said city of Astoria to defendant's said terminus as well, and defendant soon ascertained that its business, instead of increasing, as it should have done, with its additional facilities for accommodating travel on its said railway, and also in new and better boats, which it also constructed and operated, was decreasing, and that it was necessary for it to take some step to protect and increase its business, and to recover its old business. That respondent is able to accommodate all the travel. That there is but one slip or landing place at said wharf, and defendant was sometimes obliged to moor its boats outside of plaintiff's, and transfer the freight and passengers across the same. That confusion was thereby caused, and the patronage of defendant's boats lessened. That said wharf is constructed at the end of a trestle running out from the shore of the Columbia river thereto, on which trestle is also a wagon road for teams and foot-passengers to travel,—safe, secure, and convenient. That said trestle extends over and across the tide land adjacent to the bank of said river, but said trestle and wharf were constructed there by defendant, under a claim of ownership of the said tide land, prior to the date of the admission of the state of Washington, as a state, into the Union, and while it was yet a territory of the United States; and said town of Ilwaco is, and during all the times herein stated, since the admission of the state of Washington into the Union, has been, an incorporated town, under the laws of Washington, but the corporation limits thereof extend only to the line of ordinary high tide of said Columbia river. That the harbor lines of the said town of Ilwaco have not yet been located, but the United States government, through its proper officials, is now

proceeding to locate the same. That prior to the commencement of this suit, to wit, on the ——— day of ———, 1892, defendant duly applied, in writing, to the state board of equalization of Washington, to have such tide lands appraised, and has duly applied to purchase the same, but no appraisement thereof has been made yet, but defendant has the preferred right to purchase the same, and it intends to avails itself of such right.

That defendant has, during all the time since it constructed said wharf, used it as its own private property, and not as a public wharf, and has refused at all times to allow any other person or persons, firm or corporation, to use it, or share in the use thereof, and has refused at all times to allow any boats, steamers, or craft, excepting its own, to land thereat, except the times when it permitted complainant's boats and said Oregon Railway & Navigation Company's boats to land thereat, as aforesaid, and for the consideration aforesaid paid to defendant, and it is not now permitting, and it never has permitted, any other boats than its own, with the exception hereinbefore stated, to land thereat; and, since the complainant discontinued landing its boats at said wharf, no boats whatever, excepting defendant's own boats, have been allowed or permitted to land thereat. That provision is made at the defendant's terminus for selling tickets, but that this is only for the purpose of supplying persons brought there by defendant's boats, and there is no general or public station there. The regular station, and the first station on defendant's said line of railway, going north, is the one in said town of Ilwaco, aforesaid, at which station the defendant has the usual station facilities and accommodations for receiving passengers and freight. That this station is 4,035 feet distant from the wharf. That there is another wharf at said town 1,600 feet from defendant's wharf, and 2,567 feet distant, over the regularly traveled streets from defendant's station at Ilwaco, at which complainant's boats landed in 1892. That, on its said wharf, defendant leaves cars, when not in use, and whereon it places them to be loaded, and this affords the only terminal facilities which it has. That complainant and defendant are competitors.

On these facts the plaintiff contends that defendant, by excluding the plaintiff's boats from its wharf, offends against section 3 of the act to regulate commerce. It attempts to support this contention by dividing defendant's line, and making its railroad part and its steamboat part connecting lines, as defined in said section 3. The first subdivision of the section is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever."

But is the division of defendant's line justifiable? The parts of the line have not independent ownership. The defendant company

was organized for the purpose of constructing a transportation route from Astoria, Or., to Shoal Water bay, Wash. Its means of transportation are steamboats and a railroad. The wharf at Ilwaco makes the connection between them, and the continuity of the route. The act contemplates, we think, independent carriers, capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

We do not think that the cases cited by appellee militate with these views, nor do they justify a railroad company combining with its proper business a business not cognate to it, and discriminating in favor of itself, as it might in counsel's illustration of a combination of a railroad company with the Standard Oil Company, or as illustrated in the cases of Baxendale v. Great Western Ry. Co., 1 Railway & Canal Traffic Cas. 202; Same v. London & S. W. Ry. Co., Id. 231; and Parkinson v. Railway Co., Id. 280. In all these cases the railroad company attempted to discriminate in favor of itself as carrier, separate from its capacity as a railway carrier. We find no difficulty of concurring in these cases, and distinguishing them from the case at bar. It was not to engage in the business of drayman, as Cockburn, C. J., indicates in the first case, that great powers have been given to railway companies, and, if permitted to be so used, might indeed be converted into a means of very grievous oppression. The principle of these cases does not extend to boats owned by railroads, as a part of a continuous line. Nor do we think the case, Indian River Steam-Boat Co. v. East Coast Transp. Co., (Fla.) 10 South. Rep. 480, sustains complainant. It was a case of discrimination. The action was between two competing steamboat companies, in favor of one of which a railroad company had discriminated by leasing its wharf. Both companies were independent of the railroad, and both connecting lines with it. But the court recognized the right of the railroad company and the Indian River Company to build and maintain a wharf, as incidental to their business, saying: "If either company should erect a dock or wharf for its private use, we know of no law to prohibit it." Page 492. The steamboats were competing lines, and the statutes of Florida regulating railroads provided that no common carriers subject to the provisions should "make any unjust discrimination in the receiving of freight from or the delivery of freight to any competing lines of steamboats in this state." The decision, therefore, was sustained by the laws of the state. The reasoning of the court, beyond this, seems to be in conflict with the Express Cases decided by the supreme court of the United States. 117 U. S. 29, 6 Sup. Ct. Rep. 542, 628.

It is not clear what complainant claims from the second subdivision of section 3, besides what it claims from the first subdivision. The second subdivision is as follows:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities

for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion, however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate our views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist.

Judgment reversed, and cause remanded for further proceedings.

LEVI v. EVANS. SAME v. SIEBERLING. SAME v. WILD.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

Nos. 45–47.

1. EQUITY JURISDICTION—WAIVER.
   Where a defendant in a suit in equity voluntarily enters his appearance therein, expressly waiving the question of the jurisdiction of the court, he cannot afterwards object that the court is without jurisdiction because of the existence of an adequate remedy at law, especially when such objection is not made until after answer filed.
2. SAME—TRUSTS.
   A court of equity has jurisdiction of a suit to establish and enforce an alleged trust, secure an accounting for a fraudulent breach thereof, and settle conflicting claims to a fund in the registry of the court.
3. TRUSTS—EVIDENCE—STOCK SUBSCRIPTION.
   Where one who subscribed for corporate stock in his own name testifies that he subscribed solely for himself, a trust in part of the stock for another, who paid no part of the subscription price, cannot be established by vague and indefinite oral declarations of the subscriber.
4. SAME—RIGHTS OF TRUSTEE—CORPORATE STOCK.
   Three stockholders executed an instrument whereby they professed to sell their stock to the fourth stockholder in the same corporation, "for and during the period of 6 months, in trust for the use and benefit of the grantors," with power to sell the same on certain specified terms. *Held*, that said instrument in no way prevented the latter from selling his own stock on such terms as he chose, it not appearing that his so doing in any way prevented the sale of the stock named in said instrument.
5. SAME—FRAUD BY TRUSTEE—ACCOUNTING.
   A stockholder who sells his own stock, together with stock held by him in trust for another, to a purchaser, who, as an inducement to the s. . buys from him without inquiry a worthless patent right, must account to such other stockholder for a share in the price received for such patent right, proportioned to the amount of the latter's stock.

Appeal from the Circuit Court of the United States for the District of Indiana.

Statement by BAKER, District Judge:

The appellee James L. Evans commenced an action in attachment in the circuit court of Hamilton county, Ind., against the appellant, Emil S. Levi,

making the American Strawboard Company and Crawford Fairbanks garnishee defendants therein. The complaint was in a single paragraph for money had and received, as the proceeds of the sale of certain shares of stock. In the state court the appellee Leonard Wild filed under said attachment a similar complaint. Upon the appellant's petition, the causes were removed into the circuit court of the United States for the district of Indiana. After such removal, and before the filing of the transcript in the federal court, the appellee Monroe Sieberling filed in the latter court his complaint and proceedings in attachment similar to the complaints filed in the state court by Evans and Wild. The transcript on removal was filed on the 9th day of December, 1889. On the 7th day of January, 1890, Crawford Fairbanks, garnishee, acknowledged his indebtedness in the sum of $12,590.80, which he then paid into the registry of the court in obedience to its order. At the same time the American Strawboard Company, garnishee, acknowledged an indebtedness of $24,214.60, which was paid in under the order of the court "for the use of the parties lawfully entitled thereto."

On the 10th day of January, 1890, the following entry was made in the original cause:

"Evans v. Levi. Come James L. Evans, Leonard Wild, and Monroe Sieberling, by Shirts & Vestal and A. C. Harris, their attorneys, and file amended complaints herein as follows: [h. i.] And it is ordered for the convenience of trial that each case be docketed as a separate case, and, on motion, the defendants are ruled to answer such complaint."

The amended complaints so filed were in fact bills in equity, wherein the appellant, Levi, and the American Strawboard Company and Crawford Fairbanks were defendants, charging that conflicting claims to said funds existed, and setting out the facts in detail substantially as stated in the second paragraphs filed May 5, 1890, except that in the latter paragraphs it was shown that all of the money had been paid into court for the use of whoever was entitled thereto.

After the money had been paid into court by Fairbanks and the strawboard company, the appellant, Levi, sought to give the ordinary delivery bond and take the money, but the appellees objected, on the ground that the money was a trust fund, the proceeds of the sale of their stock, and therefore could not be taken out. Thereupon, on the 21st day of January, 1890, the parties entered into the following stipulation:

"Whereas, there is a controversy over the question whether Emil S. Levi has a right to tender a bond and take part or all of the money now in the registry of the circuit court of the United States for the district of Indiana, paid in by the garnishees in cause No. 8,551; and the jurisdiction of the court over the person of the defendant in said cause is also in question: Now, then, in consideration of the mutual settlement of these two questions, it is agreed by and between Emil S. Levi, on the one part, and James L. Evans, Leonard Wild, and Monroe Sieberling, on the other part, that an order shall be forthwith made by said court that the said sums of money shall be forthwith paid over to said Levi or his attorneys, when the said Levi shall file with said clerk an appropriate delivery bond, with R. T. McDonald as surety, and upon the entering by counsel of a full general appearance to said action, and to the amended pleadings filed therein, which have been for the convenience of this court docketed as separate actions, numbered 8,558, 8,559, and 8,560, on the law side of said court. It is understood that by this agreement the said Emil S. Levi expressly waives all questions of the jurisdiction of the Hamilton circuit court or of this court in said causes, including said amended pleadings; but he reserves the right to answer, plead, or demur to the same extent as though he was brought in by process duly served. This agreement may be filed in said cause as evidence of the facts herein set out."

The foregoing stipulation was duly signed, and on the 22d day of January, 1890, the parties filed the same in said causes in said court, and Levi tendered the bond and received the money thereunder. Afterwards, on May 5, 1890, Evans, Wild, and Sieberling each filed second paragraphs of complaint, which differed from the amended bills filed January 10, 1890, only in

that the second paragraphs each showed the money had been paid into court, leaving the litigation to be waged only between the parties to these appeals.

On the 29th of August, 1890, the court made the following order:

"Come the parties, and it appearing that this suit when removed from the state court was an action at law, and it further appearing that after its removal the original plaintiffs filed additional or amended pleadings seeking equitable relief, and that thereupon the defendants entered their appearance to the suit, including said additional or amended pleadings, it is therefore ordered that said common-law action, as it originally stood at the time of removal, be docketed on the law side of the court, and that the additional or amended pleadings be docketed on the equity side thereof, and that they proceed as suits in equity, and the defendants are ordered to answer therein on or before the first Monday in October."

The causes were so docketed, and on the 1st day of October, 1890, the appellant demurred to each bill of complaint, which demurrers were overruled February 17, 1891, and on March 3, 1891, he filed his answers. The causes were put at issue, and were referred to the master, who, by consent, heard the cases together, and on the 12th of October, 1891, made his report finding for the appellees. The appellant filed exceptions to the master's report, pending which he also moved to dismiss the causes. The motion to dismiss, as well as the exceptions, were severally overruled, and final decree was entered in accordance with the master's finding.

The case made by the findings is substantially as follows: In 1888 the Noblesville Manufacturing Company was organized with an authorized capital stock of $150,000, of which $80,000 was deemed to be represented and paid up by various donations. The remaining $70,000 was held as follows: Emil S. Levi, individually, $20,000; Levi, trustee for Sieberling, $10,000; James L. Evans, $10,000; Leonard Wild, $10,000; John B. Carter, $10,000; Charles A. Jay, $10,000. By the original agreement, Levi, Evans, Wild, Carter, and Jay were to and did each subscribe for $2,000 for the benefit of Sieberling, in trust, which was to be carried for him in consideration of his knowledge and skill in the business, and in consideration that he should furnish plans for the buildings and machinery. This arrangement was modified by a subsequent written contract, whereby Levi became sole trustee for Sieberling for the $10,000 worth of stock which he was to pay for and hold for his reimbursement, with full power to vote the same. Afterwards, the capacity of the mill was increased, and $80,000 of additional stock was issued, of which $40,000 was sold to one Sheldon, trustee, for A. L. Conger. Sieberling obtained from Conger $10,000 of this stock. The remaining $40,000 was to be divided between the original stockholders in proportion to their holdings of original stock. Levi went to Europe about the time the stock was increased, but left Carter to act for him. Levi, when in Europe, subscribed for $20,000 of the new stock, and sent the subscription paper back to Carter for the other subscriptions. It is claimed that $5,000 of the $20,000 subscription made by Levi was agreed by him to be held in trust for Sieberling, for whom he was to pay assessments as made with his own money. On August 15, 1889, Carter, Evans, and Wild executed the following agreement:

"Know all men by these presents, that we, John B. Carter, of the county of Howard, James L. Evans and Leonard Wild, of the county of Hamilton, all in the state of Indiana, witnesseth, that whereas, the said parties are each the owner of stock in the Noblesville Manufacturing Company, a corporation having its place of business at the city of Noblesville, in said county of Hamilton, of the face value of fifteen thousand dollars: Now, therefore, the said John B. Carter, James L. Evans, and Leonard Wild, for value received, do by these presents bargain, sell, and convey unto Emil S. Levi, of the city and state of New York, for and during the period of six months from this date, all and singular the said shares of stock, and all of our respective interests in said corporation, in trust, however, for the use and benefit of the grantors, and with full and absolute power to the said Levi to sell, transfer, and convey the same for cash: provided, however, the said Levi only has power to sell the said shares as a whole, and for not less than the amounts

of money that have been paid thereon by said shareholders to the present time, and one hundred per cent. thereon in addition thereto, together with the amount of money that may be paid upon said shares by the grantors between this date and the date of any sale thereof by said Levi. The proceeds arising from any such sale shall be paid to the grantor in equal shares, by either paying the same to him at said city of Noblesville, or by depositing the same to his credit at the Citizens' State Bank at said city of Noblesville. And the said trustee has full power to do any and all acts necessary to consummate any such sale. And whatever the said trustee may lawfully do in the premises we do hereby ratify, confirm, and grant as if present and doing the same."

This instrument was accepted by Levi, and held and retained by him until after the sale hereinafter mentioned.

A day or two thereafter, Sieberling executed to Levi a similar agreement concerning his stock.

While Levi was holding these instruments, on the 16th of September, 1889, he went to Terre Haute, Ind., in company with John B. Carter, and they then and there sold the stock owned by them in the Noblesville Manufacturing Company to the American Strawboard Company. Crawford Fairbanks represented said strawboard company in said transaction. Levi and Carter together owned 1,267 shares of stock, of the par value of $63,350 on which they had paid subscriptions to the amount of one-half its par value. The strawboard company agreed to pay for said shares of stock $63,350, as follows: $10,000 cash in hand; $10,000 in ten days; and the remainder in three equal installments, in 30, 60, and 90 days; and to assume the payment of the remaining one-half of the unpaid subscription price of said shares of stock. Levi and Carter also agreed not to go into the business of manufacturing strawboard for the period of 20 years. The strawboard company further agreed to buy at the same rate, and upon the same terms and conditions, the interests of Evans, Wild, and Comstock in the Noblesville Manufacturing Company, not exceeding in all $35,000, which was the exact par value of the shares of stock owned by Evans, Wild, and Comstock. At the time of the execution of the foregoing contract for sale of stock, an agreement was entered into between Levi and Carter, of the one part, and Crawford Fairbanks, of the other part, by the terms of which Levi and Carter sold a one-half interest in a patent for grinding wood pulp to Fairbanks for $16,000, said $16,000 to be paid in 60 days. The interest of Carter in said $16,000 was agreed to be $3,409.20, and the interest of Levi therein was agreed to be $12,590.80.

At the date of the contract the patent was worthless. Fairbanks knew nothing about it, nor the principle upon which it operated, and stated that it was not worth anything, and that the money he paid for it was to secure the stock, and that the money paid therefor belonged to the strawboard company.

Upon the execution of the two foregoing contracts, Levi went to Noblesville, and exhibited to Evans and Wild the contract for sale of the stock, and represented that he had a hard time to get it, and he concealed the fact of the existence of the contract for the sale of the patent.

W. A. Ketcham and Louis Newberger, (Morris, Newberger & Curtis, on the brief,) for appellant.

Geo. Shirts and Addison C. Harris, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge, (after making the foregoing statement.) It is contended by counsel for the appellant that the court erred in overruling his motion to dismiss these causes on the ground that the appellees had a plain and adequate remedy at law. When these causes came from the state court they were actions at law,

upon the common counts, for money had and received. Additional and amended pleadings were filed in the court below, without objection, stating facts which disclosed causes of action of equitable cognizance; and so that court made an order that the original causes should remain on the law side, and the additional and amended pleadings, which disclosed equitable causes of action, should go on the chancery side, and proceed as suits in equity. The court below had the undoubted authority to make such an order. Falls of Neuse Manuf'g Co. v. Georgia Home Ins. Co., 26 Fed. Rep. 1. If additional and amended pleadings, exhibiting causes of action of an equitable nature, could not properly be filed in an action at law, all objection to such course of procedure was expressly waived by the appellant, and he voluntarily appeared to these equitable suits, pursuant to a stipulation entered into by him with the appellees for a valuable consideration. Good faith and fair dealing would now preclude the appellant from profiting by his objection. But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. 1 Daniell, Ch. Pr. (4th Amer. Ed.) p. 555; Reynes v. Dumont, 130 U. S. 395, 9 Sup. Ct. Rep. 486; New Orleans v. Morris, 105 U. S. 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the complainant. Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. Rep. 604.

These bills, however, are clearly of an equitable character. They seek relief from fraud, and to settle conflicting claims to a fund in the registry of the court, and to establish and enforce an alleged trust, and to secure an accounting for a breach thereof. All of these are familiar subjects of equitable jurisdiction. Story, Eq. Jur. § 601; Fowle v. Laurason, 5 Pet. 495; New Orleans v. Morris, 105 U. S. 600. In 1888 the Noblesville Manufacturing Company was organized with an authorized capital stock of $150,000, of which $80,000 was deemed to be represented and paid up by various donations. The remaining $70,000 was subscribed for by the following persons and in the following amounts: Emil S. Levi, individually, $20,000; Levi, trustee for Monroe Sieberling, $10,000; James L. Evans, $10,000; Leonard Wild, $10,000; John B. Carter, $10,000; Charles A. Jay, $10,000. In March, 1889, at a meeting of the stockholders, the capital stock was increased to $300,000. The ostensible object of this increase was to enable the company to enlarge the capacity of the mill. Eighty thousand dollars of this stock was subscribed for as follows: C. E. Sheldon, trustee, $40,000; Emil S. Levi, $20,000; John B. Carter, $5,000; James L. Evans, $5,000; Leonard Wild, $5,000; Charles A. Jay, $5,000. The master found and reported, and the court below adjudged, that it was a part of the agreement, at the time the last subscriptions were made, that Sieberling was to have $5,000, the same amount of new stock that was allotted to Carter, Evans, Wild, and Jay, and that the $20,000 subscribed in the

name of Levi embraced $5,000 for Sieberling and $15,000 for Levi. This is denied by Levi, who was in Europe at the time he made his subscription, and he insists that he made it wholly on his own account.

It is contended by the appellant that the court below erred in decreeing that $5,000 of the $20,000 subscription made by him in his individual name was actually taken for and on behalf of Sieberling. A careful examination of the evidence satisfies us that this claim is well founded. Levi made the subscription in Europe whereby he took $20,000 of the new stock in his own name, which he agreed to pay for. The contract of subscription was wholly between him and the manufacturing company. The entire right and interest in the stock, as shown by the written contract of subscription, was in Levi. He testified positively and emphatically that such was the fact. The evidence to raise a trust in this stock in favor of Sieberling consists wholly of oral declarations and statements claimed to have been made by Levi and by Carter as his agent. Many of the declarations claimed to have been made by Carter are purely hearsay. The legitimate evidence before the court, we think, fails to show any definite agreement by Levi to subscribe for $5,000 worth of stock for Sieberling. It would violate the soundest principles to permit a trust in favor of Sieberling to be ingrafted on the subscription contract on the loose, vague, and indefinite declarations and statements disclosed in this record. It is not important to discuss the evidence in detail, for if it were conceded to be sufficient to prove that Levi had agreed to subscribe in his name for stock for Sieberling, and to pay the assessments thereon with his own money, and to permit Sieberling thereafter to repay the advances so made, it would not yield any support to the decree. The most that can be claimed is that Levi, before the subscription was made, agreed to subscribe in his own name for $20,000 of stock, and to pay the assessments thereon with his own money, and that $5,000 of it should belong to Sieberling, who should thereafter reimburse Levi for the advances made by him. A trust in respect to money or other personal property may arise or be created by a parol agreement, if founded on a sufficient consideration. Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty. Perry, Trusts, § 86; Day v. Roth, 18 N. Y. 448; Hon v. Hon, 70 Ind. 135; Mohn v. Mohn, 112 Ind. 285, 13 N. E. Rep. 859. A trust may arise or be created with reference to personal property upon the same facts and circumstances which would give rise to a trust in real estate, except that in respect to the latter the trust must be manifested by an agreement or memorandum in writing, while in respect to the former it may rest in parol. Hunt v. Elliott, 80 Ind. 245. A trust results from the acts, and not from the agreements, of the parties, or rather from the acts accompanied by the agreements. No trust can be set up by mere parol agreements, or, as has been said, no trust results from the breach of a mere parol

contract. So, if one agrees to purchase real or personal property, and give another an interest in it, and he purchases and pays his own money, no trust can result. Perry, Trusts, § 134; Kisler v. Kisler, 2 Watts, 323; Williard v. Williard, 56 Pa. St. 119. And so if a party makes no payment, and none is made on his account, either actually or constructively, he cannot claim a resulting trust. And a mere parol declaration by one that he is buying property for another is not sufficient to establish a resulting trust. There must be proof of an actual or constructive payment by the person claiming such a trust. Botsford v. Burr, 2 Johns. Ch. 408; Lathrop v. Hoyt, 7 Barb. 60; Jackman v. Ringland, 4 Watts & S. 149; Smith v. Smith, 27 Pa. St. 180; Dorsey v. Clarke, 4 Har. & J. 551; Fischli v. Dumaresly, 3 A. K. Marsh. 23; Sample v. Coulson, 9 Watts & S. 62; Olcott v. Bynum, 17 Wall. 44. From these considerations it results that the court erred in holding that Sieberling was entitled to $5,000 of the $20,000 of the stock subscribed for by Levi.

It is further contended by the appellant that the court below erred in decreeing that the appellees James L. Evans and Leonard Wild should each recover from him the sum of $2,872.49, besides their costs, on account of the $16,000 received by Carter and Levi from Fairbanks on account of the sale of a half interest in the patent for grinding wood pulp. The trial court was of the opinion that the $16,000 which were professedly paid as the purchase price of a half interest in a patent for grinding wood pulp were in fact paid as a bonus or additional consideration for the 1,267 shares of stock in the Noblesville Manufacturing Company sold by Levi and Carter to the American Strawboard Company, and that Evans and Wild were entitled to participate in that fund in the proportion that the stock owned by them respectively bore to the whole amount of stock on which such bonus was paid. It is admitted by counsel for the appellees that, if the $16,000 were actually paid in good faith to Levi and Carter as the purchase price of the sale of a half interest in a patent for the grinding of wood pulp, the decree of the trial court is erroneous. The decree can only be upheld on the ground that the $16,000 were in fact paid as a bonus or additional consideration for the stock owned by Levi and Carter, and which they sold to the American Strawboard Company, and that Levi, by virtue of the instrument of writing of the 15th of August, 1889, occupied such a trust relation towards Evans and Wild that they were entitled to participate in such bonus or additional consideration. We think there was evidence before the court which fairly authorized it to find that the sale of a half interest in a patent for the grinding of wood pulp was a mere cover; and that the $16,000 was really paid as a bonus or additional consideration for the 1,267 shares of stock in the Noblesville Manufacturing Company. These shares of stock were owned by Levi and Carter, and as such owners they had the undoubted right to sell the same for such price and on such terms as they chose, and to retain the whole purchase price obtained therefor unless

the agreement of August 15, 1889, operated as a limitation on such right in favor of Evans and Wild.

On the one hand, it is contended that the agreement created such trust relations between the parties to it that Levi could not sell his own stock so long as he remained the trustee of Evans, Wild, and Carter, and that he had no right to permit Carter to sell his own stock. On the other hand, it is claimed that the agreement was merely a power of attorney clothing Levi with the naked title for the purpose of sale. In our opinion, the agreement is a power of attorney, conferring on the donee of the power at the most only a dry, legal title for the mere purpose of sale, and with the power of sale carefully circumscribed. While it professes to bargain, sell, and convey shares of stock, for value received, the sale is expressly declared to be in trust for the use and benefit of the grantors. The grantee took no beneficial interest in the stock by virtue of the agreement. The power granted the right of sale only on condition that the entire shares of stock owned by Evans, Carter, and Wild should be sold in solido for cash, and not for less than twice the amounts respectively paid by each on account of such stock. This instrument constituted Levi an agent for the sale of the stock of the grantors, with powers carefully limited and defined. At the time this power of attorney was executed the grantors knew that Levi owned $40,000 of the stock individually, and held in his own name, with full authority to sell, $10,000 of the stock which equitably belonged to Sieberling. They knew that he had been endeavoring to effect a sale of his stock. The agreement in question must be read in the light of these known facts. Thus read, did the agreement preclude Levi from selling his own stock? If such limitation existed, it arose by implication, for the power of attorney contained no express limitation on his power of sale. In view of the known facts, it is fair to presume that, if any such limitation had been intended, it would have found expression in the power of attorney.

The claim that the appellant is to be held liable to the appellees because Carter violated the agreement in question by the sale of his stock is unfounded. Carter had an undoubted right to sell his own stock, notwithstanding the existence of the power; and his so doing violated no contract rights of the appellees, and, if they were harmed by it, such harm falls under the maxim "damnum absque injuria." But, assuredly, Levi can in no way be held to respond in damages, as for a breach of trust, because of the act of Carter in selling his own stock. The fund in question arose, in no just sense, from the sale of stock owned by the appellees, or in the sale of which they had any interest. Levi sold his own stock, and on terms upon which he had no power to sell the stock of the appellees. He did not sell nor attempt to sell their stock. After selling his own stock, he procured an offer for theirs, which they were at liberty to accept or reject. There is no evidence in the record which shows that Levi could have sold the appellees' stock

on the terms of the power if he had refused to sell his own. Indeed, the evidence clearly shows that there was no possibility of selling the stock for cash in hand. Must he refuse to sell his stock, under these circumstances, on terms different from those specified in the power of attorney? The appellant sold nothing which he did not have before, and independent of the power of attorney. The power of attorney in no way aided him in selling his own stock, nor did he derive any advantage or profit from the possession of such power. The appellees have no legal or equitable right to claim any part of the price obtained by the appellant for his own property. If they can impute any wrong to the appellant, it is in selling his stock instead of selling theirs. But there is no proof in the record that tends to show that he could have sold their stock on the terms specified in the power of attorney, if he had refused to sell his own. When he found it impossible to sell the stock of the appellees under the terms of the power, we do not think he owed them the duty of refusing to sell his own.

In our opinion, the court ought to have dismissed the bill of Evans and Wild, at their costs. The appellant is properly decreed to account to Sieberling for the proceeds of the sale of the $10,000 of stock held in trust for him, including his proportionate share of the bonus or additional consideration received. The amount of stock owned and sold by Levi on his own account was $40,000, and the amount belonging to Sieberling was $10,000. The amount of the bonus or additional consideration received by Levi, and with which he is chargeable, is $12,590.80. All sums of money paid by Levi on account of the Sieberling stock will be taken into the account, and interest may be allowed on the several sums of money properly chargeable to each.

The several causes are hereby reversed at the costs of the appellees, and remanded to the court below, with instructions to proceed in conformity with the principles contained in the foregoing opinion.

MORROW SHOE MANUF'G CO. v. NEW ENGLAND SHOE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 71.

1. CREDITORS' BILL—SETTING ASIDE FRAUDULENT CONVEYANCE.
   A creditors' bill to set aside a fraudulent conveyance must allege that the plaintiff has prosecuted his claim to judgment, and had an execution issued thereon, which has been returned unsatisfied. Scott v. Neely, 11 Sup. Ct. Rep. 712, 140 U. S. 106, and Cates v. Allen, 13 Sup. Ct. Rep. 883, 977, 149 U. S. 451, followed.

2. SAME—REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW.
   The objection that such a bill is not broad enough to warrant a decree compelling the fraudulent grantee to account to the creditor comes too late when raised for the first time on appeal.

3. AUCTIONEER—LIABILITY FOR SELLING GOODS OBTAINED BY FRAUD.
   An auctioneer who sells goods which have been obtained by fraud, and who had notice of the fraud, is liable to account for the goods to the persons from whom they were fraudulently obtained.

4. FRAUDULENT CONVEYANCE—NOTICE—EVIDENCE.
Defendants knew that a merchant from whom they obtained goods which he had procured by fraud was selling large quantities of goods at auction for less than he could have bought them, and that he had secretly stored $50,000 worth of goods in a loft remote from his store. One defendant gave a false account of the transaction, and the other received letters from the merchant, intentionally delivered to him while he was on the street, and failed to account for such letters. *Held*, that the evidence was sufficient to charge defendants with notice that the goods had been procured by fraud. Bunn, District Judge, dissenting.

5. SAME—BURDEN OF PROOF.
Defendant lent $20,000 on a stock of goods stored in a warehouse. Before making the loan he examined the goods, which were in the original cases, from which the names and marks had just been scraped off. The loan was made to a corporation, concerning which he made no inquiries at the time, though he was informed that it was being pressed by its creditors. The goods had been fraudulently obtained by the corporation. *Held*, that evidence of these facts threw on defendant the burden of proving that the loan was made in good faith. Bunn, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Creditors' bill by the Morrow Shoe Manufacturing Company against the New England Shoe Company and others. The bill was taken pro confesso against the New England Shoe Company and another, but on final hearing was dismissed as to the other defendants. Complainant appeals. Reversed.

Statement by BAKER, District Judge:

This suit was brought in the court below by the Morrow Shoe Manufacturing Company, appellant, on its own behalf and for the benefit of all other creditors, against the New England Shoe Company, an insolvent corporation, which was impleaded with George P. Gore, H. H. Heimerdinger, Merrick F. Prouty, and Hiram B. Peabody, appellees herein, and certain others not parties to this appeal. The New England Shoe Company, an Illinois corporation, purported to be organized with an authorized capital of $50,000, divided into 500 shares of $100 each, of which 498 shares were owned by Charles C. Davis, who was its president and treasurer, one share was owned by his son, Charles A. Davis, who was its secretary, and one share was owned by Henry W. Sawyer. These three composed its board of directors. The bill was taken pro confesso against the New England Shoe Company and Charles C. Davis, and on final hearing it was dismissed as to the other defendants. The cause was heard and decided on its merits on the facts presented in the record, and the decree dismissing the bill was placed on the ground that notice or knowledge of the fraudulent acts and intent of the New England Shoe Company and of Charles C. Davis had not been sufficiently proven to justify a decree against any of the appellees.

The New England Shoe Company was organized August 29, 1887, with a nominal capital of $50,000. During its business existence, which was a little more than two years, there were only three meetings of the directors, the first for organization, August 29, 1887, and the other two, on March 28 and December 9, 1889, to adopt certain resolutions which C. C. Davis wished to have adopted. The other two directors paid no attention to the business affairs of the company, and acted simply to carry out the purposes of C. C. Davis. The company did a small retail business, under the sole management of C. C. Davis, in a basement on the northwest corner of State and Madison streets, in Chicago. The only other business done by it or them was to make the alleged fraudulent sales and pledge hereinafter mentioned. For about two years its purchases were made mostly, if not wholly, from or through the auction and commission house of George P.

Gore & Co., in Chicago. During this time other purchases than those made from George P. Gore & Co. were made through this firm, which advanced the money to pay for them, and it deducted from the amount paid over to the manufacturer the same commission as on goods consigned to it. For about 12 years, and up to the latter part of 1888, Davis had been in the employ of Gore & Co. as a salesman and solicitor of consignments. In the latter part of 1888 he appeared to have dropped his connection with Gore & Co., and he began to make extensive purchases from manufacturers for the New England Shoe Company, independently of Gore & Co. In order to obtain credit he pretended that $30,000 of the company's capital stock had been paid in in cash, and was then in the business; that its business amounted to over $70,000 a year, and was highly profitable; that its stock on hand amounted to $25,000, and his and the company's debts to $500, all told, and that he was worth individually $38,000. By means of these representations, which were false and fraudulent, made to manufacturers and their agents, either directly or through the reports of commercial agencies, he was enabled to obtain large quantities of goods for the shoe company on credit from numerous manufacturers. Forty-three of them identified goods that they had shipped to it, and which were unpaid for, among those of which the receiver took possession in the Sibley warehouse. These goods, with some others similarly identified, and found in a loft which had been rented by the shoe company, brought at the receiver's sale $20,912.97. These goods had been recently bought, and, with the exception of perhaps $3,000 worth, were wholly unpaid for. The complainant and other intervening creditors have proved unpaid bills to the amount of between $15,000 and $16,000. About the time that the goods so ordered began to arrive, Davis began to dispose of them otherwise than by sales in the basement store. He made these sales with a studied purpose to keep the parties from whom the goods were purchased in ignorance of what he was doing. How many channels he employed for this purpose is not known. Three are clearly shown. Beginning with December 14, 1888, and ending with December 11, 1889, he sold through the auction house of George P. Gore & Co. goods, which, at their auction prices, netted $14,555.48. Prior to June 22, 1889, these sales amounted only to $1,650.94, and were made for account of Charles C. Davis individually. After that date the sales were made for account of the New England Shoe Company, and the bulk of them, amounting to $11,235.75, were made between October 1 and December 11, 1889. A comparison of the checks drawn by George P. Gore & Co. in settlement of these sales with the credit entries in C. C. Davis' bank account shows that he deposited to his individual account in the First National Bank in Chicago $9,610.75 of the proceeds of these sales, and that the payments of $1,200 and $425 in settlement of the last two sales were not deposited there. Besides the proceeds of these sales through Gore & Co., he made other large deposits on his individual account, viz.: October 9th, $1,783.35; November 2d, $2,033.04; November 26th, $2,500; November 29th, $1,978.21; a total of $8,294.60. All of these deposits, except that of November 2d, correspond with payments made to Davis by Heimerdinger, through George P. Gore & Co. These goods were sold almost entirely at auction, along with other and larger consignments, some of which were on account of manufacturers. The prices obtained were fair auction prices, not jobber's nor manufacturer's prices, running sometimes as much as 20 per cent. below the prices at which jobbers ordinarily sold to retailers. The sales were quick, and somewhat forced, and prices corresponded. They were largely below the prices at which retailers could purchase from wholesale dealers.

The firm of Gore & Co. consists of George P. Gore alone, but Prouty and Heimerdinger respectively conducted, at Gore's store, business at his expense for storeroom, clerk hire, and capital, and at his risk for credit, every transaction including somewhere in its course a sale by Gore & Co. on commission. Prouty had the general management of Gore & Co.'s business, giving special attention to boots and shoes, and personally directed most of these sales. He drew a fixed salary as manager, and at the end of each year had an accounting with Gore & Co., as the result of which frequently

an additional allowance was made to him on a basis which he was unwilling or unable to explain.

Besides the $14,555.48 of sales made through Gore & Co.'s auction house, Davis, in the name of the New England Shoe Company, sold directly to Prouty, in Prouty's branch of the business, within two weeks of the failure, goods for which he received in advance $4,692.95. One purchase, consisting of 171 cases of shoes, was made by Prouty November 26th or 27th, for which he gave $3,858.48, after some bickering, in which an auctioneer of Gore & Co. was employed to make the final bargain; and the last purchase, of December 5th, within a week of the collapse, consisted of 258 cases of rubbers, for which Davis received $1,103.47. Both sales were made at low prices, and were paid for December 7, 1889. Heimerdinger, in his branch of the business carried on at the auction house of Gore & Co., made five purchases through Davis of the New England Shoe Company's goods, beginning September 17 and ending November 30, 1889, paying in all $7,310.38. Heimerdinger intimates that these purchases belonged to that class of his business which consisted in buying "bankrupt lots, and lots that go at sacrifice prices." Heimerdinger and Prouty were well acquainted with Davis, and knew the place and nature of his business. In October, November, and the first few days of December, 1889, Davis thus sold at low prices to or through Heimerdinger, Prouty, and Gore goods of the New England Shoe Company which netted him $23,509.08, and for which the company evidently was indebted in a much larger sum. To the books of account, which appear to have been of the most meager and imperfect character, no one had access except Davis himself, and they disappeared when he did. Once during the latter part of October, and again in November, 1889, for several days on each occasion, he employed Edward Stephenson, an accountant, to write up the books. On the occasion of his first service, Stephenson entered between 10 and 15 invoices of goods bought on credit, and again in November he entered 20 or more additional invoices for larger amounts than those which he had entered in October, and about two-thirds from parties who did not appear to have dealt with the company before. He estimates that these invoices amounted to between $50,000 and $60,000. All the purchases which Stephenson found there were on credit, while all the sales made by Davis were for cash. The reason assigned by Davis for making such large purchases of goods was that he intended and was endeavoring to rent a storeroom on the grade of the street, and failing to accomplish this, it became necessary to make sale of the goods.

From the Morrow Shoe Manufacturing Company, complainant, Davis bought on behalf of the New England Shoe Campany, in November, 1889, $2,418 worth of goods, which were shipped to it on the 12th and 18th of November; and they have never been paid for. Intervening petitioners have proved claims to the amount of over $13,000 for goods, the greater part of which were shipped in October and November, and are all unpaid for. These evidently constitute only a small part of the goods so ordered and received. Some of Davis' purchases were made from salesmen who came to his store, and he frequently requested them not to let other people know that he was buying of them. He made several visits to the east. Near the end of July he was in Philadelphia, where he placed an order of about $1,700, and gave a flattering, but untruthful, account of the condition and prospects of the basement store, with no allusion to any contemplated grade store. He asked Mr. Hill, to whom he gave the order, to put no marks to indicate the manufacturers, either on the goods or the boxes inclosing them. Early in November he visited the office of the Morrow Shoe Manufacturing Company in New York, and ordered goods which he said he needed for the holiday trade. He there represented that the New England Shoe Company had a paid-up capital exceeding all its liabilities, and that he personally was worth $38,000 over all his debts. A few days later he was in Boston, where he placed a number of orders, and represented that his business was prosperous.

On the 30th of October, 1889, at the New England Shoe Company's store and in the Palmer House, Chicago, in order to gain credit and to procure the Hocker-Manus Shoe Company of Cincinnati, Ohio, to manufacture and

deliver certain goods which had been previously ordered. Davis represented to an agent of the Cincinnati house that the statement he had made to a salesman was correct; that he was worth $30,000; that he owed little or nothing on his stock; that he had fully $30,000 worth of stock; that he had $2,000 worth of Chicago street-railway bonds, and $2,500 in the bank.

During the two or three months preceding the failure, Davis was rapidly filling up with shoes bought on credit a loft in the rear of 113 State street, some distance from the basement store. No business was done at this loft, to which nobody, except Davis, ever had access, except on rare occasions. He began to occupy it about May or June, but the most of the goods stored there came in within a month or two prior to December 11, 1889. Prouty was there in August, and again in October, to examine some of the goods stored there, which were offered for sale by Davis. He saw that there were more goods there in October than in August; "that the room was pretty well filled; that the rubbers were piled high, and also some of the shoes." The room was 60 feet long by about 30 feet wide and something more than 16 feet high. The cases of goods were mostly brought there on railroad trucks. About December 1st, after the large quantities taken therefrom to the auction house of Gore & Co., "the room was pretty full, boxes piled nearly to the ceiling." About the same time the stock in the basement store was gradually running down, receiving small additions, which Davis himself brought over from time to time from the loft.

In November, 1889, a traveling salesman happened to see in a retail store in Indianapolis some goods which his employer, the Heywood Boot & Shoe Company, had sold to the New England Shoe Company. The Indianapolis merchant told him that he had bought them from George P. Gore & Co. at a less price than that for which the Heywood Company had sold them to the New England Company. Upon the salesman reporting this to his employer, an attorney for some of the eastern creditors was sent to Chicago to inquire into the matter, and Davis was invited to a conference on December 4, 1889. After indulging in some abuse and vituperation, Davis stated that a little while after receiving the Heywood Company's goods he had at Heimerdinger's request, and as a matter of favor to him, let him have a small quantity of goods, including some of the Heywood manufacture, which Heimerdinger needed to fill an order from a western customer of his; that a few weeks afterwards Heimerdinger came to him, saying his western customer had refused the goods, and asking him to take them back, which he refused to do, and that Heimerdinger thereupon peddled them out for whatever he could get, and in this way some of them had probably come to the hands of the Indianapolis dealer. He referred the inquirers to Heimerdinger for corroboration. The next day, another customer, who had learned of the discovery and of Davis' explanation, called on Heimerdinger, who corroborated the story, adding that it was a trifling matter of a few pairs of shoes, only a single case, and that was the whole basis for whatever rumors might be afloat of Davis' forcing his goods off through Gore & Co.'s auction sales; and as a friend he further assured Mr. Morrow, who represented appellant, that Davis was sound and trustworthy, and that there was nothing in any rumors unfavorable to him. This story was wholly unfounded. Heimerdinger has testified to all of his transactions with Davis and the New England Shoe Company, and there is none of this kind among them. Heimerdinger, while testifying, fails to give any explanation or excuse for his repeating the next day the same fabricated story previously told by Davis. Both, on different occasions, and when apart, repeat the same story, each knowing it to be false.

Mr. Barrett, a shoemaker who worked for the New England Shoe Company, testified that somewhere along in November and December, shortly before the failure, Davis used to give him a note sometimes, and tell him to go up on Fifth avenue, and watch for Mr. Prouty coming down from Wells street depot, and to give the note to Mr. Prouty; that Davis told him not to go to Gore's, but to meet Mr. Prouty on Fifth avenue, between Madison and Wells street depot; that he did this two or three times in pursuance of instructions from Davis; that Mr. Prouty took these letters from him, and

said nothing. Mr. Prouty made no denial of these occurrences while on the witness stand, and offered no explanation.

The stock of goods in the basement store was seized by the sheriff on December 10, 1889, by virtue of two executions issued upon judgments confessed by the New England Shoe Company on the same day; one in favor of Van Weisenfluh for $5,530.33, and the other in favor of Cudworth for $5,000 and costs. Van Weisenfluh, in his testimony, describes himself as a speculator in real estate and horses, and had been employed by Peabody in his stock exchange, commonly known as a "bucket shop." Cudworth, who says his business is speculating, was, like Peabody, a creditor to a large amount of the unfortunate jewelry house of Clapp & Davies, whose affairs are under consideration by the Illinois supreme court, and was employed by Peabody to close out its stock. He declined, by advice of counsel, to answer questions touching his connection with the Clapp & Davies suit. He had known Peabody for 10 years, and he says "some might call it intimately." All three had been at one time or another in the shoe trade, and had become familiar with the Gore establishment, and also with Davis. As no appeal has been taken from so much of the decree as dismisses the bill against Cudworth and Van Weisenfluh, it is not necessary to go into the facts relating to their claim against the New England Shoe Company, or their relations with Davis. It is sufficient to say that their dealings with Peabody, Davis, and the New England Shoe Company are calculated to arouse suspicion.

On the 5th, 6th, 7th, and 9th of December, 1889, Davis' son and another young man were employed in the State street loft scraping off the names and marks from the boxes there stored, and as fast as they were thus prepared they were carried to the Hiram Sibley warehouse, on the north side, only about eight cases being left in the loft. All of the 686 packages removed from the loft to the warehouse had been sold and shipped to the New England Shoe Company. Davis took warehouse receipts in his individual name for 512 cases, and in the name of the New England Shoe Company for 174 cases only. These receipts show that the last delivery to the warehouse was made on Monday, December 9, 1889, the same day on which the attorney of Cudworth and Van Weisenfluh received from Davis, for them, the judgment notes upon which, the next day, judgments were entered, and executions were issued and levies were made on all the goods in the basement store. On Tuesday, December 10, 1889, the appellee Peabody arrived in Chicago. He had been in New York for about a week preceding. For nearly a year prior thereto he had been absent on a European tour. He reached his office about noon, and found Davis waiting for him there, with the nine receipts issued by the Sibley warehouse, and which Davis claimed covered goods worth from $35,000 to $40,000, on which he asked a loan of $20,000. After a little conversation, Peabody asked his bookkeeper if they had that amount to spare, and being informed that they had he took the receipts, and with his bookkeeper went to the warehouse, and there inspected the cases, just enough, he says, to ascertain that there were probably about as many cases as the receipts called for, and then returned to his office. He does not say whether he noticed that the names and marks were all recently scraped off the cases or not, although the evidence shows that such scraping was plainly apparent. In about five minutes after his return to his office, Davis came in again, and the loan was at once agreed upon. The bookkeeper wrote out a check for $20,000, payable to the order of the New England Shoe Company. Davis took the check, and gave the New England Shoe Company's note for 90 days at 7 per cent., pledging the receipts as security, and indorsing the note as guarantor. The note authorized its holder to sell the receipts before maturity if in his opinion the securities had depreciated, and to apply the proceeds to the payment of the note and expenses. Davis then went away. Peabody left his office soon after, and went to the bank, and was at the paying teller's window while Davis was receiving $20,000 in currency for the check. His presence was noted on the check by the paying teller. Peabody claims that his presence was a mere coincidence. He says that on his way to his hotel he had stopped at the bank to call upon some of the officers

of the bank, who were his friends, and that, seeing Davis there, from a mere impulse of sociability he stepped up near to him. He claims that he did not know whether Davis was getting the cash on his check or not, nor did he make any inquiry. He admits that if he had known it was his check, he would have thought it a little irregular to draw out the currency instead of depositing the check; and if he had known that Davis kept his own account there he would have had a decided suspicion of something wrong. Peabody says that when Davis first applied for the loan he told him he wanted it in order to avail himself of a large discount which some of his creditors had offered him if he would cash their claims. He said that some of his creditors had offered him as high as 10 per cent., some as high as 13 per cent., for cash. He says that it would be an irregular way of doing to get all the currency into his hands, instead of depositing the $20,000 check, and then drawing his own checks in favor of his creditors. The form of the note was notice to Peabody that the goods which it pledged belonged to the New England Shoe Company, and not to Davis, its president. He also admits that he was so informed by Davis. The receipts for 512 cases of the goods pledged to Peabody were issued to Davis individually. Peabody did not ask nor obtain any explanation of this. He made no inquiry whether the directors of the New England Shoe Company had authorized Davis to pledge its stock in trade. As a matter of fact the pledge was never authorized by the directors. Peabody says that Davis told him that the goods pledged were not all paid for. The receipts issued to Davis individually were indorsed by him in his individual name only. Peabody admits that he was told by Davis, before the receipts were pledged to him, that all the goods covered by them belonged to the New England Shoe Company. He told the receiver that when applying for the loan Davis told him that some of his creditors were pressing him. He afterwards wished to retract this statement, and it was crossed out of the written memorandum which the receiver took down. He denied in his interview with the receiver that he had ever before loaned Davis any money, but when testifying in his own behalf he claimed that he had made him a previous loan of $5,000. Peabody admits that he had been in the basement store operated by Davis for the New England Shoe Company. Before making the loan, he made no inquiries about the business of the shoe company. He says: "I asked Davis how he happened to put his goods in the warehouse; why he hadn't put them in the store. He said that he had engaged a store on State street, a large store, and had got disappointed in it, and so put them in the warehouse."

E. O. Brown and H. H. Miller, for appellant.

F. J. Smith and W. J. Foster, for appellees.

Before WOODS, Circuit Judge, and BUNN and BAKER, District Judges.

BAKER, District Judge, (after stating the facts.) It is contended by counsel for the appellant that the court below erred in dismissing the bill against the appellees for the reason that the evidence clearly shows that the New England Shoe Company and Charles C. Davis, its president, obtained large quantities of goods from the appellant and numerous other parties by means of false and fraudulent representations, without any intention of paying for the goods so obtained, and that the appellees had actual or constructive notice of the fraudulent acts and intent of the New England Shoe Company and of its president. The charges made against the appellees Gore, Heimerdinger, and Prouty by the bill of complaint, and the proofs in their support, have no immediate connection with those made against the appellee Peabody.

The case against Gore, Heimerdinger, and Prouty was tried in the court below, and has been argued here by the same counsel; while the case against Peabody was tried in the court below, and has been argued here by counsel solely representing him. It will be most convenient to follow the same course in determining this appeal.

It is suggested, rather than argued, by counsel for Gore, Heimerdinger, and Prouty, that the bill of complaint is not broad enough, even if the evidence justified it, to warrant a decree against them compelling them to account for the proceeds of the goods belonging to the New England Shoe Company which are traced into their possession. The suggestion would have deserved careful consideration if the question had been called to the attention of the court below. If the objection had been presented below, the trial court could, and in furtherance of justice, should, have permitted the bill to be amended to conform to the case made by the proofs upon such terms as were just and equitable. Neale v. Neale, 9 Wall. 1; The Tremolo Patent, 23 Wall. 518; McArtee v. Engart, 13 Ill. 242. Under the circumstances the bill ought to be treated as amended here, so far as needful, to enable the court to decide the case on its merits. The practice of presenting in the first instance in this court some alleged defect or insufficiency in the bill of complaint or answer which would have been properly amendable in the court below is not to be commended.

There is no serious controversy touching the false and fraudulent representations of Davis, as the manager and president of the New England Shoe Company, in obtaining goods from the appellant and numerous other parties, nor in regard to his intention not to pay for them, nor that the corporation was insolvent. The systematic frauds of the one and the insolvency of the other are established by the most abundant and convincing evidence. Indeed, they were not controverted by counsel for appellees, who made no attempt to deny or palliate the criminal conduct of Davis, who, upon the collapse of the New England Shoe Company, fled to Canada, presumably to avoid criminal prosecution. The purchaser who by fraud purchases goods has no protection in law against the party defrauded. The seller, on discovering the fraud, may affirm the sale and sue for the price, or he may disaffirm it, and reclaim the goods, or he may proceed criminally. Donaldson v. Farwell, 93 U. S. 631; Parrish v. Thurston, 87 Ind. 437; Gray v. St. John, 35 Ill. 239; Bowen v. Schuler, 41 Ill. 193; Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. Rep. 491; Sargent v. Sturm, 23 Cal. 359; Titcomb v. Wood, 38 Me. 563; Hill v. Freeman, 3 Cush. 259; Nichols v. Michael, 23 N. Y. 266. A person obtaining goods by fraudulent pretenses is guilty of a tortious taking, and no demand for possession is necessary to enable the person defrauded to maintain replevin for them, unless they have passed to a third person, holding them bona fide for a valuable consideration, without notice. Bussing v. Rice, 2 Cush. 48; Thurston v. Blanchard, 22 Pick. 18; Butters v. Haughwout, 42 Ill. 18; Bruner v. Dyball, Id. 34;

Ryan v. Brant, Id. 78. When no questions are asked, no false pretenses and no artifices are resorted to, mere silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent, and the seller is entitled to possession as against the purchaser or his voluntary assignee. Davis v. Stewart, 8 Fed. Rep. 803.

The New England Shoe Company, and Davis, its president, according to the undisputed evidence, obtained possession tortiously and wrongfully of the goods which subsequently came into the possession of the appellees. Unless the goods came into their possession bona fide, for a valuable consideration, without notice, their possession was wrongful, and they must return the goods, or account for their reasonable value. The appellees assert that they were bona fide purchasers for value, without notice, and that, consequently, they acquired an unimpeachable title to the goods. It is not enough that the appellees were purchasers for value. They must also be innocent purchasers. The law raises this presumption in their favor, and casts the burden on the appellant to show that the appellees were guilty of participation in the fraudulent acts of Davis. The law justly imposes on every person the duty of exercising ordinary care and prudence in his business transactions. It imputes to him notice or knowledge of every fact which an ordinarily cautious and prudent man, in the same situation, would naturally have observed. He may not, except at his peril, purposely or negligently omit to give heed to what is audible and visible by the exercise of ordinary care. He must not fail to make such inquiries as an ordinarily cautious and prudent man, under the same circumstances, would have made. It follows that the appellees will be affected by the fraudulent acts and intent of Davis, if they had knowledge of them, or of the existence of such facts and circumstances as were naturally and justly calculated to awaken suspicion in the mind of an honest man of ordinary care and prudence, and lead him to inquiry. The law is well stated by Chancellor Zabriskie:

"Any sale in which the object of the debtor that prompts and determines him to make it is to hinder, delay, or in any way put off his creditors, is void if made to any one having knowledge of his intent; and this knowledge need not be by actual positive information or notice, but will be inferred from the knowledge, by the purchaser, of facts and circumstances sufficient to raise such suspicions as to put him on inquiry."

Atwood v. Impson, 20 N. J. Eq. 156; Clements v. Moore, 6 Wall. 299; Bartles v. Gibson, 17 Fed. Rep. 293; The Holladay Case, 27 Fed. Rep. 830; Singer v. Jacobs, 11 Fed. Rep. 559; Walker v. Collins, 4 U. S. App. 406, 1 C. C. A. 642, 50 Fed. Rep. 737.

Gore, Heimerdinger, and Prouty had long been intimately associated together, all occupying and doing business in the same rooms, and with and through each other. All their business was carried on through the books of George P. Gore & Co. They were well acquainted with C. C. Davis, who had been employed as a salesman and solicitor of consignments in the auction house of

Gore & Co. for fully 12 years. They were acquainted with the basement store of the New England Shoe Company, and its business as conducted and managed by Davis. Mr. Prouty was the general manager of Gore & Co. and had almost exclusive control of the shoe business conducted by it. Heimerdinger and Prouty knew, as early as September, 1889, that Davis was storing large quantities of goods in an out-of-the-way loft on State street. They say that Davis gave as a reason why he had bought and stored in the loft such large quantities of goods that he had arranged for a grade store on State street, which he had been disappointed in securing. He gave this as the reason for selling in the course of about 60 days before the failure, to or through Gore, Heimerdinger, and Prouty, at prices below their cost, goods which netted over $23,000. This story of a grade store was accepted without inquiry or question as a sufficient explanation for the purchase and storing in the loft of goods which certainly aggregated more than $50,000 in value. They knew of the purchase and storing of these goods. They knew that Davis was selling at Gore's auction house, or to them personally, goods in large quantities, and at prices below the price for which he could obtain them from wholesale dealers. These sales were made to or through them in large quantities and in rapid succession, so that they knew, or ought to have known, that they were being made by a man anxious to convert the goods into money. Heimerdinger gave a false and fabricated account of his dealings with Davis. Prouty received letters from Davis under circumstances of suspicion, and failed to produce them, or to give any explanation of their contents. There is no evidence that Davis arranged for or engaged a large storeroom on State street, and the story was evidently devised as a part of his scheme of fraud. These facts and circumstances, with many others disclosed in the statement of the case, which were within the knowledge of these parties, were clearly sufficient to have put them on inquiry. The mind cannot well avoid the conclusion that if they did not know of the fraudulent purposes of Davis it was because they were willfully blind. Such facility of belief, it has been well said, invites fraud, and may justly be suspected of being its accomplice.

When the complainant learned that a few shoes, which it had sold to the New England Shoe Company, had been sold by it through Gore & Co.'s auction house to a shoe dealer in Indianapolis for less than their cost, it created such suspicion of fraud that an attorney was sent from Boston to Chicago to investigate the matter. This single fact was sufficient to create suspicion in the minds of the eastern creditors of Davis, and to cause inquiry. The numerous facts calculated to excite suspicion known to the appellees were disregarded on the pretense of Davis that he had failed to secure the storeroom which he claimed to have arranged for or engaged. When the facts and circumstances are such as to put a reasonably prudent and cautious man on inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and

more reliable sources of information are open to him. Whether these parties were guilty of actual participation in the fraudulent scheme of Davis or not, they certainly did deal in the goods obtained by fraud recklessly, and with guilty knowledge, or, which is the same thing, with knowledge of such facts and circumstances as would have put prudent and cautious men on inquiry. Heimerdinger and Prouty bought the goods of the New England Shoe Company, through Davis, under such circumstances as to charge them with knowledge of the fraud of the shoe company and its president. On the plainest principles of equity they are chargeable with the value of the goods obtained by them from Davis and the shoe company, and which they have converted to their own use. Although they may have paid the full value, and the property may have passed beyond the reach of the process of the court, equity regards them as trustees, and charges them accordingly. The cardinal principle in all such cases is that the property obtained by fraud shall not be placed beyond the reach of the party defrauded, either by the fraudulent vendee or others chargeable with the knowledge of the fraud. To permit it would be to allow the party to profit by his fraud. Clements v. Moore, 6 Wall. 299.

Gore intermeddled with these goods by selling them for Davis as an auctioneer, under such circumstances as to charge him with notice that they had been obtained by fraud, and the question remains whether such agent and auctioneer, who has sold goods and accounted for the proceeds to the guilty principal in the fraud, can be compelled to account to the parties defrauded for the goods or their value. That such auctioneer can be compelled to account to the extent of the commissions received and retained by him is settled by authority, and is not open to debate. Can he be compelled to account to the parties defrauded for the proceeds of the goods after he has accounted to the party from whom he received them? On principle, he ought to be held to account. Having sold the goods, and put them beyond the reach of the parties aggrieved, with notice of the fraud, he occupies no better situation than his bailor. He is chargeable on the principle that he knowingly aided and assisted the fraudulent vendee in depriving the vendor of the opportunity to reclaim his property. He thereby becomes a particeps criminis with the fraudulent vendee, and is liable for the value of the goods equally with him.

It is firmly settled that if an agent delivers to his principal money or property after demand and notice that they belong to another, he will be compelled to account therefor to the true owner. Payment after demand and notice is wrongful. Garland v. Bank, 9 Mass. 408; Jefts v. York, 10 Cush. 392, 12 Cush. 196. Having knowledge that the goods had been obtained by fraud, it became the duty of Gore not to meddle with them, or, having received them, to retain them or their proceeds for the benefit of the true owners. Equity regards the fraudulent vendee as holding the goods in trust for the party defrauded. It has been held, where an agent aids a trustee in making or procuring the conversion or un-

authorized transfer of property held in trust, that he is liable for the loss sustained by the cestui que trust, although he acted in the matters of the agency without benefit or profit to himself. Caulkins v. Gaslight Co., 85 Tenn. 683, 4 S. W. Rep. 287. A fortiori, the agent who, with notice of the fraud, aids the fraudulent vendee in putting the property beyond the reach of its true owners, ought to be liable for the value of the property thus wrongfully diverted. Hoffman v. Carow, 20 Wend. 22; Id., 22 Wend. 285; Mechem, Ag. § 915. This case does not fall within the principle which ruled the cases of Lamb v. Stone, 11 Pick. 527; Wellington v. Small, 3 Cush. 145; Bradley v. Fuller, 118 Mass. 239; Tasker v. Moss, 82 Ind. 62, and Blair v. Smith, 114 Ind. 114, 15 N. E. Rep. 817. These cases hold that a creditor who has no interest in nor lien upon the property of his debtor cannot maintain an action at law against a person who has accepted a conveyance of the debtor's property for the purpose of defrauding the creditor, after such fraudulent grantee has conveyed the property to another at the instance and for the benefit of the debtor, without retaining any portion of it, or receiving any benefit from it. In such cases it is held that the injury complained of is too remote, indefinite, and contingent. The property belonged to the debtor, and the creditor had no special property or interest in nor claim on the property fraudulently conveyed which could be injuriously affected or destroyed by the act of the fraudulent grantee. The most that the creditor can claim in such a case is that he intended to attach or levy on the property, and that the wrongful act of the fraudulent vendee has prevented him from executing his intention. This is an injury so remote, uncertain, and contingent, that it affords no ground for relief in an action at law. In the case at bar the property had been obtained by fraud from the creditors who are prosecuting this bill, and Gore, with knowledge of that fact, accepted it, and for his own profit sold the goods at auction, thus placing them beyond reclamation. Here the creditors in equity and good conscience remained the owners of the property, which he wrongfully sold and converted. While the bill is filed by a single creditor, the suit is brought and prosecuted for the benefit of all the creditors whose property was obtained by fraud; and in this property thus obtained the creditors have such special title and interest in common as to enable them to charge every person as trustee who has wrongfully dealt with it with knowledge of the fraud. Gore must, therefore, account for the goods received by him from Davis on account of the New England Shoe Company, which were sold by him as auctioneer.

Peabody invokes for his protection the claim that he received the warehouse receipts covering from $35,000 to $40,000 worth of goods in good faith to secure a loan of $20,000 made by him to the New England Shoe Company. The evidence shows that Peabody was a man of large and varied business experience. At different times in his life he had been engaged in dealings in bucket shops, in buying boots and shoes, in purchasing jewelry from failing concerns and at bankrupt sales, while at and for some time before the trans-

actions in question he was a capitalist engaged in loaning money. He had been acquainted with Davis for 20 years. He had visited the basement store of the New England Shoe Company, and did not know of its having any other. He testifies that at one time he had loaned Davis $5,000, but previously, in an interview sought by him with the receiver of the New England Shoe Company, he denied that he had ever previously loaned Davis any money. He arrived in Chicago on the 10th day of December, 1889, and went immediately to his office, where he found Davis awaiting him. Davis had visited Peabody's office a number of times within a few days preceding his return, and in conversation with his confidential clerk and bookkeeper had expressed anxiety to see Peabody. Davis at once told Peabody that he wanted to borrow some money, and he exhibited the nine warehouse receipts on which he asked a loan of $20,000. After a little conversation, Peabody asked his bookkeeper if he had that amount to spare, and, on being informed that he had, he took the receipts, and with his bookkeeper went to the warehouse, and inspected the cases of goods, and returned to his office. The goods were in the original cases, and the names and marks had all been recently scraped off from the cases. The evidence shows that the scraping was fresh, and plainly apparent, and must have been observed by any one giving the least attention. In about five minutes after his return to his office, Davis called again, and the loan was at once agreed on. The bookkeeper wrote the check for $20,000, payable to the order of the shoe company. Davis took the check, and gave the shoe company's note for 90 days at 7 per cent., pledging the receipts as security, and indorsing the note as guarantor. The note authorized its holder to sell the receipts before its maturity if, in his opinion, the securities had depreciated, and to apply the proceeds to the payment of the note and expenses. Peabody was present at the bank when Davis drew $20,000 in currency on the check. When Davis applied for the loan he told Peabody that he wanted it to avail himself of a large discount which some of his creditors had offered him if he would cash their claims. Peabody told the receiver that when Davis was asking for the loan he stated that some of his creditors were pressing him. Before making the loan he made no inquiry concerning the business or condition of the shoe company. He asked Davis how he happened to put his goods in a warehouse, and claims that Davis told him that he had engaged a large store on State street, and had been disappointed in getting it, and so had put them in the warehouse. The foregoing facts, with others disclosed in the statement of the case, raise a strong suspicion against the bona fides of the transaction between Davis and Peabody. His statement to the receiver that he had never loaned Davis money on any former occasion is proved to have been untrue by his own admission under oath. A false statement is always suggestive of fraud. He knew that Davis was being pressed by his creditors, and was urgent to secure money by pledging goods, which he knew were not paid for. The large quantity of goods, the place of their deposit, the defacing of all

marks from the original packages, the pretense of Davis that he had engaged a large storeroom, which he had failed to secure, the transfer of nearly $40,000 worth of goods on such terms as precluded their redemption, and the failure to make any inquiry are a few of the circumstances, calculated to create a strong doubt of the integrity of the transaction between Davis and Peabody. "They threw on Peabody the duty of making a full explanation, and the burden of proof to sustain it." Clements v. Moore, 6 Wall. 299, 315; Piddock v. Brown, 3 P. Wms. 289; Wharton v. May, 5 Ves. 49; Zook v. Simonson, 72 Ind. 83. He has wholly failed to produce any evidence to relieve the transaction of the strong doubts of its integrity which surround it. The title of his pledgor was fraudulent and voidable, and, if Peabody is to be permitted to defeat the prior rights of the parties defrauded by Davis, it can only be done when on the whole evidence it is made to appear that he was a bona fide purchaser for value. If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail.

The evidence makes a case which fully satisfies us that the proceeds arising from the sale of the goods pledged by Davis must, so far as necessary, be applied to the payment of the appellant's claims. It is urged that the exigencies of business in great commercial centers justify less inquiry into the title and ownership of personal property offered for pledge or sale than would be exacted elsewhere. If good faith and honest dealings are to be maintained, if business is not to degenerate into robbery, the courts must with unflinching hand strip the mask of hypocrisy from the face of fraud, whether practiced in city or hamlet. The transactions of great commercial centers furnish abundant facilities for the practice of fraud, and courts ought to scrutinize them with a jealous solicitude to defeat the wrong, and to vindicate the right.

The bill fails to allege that the plaintiff had prosecuted its claim to judgment, and had issued an execution thereon, and had the same returned nulla bona. For this reason the bill of complaint is insufficient within the doctrine of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712, and Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. Rep. 883, 977.

It is therefore adjudged that the decree herein be reversed, but at the costs of the appellant, and that the cause be remanded to the court below, with leave to the complainant to amend its bill of complaint within 30 days after the judgment herein shall be certified to the court below; and, if the complainant shall fail to amend its bill of complaint within the time herein allowed, the same shall be dismissed without prejudice.

BUNN, District Judge, (dissenting.) I am unable to concur in the conclusions reached by a majority of the court in this case. I think the evidence hardly more than sufficient to raise a suspicion of fraud as against the appellees, without proving its existence, and that the decree of the circuit court should be affirmed.

WESTERN UNION TEL. CO. v. McGILL et al.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 271.

1. DEATH BY WRONGFUL ACT—KANSAS STATUTE—NEXT OF KIN.
Under Gen. St. Kan. 1889, par. 4518, giving a right of action for death by wrongful act, and providing that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, the next of kin are not entitled to the benefit of the statute unless there is no widow or children to enjoy the same.

2. SAME—ACTION BY WIDOWER.
As a widower is not one of the beneficiaries of the statute, he cannot recover, as such, for the wrongful death of his wife.

3. SAME—PARTIES—NEXT OF KIN—WIDOWER.
Under Gen. St. Kan. 1889, par. 4519, providing that an action for death by wrongful act, when there is no personal representative, may be brought by the widow, or, when there is no widow, by the next of kin, the widower cannot be a party to an action for the death of his wife, as he is not included in "the next of kin."

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

At Law. Action by Thomas McGill, and by Richard Lambert McGill, and Jessie Margaret McGill, by their next friend, Thomas McGill, against the Western Union Telegraph Company, to recover for the death of Rebecca G. McGill, resulting from the wrongful act of defendant. Judgment was given for plaintiffs. Defendant brings error. Reversed.

Statement by SANBORN, Circuit Judge:

The Western Union Telegraph Company, the plaintiff in error, brings this writ to reverse a judgment against it in favor of Thomas McGill, Richard Lambert McGill, and Jessie Margaret McGill, the defendants in error, who were the plaintiffs below, for causing the death of Rebecca G. McGill by neglecting to deliver a telegram. Rebecca G. McGill was the wife of Thomas McGill, and the mother of the other defendants in error.

In the year 1868 the legislature of the state of Kansas enacted the following statute: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Gen. St. Kan. 1889, par. 4518.

In the year 1889 that legislature enacted the following statute: "That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80, Laws of 1868, (now paragraph 4518, supra,) is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased." Gen. St. Kan. 1889, par. 4519.

The plaintiffs base their action upon these two statutes. Evidence of the pecuniary loss to the widower, Thomas McGill, by the death of his wife, was received in evidence over the defendant's objection. The court refused a request of the defendant to instruct the jury "that Thomas McGill, being the hus-

band of the deceased, is not the widow or next of kin, and is not, under the law, authorized to maintain this action against the defendant." These rulings of the court, with others, are assigned as error.

R. R. Vermilion and C. M. Ferguson, (George H. Fearons and Kos Harris, on the brief,) for plaintiff in error.

T. B. Wall, (J. R. Hallowell and J. M. Humphrey, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Under the common law no one could maintain an action for the negligent killing of another; no one was entitled to damages for such an act. The first change in the common-law rule was made in England by Lord Campbell's act, (9 & 10 Vict. c. 93, p. 693,) which provided that, whenever the death of any person should be caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, an action might be maintained if brought within 12 months after the death of such person in the name of the executor or administrator of the person killed, for the benefit of the wife, husband, parent, and child of the person whose death should have been so caused; that the jury might give such damages as they might think had resulted to the respective persons for whose benefit the action should be brought; and that the damages so recovered, after deducting the costs not recovered from the defendant, should be divided among such beneficiaries in such shares as the jury by their verdict should find and direct. The first statute in this country upon the subject was the act of the New York legislature of 1847, (chapter 450.) That act made the party responsible if death had not ensued liable to an action for damages, notwithstanding the death, to be brought by the personal representatives, and provided that the recovery should be "for the exclusive benefit of the widow and next of kin." The legislatures of the various states have generally copied these acts with more or less accuracy, and many of them have been construed by the courts of England and of this country. Under these statutes the following rules have been established without dissent among the authorities:

The action under them is entirely the creature of the statute. If the right to maintain it and to recover the damages allowed in it in any case is not expressly given by these statutes, the judgment rendered cannot stand.

Where such a statute giving a new right of action for damages specifies the person or class of persons for whose exclusive benefit the damages are to be recovered, no damages to any other person or class of persons can be allowed in the action based on the statute.

The damages given by these statutes are not given in satisfaction of the wrong done, but are intended as a compensation to the persons for whose benefit the recovery is permitted for the pecuniary losses they have sustained by the death. They must be measured by these losses. There can be no recovery for the injuries or suffering of the deceased, or for the anxiety, sorrow, or bereavement of those who survive.

If no such person or class of persons exists as that specified in the statute as the beneficiary of the recovery, no action can be maintained, and in order to maintain the action the existence of the beneficiary and the pecuniary loss must be alleged and proved. Railway Co. v. Needham, 3 C. C. A. 129, 52 Fed. Rep. 371, 373; Dickins v. Railroad Co., 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389; Trafford v. Express Co., 8 Lea, 96, 111; Blake v. Railway Co., 10 Eng. Law & Eq. 437, 443, 444; Safford v. Drew, 3 Duer, 627, 635, 640; Railway Co. v. Morris, 26 Ill. 400, 403; Burke v. Railroad Co., 10 Cent. Law J. 48; Duckworth v. Johnson, 4 Hurl. & N. 653; Railroad Co. v. Swayne, 26 Ind. 477; Perry v. Railroad Co., 29 Kan. 420; Railway Co. v. Cutter, 19 Kan. 83.

The first statute in Kansas relative to this right of action is now paragraph 4518 of the General Statutes of that state for 1889, and it was passed by the legislature in 1868. That statute gave the right of action, provided that it might be brought by the personal representative of the deceased, and declared for whose exclusive benefit the damages recovered should inure, and how they should be distributed among the beneficiaries. Thus the law stood in Kansas until 1889, when the legislature passed the act which is now paragraph 4519 of the Kansas General Statutes, which simply provides that the widow or next of kin may bring the action if there is no personal representative of the deceased. When the original statute was passed it was within the power of the legislature of that state to refuse to allow any one to recover damages for the negligent killing of another, to give to every one who suffered any losses on that account the right to recover them, or, in its discretion, to select certain persons or classes of persons whose losses so occasioned might be recovered. Obviously, if this original act, which gave the right of action, specified the persons for whose benefit the recovery could be had, then no damages could be recovered on account of losses sustained by any persons or class of persons not thus named. The rights of the latter must in that event still be governed by the common law as they were before the statute was enacted, and the maxim, "expressio unius est exclusio alterius," must exclude them from the benefits of the action. Bearing in mind the established rules to which we have adverted, let us now consider whether the Kansas statutes gave the right to recover any damages in this action for the losses sustained by the husband through the death of the wife. To determine this question we are called upon to consider but a single clause of the statutes. The last clause of the original section which gave the right of action provides that "the damages cannot exceed ten thousand

dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Paragraph 4518, supra. This subject is not mentioned in any other part of the statutes. What, then, is the effect of this clause on the right of the husband to prove and recover for his losses in this action? The statute is not ambiguous. It is not the subject of construction. It declares without doubt or question that the widow and children, if there are any, shall have the exclusive benefit of all the damages recovered, and that these damages shall be distributed among them in the same proportions as is the personal property of the deceased; but that, if there is neither widow nor child, then the next of kin shall receive the damages, to be distributed among them in the proportions in which they would receive the personal estate in that event. In other words, the statute declares that, if there are any persons of the first class, the damages must be paid to them exclusively, and no one in the second class can receive any share of them.

An elaborate argument has been made to show that this widower is one of the next of kin of his deceased wife. If that were so, it would not be material in the determination of this question. If he were of the next of kin, the loss which he sustained by the death of his wife would not be recoverable in this action, because he would then belong to the second class named in the statute; and there are at least two persons of the first class—the two children in being—who are entitled to all of the damages.

It is urged that by the Kansas statutes of descent and distribution of estates the husband of a deceased wife, who leaves him surviving her, is entitled to a share of her personal estate, and hence that the last portion of this clause, which declares that the damages shall be distributed to the widow and next of kin "in the same manner as personal property of the deceased," must include the husband. But this statute which gives this right of action does not provide that the damages shall inure to the benefit of and be distributed to those entitled to share in the personal estate of the deceased in the same manner as that property is distributed. That was the effect of the Arkansas statute which was considered by this court in Railway Co. v. Needham, supra. That statute provided that the amount recovered in such an action should be for the exclusive benefit of the widow and next of kin, and that it should be distributed to them in the same manner as the personal estate of the deceased person was. That is the disposition that the law would have made of the damages in this action if the Kansas statute had stopped with vesting it in the personal representatives of the deceased for the benefit of the relatives entitled to share in his personal estate. But this statute expressly prohibits that disposition. It declares that the damages "must inure to the exclusive benefit of the widow and children, if any." To hold that these damages could be diverted to the benefit of any one else would be to fly in the very teeth of the law. Moreover, it

is settled by a long and uniform line of decisions that where by statute, conveyance, or will personal property is granted or devised for the exclusive benefit of a certain class of persons, to be distributed "according to the statute as in case of intestacy," or "in the same manner as personal property of the deceased," the use of the words in quotations, or similar terms, does not increase or diminish the number or change the characteristics of those who belong to the class. Cholmondeley v. Lord Ashburton, 6 Beav. 86; Garrick v. Lord Camden, 14 Ves. 372; Murdock v. Ward, 67 N. Y. 387; Luce v. Dunham, 69 N. Y. 36, 43.

Finally, it is said that the word "widow" in this statute ought to be construed to mean "widower" in every case where the wife has been killed; that the legislature must have intended to include him in the class of the widow and children, because he must often suffer great pecuniary loss by the death of his wife. If there was any ambiguity in this statute, we might speculate on the probable intention of the legislature, and consider who ought to be added to the first class which they have formed. We might consider that, where a husband is killed, who is the only support of aged and infirm parents, who have spent the best years of their lives to educate him and establish him in business, every consideration of justice and humanity demands that these parents should be counted as members of the class of the widow and children; that when a married woman is killed, whose kindness, sympathy, and care have furnished the only consolation and support of an invalid sister, she ought to be added to this class; and that in every case those who suffer most severely from the death should be deemed the widow and children of the deceased, and should receive the exclusive benefit of the recovery in the action.

If we entered upon this inquiry it would not fail to occur to us, however, that when the legislature gave these damages to the widow and children they may have considered that the husband is, and ought to be, the provider for and supporter of the family; that his death often leaves the widow and children helpless, without the power to earn the means needed to purchase the necessaries and comforts of life; that the burden of supporting and providing for the family is seldom cast upon the wife; that, where it is, the husband is sometimes unworthy to share in the damages for her death, and they ought to go to the children exclusively, and that, where it is not, her death will not be the pecuniary loss to the family that the death of the husband must have been, since the supporter of the family still remains, and can provide the means for its support. We shall not enter upon these speculations. They present matters proper for the consideration of the legislature of the state of Kansas, but the terms of the statute are too clear to permit us to indulge in them. This statute does not put in its first class the infirm parents, the invalid sister, or the bereaved husband. It places no one there but the widow and children. To the pressing invitation to us to add others to the list, we answer in the words of the supreme court of Kansas: "We do not make

the law. If there is any omission in the statutes, the remedy is with the legislature." Limekiller v. Railroad Co., 33 Kan. 83, 90, 5 Pac. Rep. 401.

The result is that where a new right of action is given by statute on account of the death of one by the wrongful act or omission of another for the exclusive benefit of the widow and children of the deceased, a widower is not one of the beneficiaries of the statute, and it is a fatal error to allow a recovery of damages for losses he sustains by the death of his wife in an action brought against the wrongdoer for the benefit of the children. On this ground the judgment below must be reversed.

The record presents one other question which ought to be disposed of before the case is retried. It is, was this widower a proper party to this action? There was no legal representative of the deceased wife. The statute of 1889 provided that when there was no such representative the action might be brought by the widow, or, where there was no widow, by the next of kin of the deceased. Paragraph 4519, supra. It is not claimed by plaintiff's counsel in this part of the discussion that Mr. McGill is the widow, but it is insisted that he is the next of kin to his wife, and in support of that proposition he cites the following decisions: Steel v. Kurtz, 28 Ohio St. 191; City of Chicago v. Major, 18 Ill. 349; Insurance Co. v. Hinman, 34 Barb. 410; Betsinger v. Chapman, 88 N. Y. 487; Haggerty v. Railroad Co., 31 N. J. Law, 349, 350; Bream v. Brown, 5 Cold. 169; Trafford v. Express Co., 8 Lea, 96.

But one of these cases is directly in point. The two Tennessee cases arose under a statute which provided that the right of action of a person injured by the wrongful act or omission of another should not abate by his death, but should survive to the personal representative of the deceased for the benefit of his widow or next of kin, and the supreme court of Tennessee held that the widower could maintain the action under this statute on the ground that the right of action was a chose in action of the wife while living; that the wife's personal estate, including this right of action, vested in the husband before administration taken out, and that he was entitled to recover jure mariti. Trafford v. Express Co., 8 Lea, 111.

In City of Chicago v. Major, supra, Haggerty v. Railroad Co., supra, and Bream v. Brown, supra, the decisions were that under statutes allowing a recovery of damages for the benefit of the widow and next of kin an action would lie for the negligent killing of one who left no widow,—as an infant or a wife.

In Insurance Co. v. Hinman, supra, the decision was that a statute authorizing an action against the next of kin for moneys of an estate wrongfully paid to them warranted an action against the widow where she had wrongfully received such a payment.

In Betsinger v. Chapman, supra, it was held that where a widow was entitled to share in the distribution of an estate she could maintain an action under a statute which authorized a suit

against executors or administrators under certain conditions for the recovery of legacies or distributive shares "by any legatee or by any of the next of kin entitled to share in the distribution of the estate."

It is evident that these cases are not in point. These decisions do not rest upon the legal or commonly accepted meaning of the term "next of kin," but upon the modifications of its meaning, effected by the peculiar language of the various statutes considered.

In Steel v. Kurtz, 28 Ohio St. 191, however, the supreme court of Ohio determined this question in favor of the plaintiffs. The Ohio statute gave a right of action for the negligent killing of a person for the benefit of the widow and next of kin. The question was whether the husband was a beneficiary under the statute. The supreme court of Ohio declared that the statute was not ambiguous, but incomplete, and, in order to complete it, they held that the husband was the next of kin of his wife.

On the other hand, in Dickins v. Railroad Co., 23 N. Y. 158, 160, under the New York statute, which provides that the amount to be recovered in this class of actions shall be for the "exclusive benefit of the widow and next of kin" of the deceased, the court of appeals of New York held in 1861 that the husband was not within the description of next of kin of his wife. Judge Denio, delivering the opinion of the court, said:

"It is the pecuniary injury resulting to the wife and next of kin which is to be estimated; but the injury to the husband, when it is the wife whose death has been caused by the defendant's act, is not spoken of as a ground of damages. And the husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not kin to each other in a legal sense, and the husband cannot take under a settlement limited to the next of kin of his wife. Watt v. Watt, 3 Ves. 244, and note (a) in Sumner's edition; Garrick v. Lord Camden, 14 Ves. 372; 2 Kent, Comm. 136, (5th. Ed.)"

This decision was affirmed in Drake v. Gilmore, 52 N. Y. 389, 392. It was cited and approved by the supreme court of Tennessee in Trafford v. Express Co., 8 Lea, 111, where that court said:

"In the New York statute, the recovery, as we have seen, was compensation for the pecuniary injury to the widow and next of kin, not damages for the injury to the person killed, and it therefore followed logically that a husband had no interest in any recovery for the death of his wife until the law was changed so as expressly to include him. The same result would follow under our statute if the recovery was, either in whole or in part, as compensation for the injury to the widow and next of kin, to the extent of so much of the recovery."

In Haraden v. Larrabee, 113 Mass. 430, 431, Mr. Justice Gray, then chief justice of the supreme judicial court of Massachusetts, in considering a devise to "the next of kin" of a husband, "to those persons to whom the property would go provided" he "owned the property and died without issue and intestate," thus laid down the rule for the definition of the term "next of kin." He said:

"The words 'next of kin' are limited in legal meaning, as in common use, to blood relations, and do not include a husband or a wife, unless accompanied by other words clearly manifesting a purpose to extend their

signification; and the mere addition of a reference to the statute of distributions is not sufficient. Withy v. Mangles, 4 Beav. 358, 10 Clark & F. 215; 2 Jarm. Wills, (3d Eng. Ed.) 96."

This rule commends itself to our judgment as sound and just. There are no other words in the Kansas statutes relating to this right of action that clearly manifest a purpose to extend the legal and commonly accepted meaning of the words "next of kin." According to that meaning, the husband is not of the next of kin to his wife, nor the wife to the husband, because they are not blood relations; and the widower, Thomas McGill, was not a proper party to this action.

There are many other errors assigned in this record, but, in view of the fact that the case must be retried, and that the evidence upon the second trial may vary materially from that now presented, it is unnecessary to consider them. The judgment below is reversed, with costs, and the cause remanded, with directions to grant a new trial.

THE COQUITLAM.

UNITED STATES v. THE COQUITLAM.

(District Court, D. Alaska. September 18, 1893.)

1. CUSTOMS DUTIES—VIOLATIONS—FORFEITURES — CONSTRUCTION OF STATUTES.
Acts of congress declaring forfeitures of vessels and cargoes for violation of the revenue laws are not to be construed with the strictness applicable to penal laws, but rather are to be so construed as to accomplish the purpose for which they were intended; for, in the technical sense, they are not penal, but rather remedial,—intended to effect a public good, and to prevent frauds. Ten Cases of Opium, Deady, 70, followed. The Cargo ex Lady Essex, 39 Fed. Rep. 765, distinguished.

2. SAME—EVIDENCE—INTERESTED WITNESSES.
On a question whether the cargoes of certain sealing schooners were transferred to a steamer within 12 miles of the shore, so as to violate the revenue laws, the testimony of the masters of the schooners that the transfer was made more than that distance should be received with caution, if not wholly rejected, where it is contradicted by other evidence, or rendered improbable by circumstances, since they stand much in the light of accomplices in the wrong charged.

3. SAME—FRAUDULENT CLEARANCE PAPERS—EVIDENCE.
When the clearance of a vessel, as shown by her papers, is questioned as being intentionally misleading or fraudulent, the port or harbor for which she is actually bound may be proved by the course she sails, the landings she makes, and other facts connected with the voyage.

4. SAME—ILLEGAL UNLADING—WHAT STATUTE VIOLATED.
An illegal unlading within the limits of the United States, and before arrival at any port within such limits, is a violation of Rev. St. § 2867, but an illegal unlading after arrival at such port should be prosecuted under section 2872. The Active, Deady, 165, followed.

5. SAME—WHAT CONSTITUTES.
If, for the purpose of exchanging cargo, vessels rendezvous at a place within four leagues of the shore, and one of them then tows the others beyond the four-league line, where the exchange is made, then the continued,

concerted, necessary action for the effectuation of that purpose, including the towing out, should probably be considered as a part of the actual exchange, being a part of the res gestae of the offense which the statute was intended to prevent.

6. SAME— ARRIVAL FROM ADJACENT FOREIGN COUNTRY — FAILURE TO OBTAIN PERMIT.
A Canadian steamer laden with supplies for sealing vessels in the North Pacific ocean and Behring sea arrived in the waters of the United States about 30 miles from St. Paul on Kadiak island, which is a port of entry. She did not report to the United States revenue officer there, but went on through United States waters to Tonki bay, where she exchanged merchandise with sealing vessels, and then proceeded to Port Etches, where she anchored in the inner harbor. *Held*, that the steamer was liable to forfeiture under Rev. St. § 3109, which requires the master of any foreign vessel arriving in United States waters from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, to report to the collector at the nearest port to the place of entry to such waters, and obtain a permit before proceeding further inland for the purpose of lading or unlading cargo.

7. SAME—ABSENCE OF MANIFEST OF CARGO.
A steamer fitted out with supplies for the sealing fleet sailed from Victoria, B. C., and, according to a preconcerted arrangement, met vessels of the fleet at Tonki bay and Port Etches, in the waters of the United States, within four leagues of the shore, and there transferred to them part of her cargo, and received sealskins from them, in violation of the revenue laws. She was then seized by the federal authorities, and found to be without any manifest of her cargo, as required by Rev. St. §§ 2806, 2807, 2809. *Held*, that under these sections the part of her original cargo still on board, and the sealskins received, were subject to forfeiture.

8. SAME—CARGO RECEIVED ON HIGH SEAS.
Where a vessel bound from a foreign port to a port of the United States receives cargo on the high seas, and brings it into the United States, such cargo must be regarded as brought from a foreign port, and is forfeitable under Rev. St. §§ 2806, 2807, 2809, if there is no manifest thereof.

9. SAME.
Where a cargo is seized for want of a manifest thereof, the master cannot prevent a forfeiture by thereafter making out a manifest, and tendering it to the officers making the seizure.

10. SAME—FORFEITURE—BURDEN OF PROOF.
Where probable cause is shown for the seizure of a vessel and cargo for violation of the revenue laws, the burden of proof to establish the innocence of the property is placed on the claimant by Rev. St. § 909.

11. SAME—MEANING OF "ARRIVED" AND "BOUND" IN REV. ST. §§ 2867, 2868.
When a vessel comes within four leagues of the shore of the United States, and makes a transfer of merchandise with another vessel there, without authority from the revenue officers, it should be held to have "arrived" there, and be treated as a vessel "bound" to the United States, within the meaning of Rev. St. §§ 2867, 2868, providing for the forfeiture of the cargo and vessel in such case.

In Admiralty. Libel of forfeiture for violation of sections 2806-2809, 2867, 2868, 3109, Rev. St.

C. S. Johnson, U. S. Dist. Atty., (F. P. Dewees, Special Asst. U. S. Atty., on the brief,) for libelant.

John B. Allen and Hughes, Hastings & Steadman, for respondents.

TRUITT, District Judge. The libel of information in this case was filed July 5, 1892. It is voluminous, and consists of four sep-

arate counts. Two of these—the first and second—are against the steamer Coquitlam, her boats, tackle, apparel, furniture, boilers, and engines; the third and fourth are against her cargo. The libel sets out the facts of the seizure as follows:

"That C. L. Hooper, a captain in the United States revenue marine service, duly commissioned by the president of the United States, and then and there commanding the revenue cutter Corwin, on duty in the waters of Alaska, and duly authorized in the premises, on or about the 22d day of June, 1892, at or near Port Etches, Hinchinbrook island, within the district of Alaska, and within the jurisdiction of this court, on waters navigable from the sea by vessels of ten or more tons burden, seized the ship or vessel commonly called a 'steamer' and known as the 'Coquitlam,' her boats, tackle, apparel, furniture, engines, boilers, and cargo, and turned them over to the collector of customs for the port of Sitka, in the district of Alaska."

The first count of the libel charges a violation of sections 2867 and 2868 of the Revised Statutes on the part of the Coquitlam, by receiving or unlading a large amount of merchandise and cargo, consisting of fur sealskins, at or near Afognak island, on the 19th day of June, 1892, within the limits of the United States and the District of Alaska, in the waters thereof, and within four leagues of the coast. It is further alleged in this count that on or about the 20th and 21st days of June, 1892, within the Gulf of Alaska, in the district of Alaska, and within four leagues of the coast, the sealing schooners, Oscar & Hattie, Viva, and Faun made unladings of cargoes, consisting of fur sealskins, to the Coquitlam.

The second count charges that said steamer violated section 3109, Rev. St., at the same time and place first named in the first count, by transferring merchandise to the British schooners Brenda, Umbrina, Sea Lion, Venture, Maud S., Winifred, Libby, and Walter A. Earle, and then and there receiving as cargo from each of said schooners except the Winifred and Libby, a large quantity of fur sealskins, aggregating in all the number of 3,893. Section 2867 of the Revised Statutes, which is section 27 of the collection act, provides for a case where goods are unladen after a vessel laden with merchandise, and bound for the United States, has arrived within the limits of a collection district, or within four leagues of the coast thereof, and before coming to the proper place for the discharge of her cargo, or some portion of it, without being there duly authorized by the proper officer of the customs to unladen the same. The punishment prescribed for a violation of this section is a forfeiture of the goods so unladen, and penalty of one thousand dollars, each, against the master and mate, or other person next in command, except in case of unavoidable accident, necessity, or distress of weather; but the vessel itself is not forfeited.

The next section of the chapter is 2868, which reads as follows:

"If any merchandise, so unladen from on board any such vessel, shall be put or received into any other vessel, except in the case of such accident, necessity or distress, to be so notified and proved, the master of any such vessel into which the merchandise shall be so put and received, and every other person aiding and assisting therein, shall be liable to a penalty of treble the value of the merchandise, and the vessel in which they shall be so put shall be forfeited."

This section is invoked for the purpose of forfeiting the Coquitlam, and the question turns upon the sufficiency of the evidence to support the allegations of the first count of the libel.

A violation of section 3109 is charged in the second count, and, if the allegations thereof are sustained by the evidence, the vessel would also be forfeited under this count. Section 3109 is as follows:

"The master of any foreign vessel, laden or in ballast, arriving in waters of the United States from any foreign territory adjacent to the northern, northeastern or northwestern frontiers of the United States, shall report at the office of any collector, or deputy collector of the customs, which shall be nearest to the point at which such vessel may enter such waters; and such vessel shall not proceed further inland, either to unlade or take in cargo, without a special permit from such collector, or deputy collector, issued under and in accordance with such general or special regulations as the secretary of the treasury may in his discretion from time to time prescribe. For any violation of this section such vessel shall be seized and forfeited."

To the libel of information herein, the Union Steamship Company, Limited, Vancouver, British Columbia, intervening for its interest in the steamer Coquitlam, her boats, tackle, apparel, furniture, engines, boilers, and supplies, and Thomas Earle, of Victoria, British Columbia, intervening for the interest of William Munsie, R. P. Rithet & Co., Limited, George Collins, Donald Urquhart, Pacific Sealing Company, and Thomas Earle, in the cargo of the Coquitlam, filed their answers. Upon the issues thereby raised, the trial was had. It is admitted, in answering the first count, that in the waters of the North Pacific ocean, at or about the dates named in the libel, the sealing schooners therein mentioned did unlade fur seals in the numbers alleged, but it is denied that, at the time of such unlading, any of said vessels were within the limits of the Alaskan collection district, or within four leagues of its coast, or within the waters of the United States, or within the jurisdiction of this court; and, further answering said count, it is admitted that each and all of said vessels so unladen were from Victoria, or some other port of the dominion of Canada, but that any of them were bound to the United States, or laden with any merchandise bound to the United States, is specifically denied.

In answering the second count it is admitted that the Coquitlam is a foreign vessel; that she cleared on the 8th day of June, 1892, from the foreign port of Victoria; that she was laden with certain general merchandise; that E. E. McLellan was master of said steamer at all times stated in the libel; and that said steamer did transfer certain merchandise to some of said sealing schooners. It is further admitted that about the time alleged in the libel the Coquitlam received the aggregate number of fur sealskins therein named from said schooners, but it is denied that the unlading of the merchandise, or the receiving of the sealskins took place within the waters of the United States, or within four leagues of the island of Afognak, or any part of the coast, or within the jurisdiction of this court. All the material allegations of the libel, in each separate count, are specifically denied by the answers, and

then a lengthy statement and explanation of the matters and transactions involved in the case are set out affirmatively.

There is no special plea to the jurisdiction, though a general denial of jurisdiction is made in the answers. The act of 1736, (9 Geo. II. c. 35,) sometimes called the "British Hovering Act," assumed, for certain revenue purposes, a jurisdiction of four leagues from the coast, by prohibiting foreign goods from transshipment within that distance without payment of duties; and the collection act of 1799 of the United States is similar in assuming a jurisdiction of four leagues from shore for the collection of customs, and to prevent illicit trade. Both of these provisions have been declared by judicial authority in each country to be consistent with the law and usages of nations; and in Church v. Hubbart, 2 Cranch, 187, the doctrine is announced that nations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their own coast, and that there is no fixed rule prescribing the distance from the coast within which such seizures may be made; but as the learned advocate who argued this case on behalf of the respondents did not raise the question as to the right of the United States to make seizures of foreign vessels for violation of its collection or revenue laws, on waters of the sea, within four leagues of the shore line, I suppose, if such right is not conceded, it is considered a political, and not a judicial, question.

As submitted, then, the case, so far as the vessel is concerned, must be determined by applying the law of sections 2867, 2868, and 3109 to the circumstances and facts shown and established by the evidence. Whether or not it should be forfeited is simply a question of fact, under the law; but as it is claimed on behalf of the respondents that, since these statutes are highly penal in their nature, they must be strictly construed, and that an act should not be held to fall within their purview unless, upon a fair construction of the language, it comes within the letter of the law and its purpose also, I deem it proper to briefly notice this claim before proceeding to pass upon the evidence. The Cargo ex Lady Essex, 39 Fed. Rep. 765, is referred to as authority for a strict construction of these statutes, but I do not think it supports the claim. That was a case where the schooner Victor, laden with lumber, bound from a Canadian to an American port, arrived within the limits of the collection district of Port Huron and was there stranded. The lumber from the stranded vessel was unladen and placed upon the schooner Lady Essex without authority from the customs officers. The stranding of the Victor made a clear case of unavoidable accident under section 2867, and the only irregularity was the failure to give notice to the customs authorities of such contingency. The information was for a forfeiture of the lumber, and Justice Brown, in the opinion, says:

"No forfeiture, however, is imposed for the failure to give such notice, though it would seem from the following section that the vessel receiving such lumber from the stranded vessel incurs the penalty of forfeiture, and

the master of such vessel a penalty of treble the value of the merchandise. While it is possible that section 2867 might be construed by inference to work a forfeiture of the cargo where no notice has been given of accident, necessity, or distress, still, although they may not be subject to the strict construction of a penal one, a forfeiture ought not to be imposed unless the language will bear no other reasonable construction."

It will be observed here that the dictum in this decision is to the effect that the vessel receiving the lumber might be forfeited under the next section, evidently for the reason that it is there prescribed that the "accident, necessity, or distress" is to be "so notified and proved" before the merchandise can be received without incurring the penalty; but as section 2867 does not expressly declare a forfeiture of the cargo for unlading, in case of accident, necessity, or distress, without the notice mentioned therein, the court did not think proper to supply, by inference or construction, what was not in the text, to work a forfeiture in a case where the want of notice was the only irregularity. However, I understand the true rule of interpretation for the statutes upon which the libel in the case at bar is based to be that stated by Judge Deady in Ten Cases of Opium, Deady, 70, as follows:

"Acts declaring forfeitures and imposing penalties for violation of the revenue laws must be construed so as to accomplish the object for which they were intended. In the technical sense they are not penal, but rather remedial—intending to effect a public good and prevent frauds."

The evidence in this case is voluminous, including the testimony of a large number of witnesses, maps and plats, ship's papers, and the log book of the Coquitlam, and it is quite conflicting on some points; but after eliminating therefrom the facts which are admitted, and passing over immaterial matters, the real questions to be determined are not numerous. There are only two principal questions involved by the issues in the first count:

(1) Were all or any of the sealing schooners, from which fur sealskins were unladen, bound for the United States? and,

(2) If so, then was the unlading made within the collection district of Alaska, or within four leagues of its coast, within the waters of the United States?

The evidence touching these questions is mainly drawn from the witnesses produced by respondents themselves, whose pecuniary interests, prejudices, and influences are such as to make them strongly favor respondents. The masters of the sealing schooners that made exchange of cargo with the Coquitlam at Tonki bay testify most strongly of any of the witnesses in favor of the claim that the exchange was made more than 12 miles from the shore, and they stand very much in the light of accomplices. I therefore think their evidence should be received with caution, if not wholly rejected, where it is contradicted by other evidence, or rendered improbable by surrounding circumstances. According to the testimony of Capt. William Grant, who was himself interested in three vessels engaged in fur seal hunting that year, there were about 55 of the fleet of sealing vessels in the North Pacific ocean in the spring of 1892, owned in Victoria. During

that spring this fleet cleared from there, or other Canadian ports, for said ocean, or Okhotsk sea. The owners of these vessels have an organization known as the Pacific Sealers' Association; and I think the evidence and the circumstances show that before their masters left Victoria it was generally understood by them that they should rendezvous at Marmot island, or Tonki bay, in Afognak island, or at Port Etches, in Hinchinbrook island, in the United States, and within the district of Alaska, and that a supply steamer would be sent out by said association to meet them at these places some time that season, from the middle towards the latter part of June, and take their catch of sealskins, and furnish them with supplies and provisions to enable them to pursue their hunting, possibly into Bering sea. Word was passed from one to another, and some of them directed their course to Tonki bay, where they were met by the Coquitlam, while others sailed for Port Etches, at which place a large number were assembled on the day of her seizure there. The schooners Umbrina, Brenda, Sea Lion, Maud S., Walter A. Earle, and Venture, from each of which sealskins were transferred at Tonki bay, and the Oscar & Hattie, Viva, and Faun, from which transfers were made off the coast of Middleton island, belonged to this fleet. The evidence tends very strongly to prove that these vessels were instructed to rendezvous at Tonki bay and Port Etches. It is in evidence that these are uninhabited bays on the remote frontier, where there is no civilized population or inhabitants, and respondents claim that this should be taken in their favor as going to show that these vessels could have no object in going there; but it seems to me that, on the theory of the libelant that they were intentionally seeking to evade our customs laws, it is rather a circumstance against them, for in that case they would naturally try to find just such places to carry out their unlawful intentions. Those who seek to break or evade the law are much given to retirement and seclusion.

Robert McReid, master of the Maud S., testifies that he was instructed before leaving Victoria to meet a vessel the latter part of June off Marmot island, and he says he received the information from Capt. Cox. Now, there is a good deal of significance to this testimony when it is known that Capt. Cox was then the president of the Pacific Sealers' Association, and was, according to the evidence of the master of the Coquitlam, in such a hurry to get that vessel out on her voyage that he prevailed on the customs officer at Victoria to let her sail without a proper manifest, because "he wanted get the ship away as soon as possible. They were behind then." If the schooners under control of this association had been instructed to rendezvous at Tonki bay and Port Etches, the middle or latter part of June, to meet a supply steamer and exchange cargoes, there was no time to lose by this steamer in making her clearance, when it was then the 8th day of June. Theodore Magnesen, master of the Walter A. Earle, took his vessel into Tonki bay to meet some kind of a vessel in that vicinity. Charles Campbell, master of the Umbrina, had heard

that a vessel was to be sent up in the vicinity of Tonki bay, from Victoria, about the 18th or 19th of June, and this witness says that, when he went into the bay, "numerous vessels were there." E. E. McLellan, master of the Coquitlam, testified that from Victoria he made Dixon's entrance, and took departure for Forester's island, and steered for Marmot island. He further says:

"My instructions were from Capt. Kelly to direct my vessel towards Marmot island, and I took the ship there. He told me that schooners would be found in the vicinity of Marmot island, or Cape Tonki."

The log book of the Coquitlam, kept by Capt. McLellan, has this very significant entry under date of June 18, 1892, the day he entered Tonki bay: "At noon, Marmot island abreast. Set course for Cape Tonki. Weathered cape, and steered in for rendezvous." It is true these vessels all cleared, so far as their papers show, for the North Pacific ocean, but this is a very wide extent of water, in which there are numerous ports and harbors belonging to the United States, and where a vessel is actually bound is not necessarily shown by its clearance. When the clearance is questioned as being intentionally misleading or fraudulent, the port or harbor for which it is bound may be proved by the course it sails, the landings it makes, and other facts connected with its voyage. But counsel for respondents contend that it will not do to say, because a vessel arrives in the United States, it is therefore a vessel bound for the United States, and that, before the first count of the libel can be sustained under sections 2867 and 2868, it must be shown that the unloading vessels were bound to the United States, and to some particular port, and to some particular port answering to that designated in the statute as "the proper place for the discharge of her cargo."

I confess, when I first considered this case, I was somewhat in doubt as to the proper construction to be given to section 2867. But the facts do not seem to bring the case within the purview of section 2872, and, furthermore, I find from an examination of the authorities that this question was directly passed upon and settled in the case of The Active, Deady, 165, where, following the authority of The Hunter, 1 Pet. C. C. 10, it was held that an illegal unlading within the limits of the United States, and before arrival at any port within such limits, is a violation of section 2867, but an illegal unlading after a vessel shall have arrived at some port within the United States should be prosecuted under section 2872. If, therefore, these vessels did make an unlading of their cargoes within Tonki bay, or within four leagues of the coast in that vicinity, without authority so to do, they cannot be successfully prosecuted for the act under any law that I know of, unless sections 2867 and 2868 do apply. I think if a vessel comes within our waters within four leagues of the shore, and makes an unlading or exchange of merchandise with another vessel, without authority, it should be held to have arrived there, and treated as a vessel bound to the United States, within the meaning of the statute, and no refinement of construction, or narrow technical meaning

of the words "arrive" and "bound" should be allowed to render the law powerless to prevent a wrong. The primary object of these and other sections of the law is to prevent frauds upon the revenue, and, to accomplish this, many acts, indifferent in themselves, but which, if permitted, might be made the means of committing, or facilitate the commission of, such frauds, are prohibited under penalties, and they should be construed so as to accomplish the object for which they were enacted. The Industry, 1 Gall. 116, 117.

I do not think the rule as to the burden of proof and weight of evidence given by counsel for respondents in their brief is the correct one in this case. Section 909, Rev. St., puts the onus probandi to establish the innocence of the property upon the claimant in all cases when probable cause for the seizure is shown. This has been held as the rule in Cliquot's Champagne, 3 Wall. 114, in Taylor v. U. S., 3 How. 197, and by a number of other authorities. It is admitted in this case that the unlading and exchange was made by the schooners and the Coquitlam in the vicinity of Tonki bay, and it is incumbent upon respondents to show that it was not illegal, and not within four leagues of the shore. It is claimed, however, that the meeting of these vessels was accidental, and that the Coquitlam, as well as some of the schooners, put into Tonki bay on account of stress of weather, but I do not think either claim is sustained. The evidence and all the circumstances show that they met in the vicinity of that bay in accordance with instructions sent out by the Pacific Sealers' Association of Victoria, and, if they were to make a rendezvous near Marmot island, it seems almost beyond question that they would make it in the safe harbor of Tonki bay. The intention of the parties may not have been to violate the letter of our revenue laws, but to evade and break them in spirit, and, if so, they can hardly stand before this court in the light and attitude of parties who unintentionally and innocently make a mistake, not having an opportunity to know the law. Being engaged in the business they were along our coast, it was their duty to know the laws governing their actions. I think the evidence shows conclusively that this transfer of cargoes between the schooners Umbrina, Brenda, Maud S., Sea Lion, and Walter A. Earle and the Coquitlam took place inside of what is called the "twelve-mile limit," somewhere between three and seven miles from the coast, and that the sealskins from the Venture were either transferred in Tonki bay, or taken out in small boats at the time the schooners were towed to sea, and taken on board the Coquitlam at the same place where the transfer was made from them.

The evidence of the masters of all these vessels, who have testified, is to the effect that they understood the transfer of cargoes could be made without violating the law by going out beyond three miles from shore, and as it was late in the afternoon of the day it was made, and the master of the Coquitlam seems to have been in something of a hurry to proceed on his voyage from Tonki bay to Port Etches, it is highly improbable that he would waste

time in towing these vessels beyond twelve miles at sea, when it was only required to tow them beyond three miles. I think the theory that it was necessary to go beyond twelve miles from shore on this occasion, on account of the winds, tides, choppy seas, and ocean swells, is more ingenious than probable. But while I think the transfer was made within four leagues of the shore, I am inclined to hold that, if the purpose of the meeting of these vessels at Tonki bay was for the unlading and receiving of cargo, then the continued, concerted, necessary action for the effectuation of that purpose, including the towing out, was a part of the actual unlading and receipt, and constituted essential parts of the res gestae of the offense which the statute was enacted to prevent, and would be a violation of it though the final act took place more than twelve miles from shore. With our vast extent of seacoast in the northwest, if vessels can, by a prearranged plan, rendezvous at one of the numerous bays or inlets along the coast, and after meeting there, if the steamer carrying stores of merchandise, provisions, or liquors from a foreign port can evade our laws by watching for favorable weather, and then simply towing a number of sloops or small sailing vessels to sea beyond the twelve-mile limit, and there exchange cargoes or furnish them with trading stores, our laws are inadequate to prevent illicit traffic or smuggling along the coast.

Under these views of the law and the evidence, I think the schooners Umbrina, Brenda, Maud S., Sea Lion, Walter A. Earle, and Venture were bound to the United States when they cleared from Victoria; that the unlading and exchange of cargoes by them, made near Tonki bay, with the Coquitlam, June 19, 1892, was within the collection district of Alaska, within four leagues of the coast, within waters of the United States; and that the allegations of the first count of the libel on these points are sustained by the proof; and that their cargoes, together with the Coquitlam, into which they were transferred, should be forfeited under said sections 2867 and 2868. But under the allegations of the libel and the theory of the prosecution it does not appear that the transfers of sealskins from the schooners Oscar & Hattie, Viva, and Faun, to the Coquitlam, were in violation of section 2867, for the proof shows them to have taken place somewhere in the North Pacific ocean, between Middleton island and Cape Cleare, Montague island, about 30 or 40 miles from the nearest land. The allegations that they were made in the collection district of Alaska, and within four leagues of shore, are not, therefore, sustained by the evidence. The second count, which is also against the Coquitlam, charges a violation of section 3109, supra, and I think the testimony and circumstances prove that she offended both as to the requirement and the prohibition of this statue. It is admitted she was a foreign vessel from a foreign port or territory, and the proof shows she arrived in waters of the United States at a point about 30 miles from St. Paul or Kadiak island, which is a port of entry where a customs officer is located. She did not report to said officer, but

went on through United States waters into Tonki bay. Furthermore, she went directly from this bay on her way towards Port Etches, where she again entered waters of the United States, passed on into the bay, and anchored in the inner harbor, about five or six miles from the open sea, less than half a mile from the land. There seems to be no question but that she was directly bound from Tonki bay to the vicinity of Port Etches, though it is claimed that she entered the harbor to procure fresh water. But if she did not intend to enter this harbor when she left Tonki bay, where there was plenty of fresh water, it is a little singular why water was not taken on at that place if it was getting scarce.

It is certainly true that a mere touching or passing through the waters of a country by a ship on her voyage elsewhere is not an arrival in such waters, within the meaning of laws for the collection of revenues; but this is not such a case. Besides, as stated by Chief Justice Marshall:

"In different seas, and on different coasts, a wider or more contracted range in which to exercise the vigilance of the government will be assented to. Thus, in the Channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further." Church v. Hubbart, 2 Cranch, 235.

There is no highway of commerce along the northwestern coast of Alaska where the seizure in this case was made, and it is a matter of general notoriety that very few vessels, except such as are engaged in illicit trade, sea otter or pelagic seal hunting, frequent this coast. Sea otter hunting is forbidden except as regulated and prescribed by the secretary of the treasury, and the United States at that time was asserting an absolute ownership over the fur seals born and reared on Pribyloff islands, which composed the herd the vessels involved in this case were hunting. This claim, it is true, was not recognized by the Paris tribunal of arbitration, but it did recognize the fact that the seals should be protected in their passage through the very waters where these vessels were then engaged in killing them. These facts, to say the least, do not put them in a very favorable light, when found breaking the customs laws while so engaged. I think the proof sustains the allegations of the second count, and that the Coquitlam is subject to forfeiture for violation of section 3109.

The third count is specially against the fur sealskins unladen from the schooners therein named on June 19, 1892, near Tonki bay, and also those unladen about the 20th and 21st of June, 1892, between Middleton island and Cape Cleare, and charges a violation of section 2867. It is admitted in the answers that the sealskins unladen at said times and places were received upon the Coquitlam, and were a part of the cargo seized upon her. I have already held that the first unlading was illegal, in considering it in reference to the Coquitlam, and that the sealskins then received by her should be forfeited under section 2867, but I also

held the allegations that the unlading from the Oscar & Hattie, Viva, and Faun took place in the collection district of Alaska, or within four leagues of the shore, to be unsupported by the proof.

The fourth and last count of the libel charges a violation of sections 2806, 2807, and 2809 of the Revised Statutes. These sections provide that no merchandise shall be brought into the United States, from any foreign port, in any vessel, unless the master has on board manifests in writing of the cargo, signed by him, and prescribe, as a penalty for their violation, that the master shall be liable for the value of the cargo not included in such manifest, and that all the cargo not so included, belonging or consigned to the master, mate, officers, or crew of the vessel, shall be forfeited. In the affirmative allegations of their answer the respondents allege "that the whole of said cargo belonged and was consigned to the master, mate, officers, or crew of said steamship." It is not claimed by them in their argument that there was a manifest of the cargo of the Coquitlam upon her at the time of seizure, though it is contended that one was not required, as she was not bound to the United States, but to the North Pacific ocean. The proofs show there was no manifest, such as the law requires, on her at the time of seizure, and Capt. McLellan testifies that they cleared from Victoria without it to save time. The fourth count is directed against the entire cargo found upon the Coquitlam; but, while I have considered the sealskins transferred to her at Tonki bay subject to forfeiture under section 2867, those received from the Oscar & Hattie, Viva, and Faun, off Middleton island, and the merchandise listed in Exhibit A of the libel, if subject to forfeiture at all, must be so under the sections named in this count. The merchandise, of which a large part was dutiable, was shipped from Victoria, a foreign port, and was brought therefrom directly into the United States. Under the plain letter of the statute I think it is liable to forfeiture. This merchandise consisted principally of supplies for those engaged in sealing, and, according to the testimony of Capt. William Grant, was for any vessel owned in Victoria connected with the sealing business. It also appears from the evidence that the schooners from which the Coquitlam transferred sealskins at Tonki bay, within the district of Alaska, received from her at the same time large quantities of such supplies. It is held in the case of The Mary, 1 Gall. 208, that the mere act of coming into port without breaking bulk is prima facie evidence of importation. In The Boston, Id. 239, it is held that when foreign goods are put on board a vessel with intent to import them into the United States they are forfeited, under act of March 1, 1809, whether there was an intended violation of law or not. If a vessel voluntarily arrive at her port of destination with a cargo, it constitutes, in point of law, an importation.

But the circumstances connected with the lading of the sealskins are different from those connected with the merchandise. Part of the sealskins were taken upon the vessel at Tonki bay,

within four leagues of our coast, and the others were received on the high seas from the schooners Oscar & Hattie, Viva, and Faun; and it is contended on behalf of respondents that "in no event could the sealskins be manifested, or required to be, under these statutes, and therefore cannot become subject to their penalty." If the law is to be strictly construed according to the letter, and the spirit and intention be wholly ignored, then this position is correct, and the skins are not liable to forfeiture. But it appears to me that this construction is too narrow, when tested by the rule given in Ten Cases of Opium, supra, and would render the customs laws nugatory. I think where a vessel bound from a foreign port to any port in the United States shall on its passage take in cargo, even on the high seas, and bring such cargo into the United States, to all intents and purposes such cargo is brought from a foreign port. If such construction cannot be maintained, the law can at any time be evaded by vessels leaving foreign ports, and meeting and exchanging cargoes on the open seas. It is held in U. S. v. Smith, 2 Blatchf. 127, that under the acts of 1821 and 1823 the penalty is incurred by bringing into the United States, from adjacent territory, goods subject to duty, and neglecting to deliver a manifest thereof at the nearest collector's office, without regard to the intent of the party. Capt. McLellan testified that after seizure, and after demand for the manifest of the cargo of the Coquitlam had been made, he made out a manifest, and offered it to the officers who made the seizure, but they then refused to look at it. I do not see how this could strengthen the case, for, if the law could be complied with after seizure, it would be done in every case, and no convictions could ever be had. In U. S. v. 10,000 Cigars, 2 Curt. 436, it is held that forfeiture is not saved by making a manifest after arrival at port, though before it is demanded by a customs officer.

A decree will be entered in accordance with this opinion, forfeiting the steamer Coquitlam, her boats, tackle, apparel, furniture, boilers, engines, and cargo to the United States.

Ex parte MARSH et al.

(Circuit Court, E. D. Virginia. September 18, 1893.)

1. TREATIES—COMPACT OF MARCH 28, 1785, BETWEEN MARYLAND AND VIRGINIA —CONSTRUCTION—FISHERIES IN POCOMOKE RIVER.
Section 7 of the compact between Maryland and Virginia, entered into March 28, 1785, provided that "the citizens of each state, respectively, shall have full property in the shores of the Potomac river adjoining their lands, with all advantages thereunto belonging, and the privilege of carrying out wharves and other improvements so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to the citizens of both states; provided that such common right be not exercised by the citizens of one state to the disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets on the shores of the other;" and section 8 of the compact provides that "all laws which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potomac or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states." *Held*, that neither directly, nor by implication or construction, did sections 7 and 8 grant a common right of fishery, including the catching and taking of oysters, in Pocomoke river, to the citizens of Maryland, or a right to joint legislation for the protection of fish in such river to the state of Maryland. Hendricks v. Com., 75 Va. 934, disapproved.

2. SAME—FISHERIES IN POCOMOKE SOUND.
Even if a common right of fisheries in Pocomoke river had been granted by the compact, such right would not have extended to Pocomoke sound, as a part of such river, since the river and sound have always been considered distinct bodies of water, and are so designated in the report of Commissioners Scarborough and Calvert, made in 1668; in the map of Augustin Herrman, published in 1673; in the first and all subsequent editions of the United States Coast Survey; and in the Black-Jenkins award of January 16, 1877, which established the boundary line between Maryland and Virginia, and was accepted by the two states, and ratified by Act March 3, 1879, (20 Stat. 481.)

3. SAME—DOUBTFUL BOUNDARY—EFFECT OF SUBSEQUENT ESTABLISHMENT.
Section 10 of the compact of 1785, which stipulates that offenses committed by citizens of Maryland within the limits of Virginia, on that part of Chesapeake bay where the line of division between Smith's point and Watkins' point may be doubtful, shall be tried in a court of Maryland, lost its force and effect by the Black-Jenkins award, which established with precision and certainty the line of division between such points, so that a Virginia court is now competent to try such offenses.

At Law. W. W. Marsh, R. L. Wharton, and Severn Nelson, brought into court on writs of habeas corpus, apply for discharges from custody, in which they were held for having violated the oyster laws of Virginia. Writs dismissed.

John P. Poe, Atty. Gen. of Maryland, Bradley T. Johnson, and Thomas S. Hodson, for petitioners.

R. Taylor Scott, Atty. Gen. of Virginia, (John W. Gillett, on the brief,) for Virginia.

Before GOFF, Circuit Judge, and HUGHES, District Judge.

HUGHES, District Judge. Three citizens of Maryland—William W. Marsh, Robert L. Wharton, and Severn Nelson—are before the court on writs of habeas corpus issued upon petitioners severally alleging that they have been unlawfully prosecuted for violating certain laws of Virginia relating to oysters, and have been unlawfully convicted and imprisoned by the county court of Accomack county, Va., for the offenses charged. Marsh was convicted of violating section 2156 of the Code of Virginia, which forbids all persons from taking or catching oysters with a dredge, scraper, or any other instrument than ordinary oyster tongs, in any of the waters of the commonwealth, except as prescribed by other sections of the Code. Wharton and Nelson were convicted under section 2147 of the Virginia Code, which forbids any person other than a resident of Virginia, who has paid a tax and obtained a license as prescribed by law, from taking or catching oysters in any manner in the waters of the state. The indictments in the cases of Wharton and Nelson charge that the offenses were committed on Ledge rock, in that part of Pocomoke sound which lies within the limits of Virginia. The indictment in the case of Marsh charges that the offense was committed on Hurley's rock, in Tangier sound, within the limits of Virginia. It is conceded that all of the offenses were committed within the limits of Virginia; but it is contended in defense that, by reason of Wharton's and Nelson's offenses having been committed in Pocomoke sound by citizens of Maryland, the courts of Virginia cannot take cognizance of them, and that by reason of Marsh's offense having been committed at a place near the boundary line between Virginia and Maryland, running from Smith's to Watkins' point, where the line is "doubtful," the Virginia courts have no jurisdiction to try him as a citizen of Maryland. We shall deal, in treating the question raised, more directly with the cases of Wharton and Nelson, and afterwards with that of Marsh.

A great mass of documentary evidence and historical literature has been filed by counsel on both sides as evidence in these causes. We have studied it with great care, and as thoroughly as the importance of the question involved seemed to require. The extraordinary volume and diffusiveness of this evidence renders necessary a more elaborate discussion and decision than is usually submitted from the bench in ordinary litigation. We will first describe in some detail, as matters of common knowledge, the oyster properties of Pocomoke sound, and the laws of Virginia enacted for the protection generally of her oyster interests.

Pocomoke sound has an area of about 90 square miles, and is one of the largest subdivisions of Chesapeake bay. According to the survey recently made by Capt. Baylor under an act of the legislature of Virginia, 52 square miles (28,528 acres) of this area are natural oyster rocks, beds, or shoals. It is common knowledge that the natural growth of oysters in this sound at one time was nearly depleted by constant and imprudent dredging; but some 10

or 12 years ago the legislature of Virginia prohibited dredging, and since then the oysters on the natural rocks have recuperated, and now the sound is well stocked. Immense quantities are removed annually; but so long as the removals are made with tongs, only, the quantity continues to be abundant; and a rock, if worked and nearly depleted, will, when left alone, reseed itself with a growth of small oysters, which in two or three years become marketable. It is doubtful if so rich a deposit of oysters, in as small a territory, can be found in the waters of Virginia or Maryland. That portion of Tangier sound which is within the limits of Virginia is a much larger body of water than Pocomoke sound; and, although it is looked upon as rich in its production of oysters, yet it has but 4,746 acres (seven square miles) of natural beds, rocks, or shoals. Pocomoke river is a navigable stream midway on the Eastern Shore peninsula, lying wholly within the state of Maryland in its entire course southward, until it crosses the boundary line five miles above its mouth, and until 1877 lying wholly within Virginia for that five miles, from the boundary line to its mouth, where it empties into the sound.

It is shown by public documents that Pocomoke sound supplies the main—almost entire—support to at least 3,000 of the inhabitants of Accomack county, Va., counting only those engaged in the oyster industry, and the members of their immediate families. Of that part of the population dependent upon their labor in this sound for the maintenance of themselves and families, five-sixths rely upon taking oysters directly from the places of their natural growth, and selling the catch. The remaining sixth plant alone, or combine planting with tonging. The planters have their grounds, upon application, assigned to them, and marked by stakes, by the oyster inspector of the district, who is an officer of the state of Virginia. Then they are surveyed by the county surveyor, and the survey returned to and recorded in the county court clerk's office. This, if exceptions are not filed and sustained, authorizes the planters to hold their assignments so long as they pay the annual rent to the state. The planter prepares his ground by depositing shells upon it, and placing a limited quantity of oysters thereon, to facilitate its seeding. If no oysters are placed upon the bed, still the spawn will attach itself to the shells, and produce a growth; but this process is hastened by placing seed oysters upon the prepared bed, as before stated. In a few years the oysters grow so large and thickly that it becomes difficult to distinguish the artificial beds from the natural rocks. At maturity (in about three years, if the location is suitable) the oysters are removed from the beds, and marketed; the quality being superior to, and the oysters commanding a better price than, those taken from the natural rocks.

Official records show that 139 assignments and surveys have been made in Pocomoke sound upon applications of planters, and these surveys embrace a little more than 1,000 acres. The rec-

ords show that the surveys run from one-eighth of an acre to 105 acres,—most of them containing less than 10 acres. Some few persons, but very few, occupy lands for planting purposes which have not been assigned or surveyed, and consequently they have never acquired a legal right to hold them.

The laws of Virginia regulating the oyster culture are found in the Code and statutes. The owner of a boat to be used in taking or catching oysters from the natural rocks is required to have the boat registered by the oyster inspector of his district every year, and pays the inspector for his services a fee of 50 cents, annually. Each registered tongman is required to report weekly the amount of his sales of oysters, and to pay thereon an amount equal to the amount of tax levied by the state on any other species of property; but, at the time of registering, any tongman can commute the tax on his sales by paying two dollars for the entire season. This the tongers invariably do, because it relieves them from the trouble of making weekly reports, and the amount of commutation is less than the tax on sales would amount to. The planter pays an annual rent of one dollar per acre for the land assigned to him, and he also reports to the commissioner of the revenue, where he lists his property for taxation, the amount of his sales of planted oysters for the preceding year, upon which sales is assessed a tax, the same as upon other taxable property. These are the only taxes collected from tongers or planters.

Two truths are obvious from the foregoing recital: First, that unless laws are passed, and stringently enforced, for the protection of the oyster rocks, beds, and plants in Pocomoke sound, the oysters which are produced in profusion there will soon be destroyed; and, second, that in order preserve and cultivate the oyster, and increase its production in those waters, it is necessary to allow private proprietorship in the oyster plants, subject, at the pleasure of Virginia, to such taxation as entails upon the state the duty of protecting these taxed oyster properties by police and penal laws. These truths very broadly distinguish the oystering industry from that of catching running fish in the waters of the Chesapeake and its tributaries, in which there can be no private property until they are caught, and invalidate any claim that may be made, by inference, to the right of oystering, from grants, in general terms, of the right of fishing. We think, moreover, it may be laid down as a proposition of natural law that, inasmuch as oysters are becoming more and more valuable and necessary every year, with the growth of populations, as human food, any state possessing great and productive oyster deposits owes it as a duty to humanity, no less than to her own citizens engaged in the oyster culture, to protect these deposits from such depredations as destroy their valuable product. In order to give effectual encouragement to this industry, Virginia has enacted laws, some of which have been described above, which confer private rights in oyster beds, and which impose taxes upon cultivators of oysters, which are expended in

supporting a police force charged with the duty of protecting these private properties from such depredations as those of which the petitioners have been convicted. We do not understand that the validity of these laws of Virginia is questioned by counsel for the petitioners, or that they question the right of private property in oyster beds. The defense set up for the petitioners is technical only, denying the jurisdiction of the Virginia court which convicted them, and basing the denial solely on the circumstance that their offenses were committed in localities in which Virginia is claimed to have relinquished jurisdiction over Maryland citizens by treaty with Maryland.

We turn now to the Potomac river, on the western side of the Chesapeake bay. The tide-water portion of this great stream, for 120 miles from the Great Falls at Georgetown to the Chesapeake bay, constitutes the boundary line for that entire distance between Maryland and Virginia. Its fisheries for herring, mackerel, shad, and other running fish were for a long time highly valuable, and are quite so still. There are oysters in the more brackish waters near its mouth, but the oyster interests of the Potomac have always been very inconsiderable. The relations of the tide-water portions of the Potomac river to the two states made it necessary that there should be some compact as to its use between Maryland and Virginia. Accordingly, on the 28th day of March, 1785, under the auspices of Gen. Washington, and at Mt. Vernon, a compact was entered into, which had the effect of a solemn treaty, between these states. That compact is still in force, except so far as the subsequent ratification by Virginia and Maryland of the constitution of the United States may have modified and changed it.

Another portion of the boundary between the two states has always been a subject of much interest, to wit, that extending from the mouth of the Potomac across the Chesapeake bay and the eastern shore or peninsula to the Atlantic ocean. Until the final settlement, in 1877, of this boundary line, by Arbitrators Black and Jenkins, which was accepted by the two states, and was ratified by congress by the act of March 3, 1879, (see 20 Stat. 481,) this line was the subject of much controversy, more or less acrimonious, between the two states and their respective citizens. One of the original subjects of contention was the exact locality of Watkins' point, which was ambiguously mentioned in Lord Baltimore's charter. This was fixed, however, at a very early date. It was determined by Commissioners Scarborough, of Virginia, and Calvert, of Maryland, in their report of March 28, 1668, defining its position, and that position has never been changed; certainly, not very largely changed. (The act of congress just cited, and the Code of Virginia, page 62, § 13, strangely refer to the Scarborough-Calvert line as marked by them in 1868, which, of course, are misprints.) Watkins' point, thus determined, has remained from 1668 till now a cardinal point in the boundary line of Maryland and Vir-

ginia. In regard to this point, which determined, and continues to determine, so large a section of the boundary line of the two states, the two commissioners use the following language:

"After a full and perfect view taken of the point of land made by the north side of Pocomoke bay and the south side of Annamessex bay, we have and do conclude the same to be Watkins' point, from which said point, so called, we have run an east line, agreeable with the extremest part of the westermost angle of said Watkins' point, over the Pocomoke river, to the land of Robert Holston's," etc., and "on into a marsh of the seaside."

That is to say, after fixing Watkins' point, they ran a line from that point on Pocomoke bay, to and "over Pocomoke river," eastward to the Atlantic ocean.

Not only is Watkins' point, as fixed, or nearly as fixed, by Scarborough and Calvert, still a cardinal point in the boundary, but the point at which these commissioners crossed over the Pocomoke river also remains an undisputed point of the line, as it was fixed by them. In modern times this crossing has been ascertained to be at latitude 37° 59′ 37″, longitude 75° 37′ 4″. The line from Watkins' point to Pocomoke river, fixed by Scarborough and Calvert, skirted the irregular northern shore of Pocomoke sound, taking in no navigable water except what is in the five miles of Pocomoke river below its intersection with the line; a fact which will be seen, in the sequel, to have given a good deal of annoyance to some of the citizens of Maryland. One of our objects in quoting exact language from the report of Scarborough and Calvert is to show that at that day, and by those two men of pre-eminent intelligence, the bay and the river Pocomoke were spoken of, and regarded, as two distinct bodies of water. From what has been said, it is plain that while the two states had very important common interests in the Potomac river, which was a common boundary for 120 miles, they had comparatively trifling common interests in the Pocomoke river; a stream that from 1668 to 1877 constituted no part whatever of a boundary between them, and whose course in Virginia was less than five miles.

The petition of Wharton and Nelson, praying for the writs of habeas corpus under which they are before this court, recites, among other things, as follows:

"By the seventh section of [the compact entered into on the 28th day of March, 1785, between the states of Maryland and Virginia,] it is provided that: Sec. 7. 'The citizens of each state, respectively, shall have full property in the shores of Potomac river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common right be not exercised by the citizens of one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.' By the eighth section of said compact, it is provided that: Sec. 8. 'All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the

river Potomac or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.' "

The petitioners now before this court, by their counsel, contend that—

"By the true interpretation of the said seventh and eighth sections of the compact of 1785, the citizens of Maryland are lawfully entitled to possess and enjoy and exercise a common right of fishery, including the right to catch and take oysters in the Potomac river and in the Pocomoke river, including what is called 'Pocomoke Sound,' which is a part of said river, being in fact really the mouth thereof."

The petition thus claims that the provision of the seventh section of the compact, giving a common right of fishery, in which the Potomac river, only, is mentioned, and the reasons for which provision were so strenuous as to make them necessary in respect to a great river, forming for 120 miles the boundary between the two states, is to be construed to apply also to a small river, not mentioned in the section, not then forming any part of the boundary, and as to which no such reason for the provision then existed, in any degree. It founds this pretension on no conceivable ground, other than the fact that the Pocomoke river is mentioned in section 8 of the compact, in a clause subsequent to another clause requiring all laws and regulations for the preservation of fish in the Potomac, particularly described in that section, to be made with the mutual consent and approbation of both states.

It is apparent from the language of the petition that the validity of the defense in these cases depends upon the truth of several propositions, viz.:

(1) That the seventh section of the compact of 1785 granted a common right of fishery to citizens of both states in the Pocomoke river, despite the nonmention of that river therein.

(2) That even if the seventh section did not, by omitting the mention of Pocomoke river, contain the grant, yet the eighth section did, by implication and construction.

(3) That the grant of a common right of fishery, thus contained in sections 7 or 8, or both, in the Pocomoke river, carried the right into Pocomoke sound, as part of Pocomoke river. And,

(4) That the grant of a common right of fishery thus derived in Pocomoke sound—that is to say of fishing for running fish, which, until caught, are ferae naturae, and not the subject of private ownership—embraces the right to scrape and dredge for oysters, not only on natural rocks in Pocomoke sound, but on the private plantations granted and taxed there by the state of Virginia, who owns the water and the soil.

Section 7 defines two classes of subjects, in relation to which the laws and regulations made by these states shall be of mutual consent and approbation. The first class embraces laws and regulations necessary for the preservation of fish and for the performance of quarantine in the Potomac river. The second embraces laws and regulations for preserving and keeping open the channel and

navigation of the Potomac, and also of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto. The compact in section 7, having given common right of fishery in the Potomac river, followed up that provision with a clause requiring all laws and regulations for the protection of this common right in that river to be made with the mutual consent and approbation of both states. And Maryland and Virginia having in 1785 rights of navigation and commerce, under the law of nations, in the Potomac and Pocomoke rivers, which were reciprocal in part, though not common in all, the compact naturally contained a provision requiring laws and regulations for keeping open the channel and navigation of the two rivers within the limits of Virginia to be made by mutual consent; the waters below the mouths of both rivers liable to obstruction being owned by Virginia. There is nothing in section 7 of the compact that can reasonably be held to give a common right of fishery in the waters of the Pocomoke to citizens of Maryland and Virginia, whether running fish or shellfish; the Pocomoke river not being mentioned or referred to in the whole section, and the oyster interests in the Potomac having been so meagre that it can hardly be supposed that they were in the minds of the two states, in stipulating for common rights of fishing in the Potomac.

After the adoption of the compact of 1785, the two states enacted laws for the preservation of fish, and regulations for fishing, in the Potomac river, having the sanction of mutual consent and approbation. They have not done so in respect to the Pocomoke river. Virginia has never enacted such laws, and it has not been shown in the evidence or argument that Maryland has ever proposed them. We are inclined to believe that Maryland has never enacted or proposed them. For 108 years, Virginia, certainly, and we believe Maryland, also, by their nonaction, have given practical refutation to the contention of counsel for petitioners that any grant of a common right of fishing in the Pocomoke river was intended in sections 7 and 8 of the compact.

On this subject, Mr. I. Nevett Steele, of the Maryland bar, in an opinion written at the request of the governor of Maryland, in respect to the present validity of the compact of 1785, remarks, after quoting section 8, as follows:

"The ordinary and grammatical construction of the section would manifestly limit the mutual or joint legislation over the river Pocomoke to the preserving and keeping open of the channel and navigation, and would not extend it to the preservation of fish in the river. If this construction be correct, there is nothing at all in the compact on the subject of fish in the Pocomoke, and consequently nothing upon which any claim of Marylanders to fish there could be founded. The compact, by its previous clauses, having given to Marylanders no right to fish in that part of the Pocomoke river belonging to Virginia, there seems to be no reason why it should give to Maryland the power to legislate for the preservation of fish in that part of the river."

We cannot accede, therefore, to the contention that, because the state of Maryland has never consented to or approved the law

of Virginia under which the petitioners Wharton and Nelson were convicted, therefore that law is inoperative and invalid as against them, as citizens of Maryland, in respect to offenses committed on the Pocomoke river. We are accordingly of opinion that section 2147 of the Code of Virginia is valid as against all offenders, including depredators from Maryland, in the waters of Pocomoke river, though it has not the consent and approval of that state.

Though it is unnecessary, after this ruling, to consider the point so strenuously urged by counsel for the petitioners,—that the exemption, by operation of the eighth section of the compact of 1785, of offenses committed in Pocomoke river by citizens of Maryland, extends to those committed in Pocomoke sound, which is claimed to be part of the river,—yet it is due to the subject, in view of the elaborateness with which the point has been pressed, to examine this claim of identity between the river and the sound, Pocomoke.

Considered either as a question of strict law, or of historical fact, this contention—this claim of identity between these two bodies of water—is equally untenable. We have already shown, by quoting from the report of Commissioners Scarborough and Calvert, made as far back as 1668, that they spoke of the bay and the river as two distinct bodies of water. We have examined all of the early maps of the waters and region embracing this sound and river, and we do not think that in any of them the name "river" is laid upon the sound. In one of the oldest and best of the maps,—that of Augustin Herrman, published in 1673, five years after the settlement of the boundary by Scarborough and Calvert,—the bay and the river Pocomoke are laid down with considerable accuracy as distinct from each other, and are separately designated, the one as "Pocomoke Bay" and the other as "Pocomoke River." Coming down to modern maps, the case is the same; distinct designations appearing in them as "sound" and "river," as in Herrman's map. The first edition of the chart made by the United States coast survey, published between 1850 and 1860, gives a clear delineation of Pocomoke river, and a distinct one, from careful surveys, of Pocomoke sound, placing the name of "Pocomoke Sound" upon the bay. Every later edition of this map of the coast survey exhibits this bay as a distinct body of water, separately designated and distinguished from the river.

It is true that Maryland has long manifested a decided dissatisfaction with the boundary line of 1668, prescribed by Scarborough and Calvert, but her chief contention was that the line should not have been placed so far north as to have left the whole of Pocomoke sound in Virginia. As the result, in part, of this dissatisfaction, a commission was finally appointed to readjust the boundary lines, generally, between Maryland and Virginia. The commissioners were Jeremiah S. Black, Charles A. Jenkins, and James B. Beck,—all men of distinction, and enjoying the confidence of the public in the highest degree. The boundaries of the two states were settled by them in an award dated January 16, 1877. This award was accepted by the two states, and was ratified by

congress by its act of March 3, 1879, hereinbefore cited. This settlement possesses every element of finality and unimpeachability. It has not only the unqualified acceptance of the two states, but has also the ratification of congress at the instance of both states. It has the merit of extraordinary fullness, accuracy, and clearness of description, in setting out the lines of boundary which it establishes. It leaves not in doubt a single point, or a single line confusedly or inaccurately delineated. Observe how precise its language is in defining the line east of Watkins' point, with which we have to do in the case at bar; and that Maryland is given part of Pocomoke sound, by the fixing of the line far enough below that of Scarborough and Calvert to leave a strip of the sound about a mile wide, for a distance of 14 miles within her limits. The arbitration of 1877, in respect to that part of the boundary line which lies east of Watkins' point, after fixing that point at latitude 37° 54′ 38″, longitude 75° 52′ 44″, goes on to say with great precision of description:

"From Watkins' point the boundary line runs due east 7,880 yards, to a point where it meets a line running through the middle of Pocomoke sound which is marked 'C' on the accompanying map, and is in latitude 37° 54′ 38″, longitude 75° 47′ 50″; thence, by a line dividing the waters of Pocomoke sound, north, 47° 30′ east, 5,220 yards, to a point in said sound marked 'D' on the accompanying map, in latitude 37° 56′ 25″, longitude 75° 45′ 26″; thence, following the middle of the Pocomoke river by a line of irregular curves, as laid down in the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May 28th, 1868, at a point in the middle of Pocomoke river, and in the latitude 37° 59′ 37″, longitude 75° 37′ 4″; thence, by the Scarborough and Calvert line, which runs 55° 15′ north of east, to the Atlantic ocean."

The misprint of "1868" for "1668" has already been adverted to. This language of the Black-Jenkins award of 1877 has been quoted for two purposes—First, in order to show that this latest historical document relating to this boundary—just as that of 1668 had done—particularly distinguishes the sound from the river Pocomoke, by two distinct mentionings of each; and, secondly, to show that the settlement of 1877 left no part of this portion of the boundary between the two states "doubtful." It is proper to observe that the United States coast survey, in its maps, has extended the river, so-called, westward of its proper mouth, to the narrows abreast of Meramscot creek, which is 12 miles south and southwest of the crossing of the river by the Scarborough-Calvert and Black-Jenkins line. It is to be also observed that the Black-Jenkins award adopts the map of the United States coast survey in designating the boundary line east of Watkins' point, and, in designating the river as distinct from the bay, makes the river commence nearly abreast of Meramscot creek. In concluding this part of the subject, we think we can say, with truth, that there is no map of these waters, and no joint official document existing in relation to them, which has confounded the river with the sound, or claimed that the sound is the river, or any part of the river, Pocomoke.

We conclude from what has been said that the eighth section of the compact of 1785 does not require that the laws and regulations established by Virginia for the preservation of fish, more particularly shellfish, in the Pocomoke river, shall have the consent and approbation of Maryland, and that, even if it did so, such requirement cannot be applied to Pocomoke sound, which is not the river, is no part of it, and is immeasurably superior to it in value and importance. This sound is 90 square miles in area, containing the most valuable oyster beds in Virginia or Maryland, and is of such extent and importance as to forbid the supposition that Virginia would have granted away her jurisdiction over it in any other than express, precise, formal, and solemn terms. There having been no grant of a common right of fishing in the Pocomoke river, no right can be derived, by inference, of common fishing in Pocomoke sound; and, there having been no grant of a common right of fishing for fish either in the river or the sound, there can be no right, derived by inference, of common fishing for oysters in either of these waters. If Virginia had intended to grant away the valuable rights now claimed by Maryland, it is fair to assume that she would not have subjected the beneficiaries of the grant to the necessity of resorting to extraordinary inferences and constructions for realizing and enjoying the fruits of the grant. It would have been her duty to have used apt and proper words for executing her purpose, and to have been just as explicit and frank in the language of the eighth section of the compact as she was in that of the seventh.

In support of their contentions based on section 8 of the compact of 1785, which have been shown to be inadmissible in the foregoing paragraphs, counsel for the petitioners cite the language used by one of the judges in the decision of the supreme court of appeals of Virginia in the case of Hendricks v. Com., 75 Va. 934. In that case, George Hendricks, a citizen of Maryland, was indicted in the county court of Fairfax county for "unlawful fishing" in the Potomac river. He contended that he was entitled to be tried in a court in Maryland, and could not be tried in a court of Virginia, because the law which he was charged with violating had been passed by the mutual consent and approbation of both states for the regulation of fishing in the Potomac river, and because another law, passed by like mutual consent, had given citizens of Maryland violating the first-named law the right of trial in a Maryland court. His contention was perfectly sound, and the Virginia court of appeals sustained this defense. The trial related exclusively to the Potomac river. It involved the question of the common right of fishery in that river, given by the seventh section of the compact of 1785. It also involved certain laws and regulations passed by both states for the protection of that common right of fishing in the Potomac river, passed in pursuance of the first clause of section 8 of that compact. There was no question in the case concerning Pocomoke river. But the justice delivering the opinion of the

court, in examining the question of the jurisdiction of the two states over an offense charged to have been committed on the Potomac river, used the following language:

"By article 8, all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river Pocomoke, within the limits of Virginia, shall be made with the mutual consent and approbation of both states. The effect of this article is to give to the state of Virginia concurrent jurisdiction with the state of Maryland over the Potomac from shore to shore, and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters."

The court here refers to section 8 of the compact of 1785 without quoting it, although the mere quotation of it would have shown the fallacy of its language in respect to the Pocomoke river. So far as the Pocomoke river was concerned, the language of the court was obiter dictum, upon a point not argued or even mentioned in the case; and Mr. Steele, in his opinion written for the governor of Maryland, before referred to, very naturally says:

"I think it may well be doubted whether the court of appeals of Virginia would consider what is there said about the Pocomoke river as a binding decision of that learned tribunal."

Few instances can be cited in which the obiter of a court has sown the seeds of greater mischief than this of the Virginia court of appeals in the Hendricks Case. It has instigated the depredations of Marylanders upon the private oyster properties of Pocomoke sound, of which the newspapers are full. It has brought these cases before this court. Yet, in using the language of the obiter part of its decision, that court did not hold that Pocomoke sound was Pocomoke river, and its obiter has no application to the case at bar. Nor did the court say that the eighth section, in which it stipulated in regard to a common right of fishery, "included the right to take oysters in the Pocomoke river."

The petitions of Wharton and Nelson must be disallowed, and the prisoners remanded to the custody of the sheriff of Accomack county.

Coming now to the consideration of the case of Marsh, it is to be observed that his offense is charged to have been committed on Hurley's rock, which the indictment alleges to be within the limits of Virginia, near the line of boundary lying between Smith's point, on the Potomac, and Watkins' point. The defense is that that part of the boundary is "doubtful," and that the prisoner is entitled to the privilege granted by the tenth section of the compact of 1785, which stipulates that offenses committed by citizens of Maryland within the limits of Virginia on that part of Chesapeake bay where the line of division between Smith's point and Watkins' point may be doubtful, shall be tried in a court of Maryland. As a matter of historical fact, no part of the line between Maryland and Virginia was at the date of the compact of 1785 more doubtful than the part between Smith's and Watkins' points, and no law could be

more just and judicious than the tenth section of the compact of 1785, containing the provisions relied on. But the able and distinguished commissioners appointed by the two states in 1877 had in charge the very duty of making certain and determinate all doubtful parts of the common boundary of the two states. Accordingly, the commission addressed itself to the task of removing all doubt from this part of the line, as well as others, and accomplished its purpose successfully. Probably no section of a boundary line was ever more clearly, precisely, minutely, definitely, or intelligibly laid down and defined than was the portion of the Maryland and Virginia line between Smith's and Watkins' points, and which may be found on pages 63, 64 of the Virginia Code, and page 482 of the twentieth volume of the Statutes at Large of the United States.

It is useless, in this opinion, to set out the careful language of the award in defining this line. The duty of the arbitrators was to make it cease to be doubtful, and to establish the line with precision and certainty. They performed that duty, and accomplished that purpose. The line is no longer doubtful, and the defense of the prisoner Marsh is inadmissible. It was competent for the Virginia court by which he was convicted to try him, and he must be remanded to the custody of the sheriff of Accomack county, Va.

BROWN et al. v. STILWELL & BIERCE MANUF'G CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1893.)

No. 41.

1. PATENTS FOR INVENTIONS — NOVELTY — ANTICIPATION — LIVE-STEAM FEED-WATER HEATER AND PURIFIER.
   Letters patent No. 274,048, issued March 18, 1883, to Edwin R. Stilwell, covers a live-steam feed-water heater and purifier connected with the boiler by steam pipes, and having a series of pans vertically arranged above the filter, and a space or chamber above the pans and water inlet, connected to the steam dome by a pipe, so as to discharge the hurtful gases from the top of the purifier directly into the boiler, thus getting rid of them without reducing the steam pressure in the purifier or boiler. *Held*, that the gas-discharge pipe was a novel and operative device, and was not anticipated by the Hayes, Jeffrey & Schlacks patents of March 30, 1880. 49 Fed. Rep. 738, affirmed.

2. SAME—COMBINATION—INFRINGEMENT.
   The second claim of the patent is, in effect, a combination claim, covering a live-steam purifier having pans placed on a filter, and a gas-escape pipe connected to the boiler, and is therefore not infringed by a purifier which is without pans vertically arranged over a filter, though it uses the other element, the gas-escape pipe. Rowell v. Lindsay, 5 Sup. Ct. Rep. 507, 113 U. S. 97, followed.

3. SAME—CONSTRUCTION OF CLAIM.
   The first claim is for "a live-steam feed-water purifying or heating apparatus, D, connected to the boiler by means of water pipe, K, steam-feed pipes, L, and gas-escape pipe, M, substantially as set forth." *Held* that, in view of the statement in the specifications that the gas-escape pipe will perform its office irrespective of the manner in which the purifier and heater is constructed, the claim should not be limited to the ex-

act combination described, but will include a combination of any live-steam purifier connected to the boiler by means of a water pipe and two steam pipes, as described.

4. SAME—LIMITATION—INFRINGEMENT.
The first claim is, however, limited by its terms and by the specifications—which connect the gas pipe either with the dome of the boiler or "the steam space of the boiler"—to a gas pipe connected directly with the boiler, and is not infringed by connecting the gas pipe to the steam pump, although by this connection the principle of operation may be the same. 49 Fed. Rep. 738, reversed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In Equity. Suit by the Stilwell & Bierce Manufacturing Company against S. N. Brown & Co. for infringement of a patent. There was a decree for complainant in the court below, (49 Fed. Rep. 738,) and defendant appeals. Reversed.

Paul A. Staley, (Lysander Hill, of counsel,) for appellant.
Wood & Boyd, for appellee.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

TAFT, Circuit Judge. This is an appeal from a decree of the circuit court for the southern district of Ohio, finding that the appellee, which was complainant below, the Stilwell & Bierce Manufacturing Company, is the owner by assignment of a valid patent issued to E. R. Stilwell for a live-steam feed-water heater and purifier, (letters patent 274,078, dated March 13, 1883,) and that the appellant and defendant below, S. N. Brown & Co., has infringed the same, and enjoining the appellant from further infringement. By stipulation, reference to a master was waived, and $150 was agreed upon as damages to be recovered by appellee if the decree is not reversed.

The appellee is a corporation engaged in the manufacture of steam machinery, and makes purifiers under the patent involved in this suit. The appellant does not manufacture purifiers, but is the user of the one claimed to be an infringement of appellee's patent, which was purchased from the Hoppes Manufacturing Company, another manufacturing company of Springfield, and a competitor of the appellee.

The water available for use in steam boilers is frequently filled with impurities, which, after a constant use of the boiler for several days, clog it, and much interfere with its proper operation. Among the impurities are sulphate of lime, sulphate of iron, and other incrusting substances, which form a scale in the boiler, difficult to remove. It becomes important, therefore, to purify the water before it is introduced into the boiler, and the patent in suit is for a device to do this. If the water is much heated, it will deposit as a sediment the objectionable substances. A well-known mode of heating the water has been to run

it into a closed purifying chamber, where steam from the boiler is introduced. From this chamber the purified water runs into the boiler by force of gravity. The steam has generally been taken from the exhaust pipe of the engine, so that it comes into the purifier after it has done its main work. As the pressure of the exhaust steam is much less than that in the boiler, its heat is less, and is often not enough to purify water which holds a good deal of matter in solution. Several patents had been taken out before the one in suit, for taking the live steam direct from the boiler into the purifier, whereby the greater heat of the steam would more completely cleanse the water. But this plan did not work perfectly. The heating of the water not only deposited the solid impurities, but also released gases, which mingled with the steam, and materially reduced its quantity and its heating capacity. The problem then was to get rid of the gases. The objection to releasing them directly from the purifier into the air was that it would seriously affect the pressure of the steam in the purifier and in the boiler. To obviate these difficulties, the patentee of appellee's patent, in addition to the ordinary live-steam pipe connection between the boiler and purifier, also connected the top of the purifier to the steam dome of the boiler with what he called a "gas-escape pipe," on the theory that through the upper pipe the deleterious gases would find their way out of the purifier into the boiler dome, and thus allow the hot steam freely to circulate in the purifier.

After this general statement, the purifier of the appellee may be described as a cylindrical shell with cast-iron heads. In the upper part is an overflow cup, G, into which the cold water is fed. Below this overflow cup are a number of trays, usually made of cast iron, through the bottom of which are openings to allow the water to flow down from one pan to the next lower. Below the pans, and filling up one side of the purifier, is a filtering chamber, J, with an entrance at the bottom. The purifier is connected with the boiler by pipes, M, L, and K. In operation, the water is pumped in at P, flowing downward from the overflow cup, G, over the trays into the chamber, H, at the bottom, upward through the filter, J, and thence through the pipe, K, into the mud drum of the boiler, C. The steam enters the purifier from the boiler through the pipe, L, branched into the pipes L′ and L″. The pipe, M, connects the top part of the purifier with the steam dome of the boiler, B. In the words of the patent, "deleterious gases escaping from the water, as it is freed from impurities, rise into the space, (i. e. the top part of the purifier;) and as the steam is taken from the steam dome these gases pass through pipe, M, directly into the steam dome, without passing through the boiler." The two claims of the patent are as follows:

"(1) A live-steam feed-water purifying or heating apparatus, D, connected to the boiler by means of water pipe, K, steam-feed pipes, L, and gas-escape pipe, M, substantially as herein set forth.

"(2) A live-steam heater or feed-water purifier having a series of pans vertically above the filter, and a space or chamber above the pans, and water inlet connected to the steam dome by a pipe, so as to discharge the gases from the top of the purifier directly into the boiler, substantially as herein set forth."

It is very clear, and it is in fact conceded by counsel, that everything connected with the purifier of appellee below is old, except the gas-escape pipe, M. Every feature except the gas-escape pipe was included in a patent issued to the same patentee in 1867, and is now public property.

The defenses are: First, invalidity of the patent for want of utility, novelty, and invention; and, second, noninfringement. The court below found all these defenses to be unsupported, and rendered a decree as above stated.

Much evidence was introduced tending to show that the theory upon which the escape pipe is supposed by the appellee to carry the gases is unsound. The appellant's experts testified that the condensation of the steam in the purifier, caused by heating the cold water, would so reduce the pressure of the steam there, compared with that of the boiler, as to produce a very rapid current of steam from the boiler into the purifier through both the steam pipe, L, and the gas-escape pipe, M, making it impossible for gases to be carried from the purifier to the boiler through either pipe. The theoretical evidence was supported by an experiment with one of the appellee's purifiers. A tin curtain was lightly hung in each of the pipes, L and M, so that it would be affected by the lightest current of air or steam, and opposite the curtains in the pipes were inserted glass peep holes, permitting easy observation of the direction in which the curtains swung. It was established by half a dozen witnesses that when steam was up, and the engine was running, the current in both pipes, at the same time, kept both curtains swung in the direction of the purifier. The appellee's expert gave it as his opinion that the curtains would interfere with the action, circulation, and movement of the gases, and that it was therefore not a demonstration of the claim based on it. Appellee's expert made experiments of his own with complicated apparatus, the substance of which, shortly stated, was that he gathered in a test tank a sample of the gases and steam from the top of the purifier, and by condensing the steam determined the relative volumes of the steam and the gases, first when a single steam-pipe connection between the boiler and the purifier was open, and then when both steam-pipe connections were open. His calculations showed that the use of the second steam pipe much reduced the relative volume of the gases as compared with the steam. It is difficult for a court to judge of the relative weight to be given to these two experiments, though it should be said that the simplicity of the first experiment, and the result, agreeing as it does with the ordinary rules of mechanics governing the effect of pressures, are rather more persuasive than the complicated experiments of the appellee's expert. It may be, on the other hand,

that the theory of pressures advanced on behalf of the appellant, by which a current is said to be created from the dome of the boiler towards the purifier, does not give sufficient weight to the difference between the pressure of the steam in the boiler itself and in the steam dome, caused by the fact that the steam is constantly being drawn from the steam dome through the main steam pipe to run the engine. This may not only reduce the pressure in the dome, but may also create a current of steam from the dome, which will exert an influence in the top of the purifier to carry the gases with it towards the engine. The evidence is conflicting as to the practical working of the appellee's purifier in keeping the boiler free from scale or other impurities. On the whole, the question is such a doubtful one that we are not disposed to differ from the finding of the court below on this point that the device is operative.

Nor do we differ with the court below as to the novelty of the invention. It does appear that in the patent of Hayes, Jeffrey & Schlacks, patented March 30, 1880, there is described a feed-water purifier for boilers, which is connected to the boiler by two pipes, through which steam would reach the purifier. The purifier, however, is very different from the one in suit. It is situated inside of the dome of the boiler. The steam pipes, connecting the purifier with the steam space of the boiler, are referred to as "one or more pipes;" and the two pipes, when used, are evidently not intended by the patentee to produce a circulation and release of gases, but rather to double the supply of steam to the purifier. The patent is never shown to have been put into operation. and the device is so small, as compared with the boiler, and so obviously without other devices necessary in a successful purifier, that we do not think it can be relied upon as an anticipation of the gas-escape pipe, M, in the patent we are considering, if that pipe in fact operates as gas-escape pipe. The other devices are much less like the patent of appellee than the one we have described.

Nor do we think there is any want of invention in supplying a gas-escape pipe, if it does the work claimed for it.

The remaining question is as to infringement. The appellant is not the manufacturer of the device claimed to be an infringement. It purchased its purifier from the Hoppes Manufacturing Company. As manufactured and furnished to defendant, the purifier contained only one steam-pipe connection between the boiler and the purifier. The pans in the purifier made by the Hoppes Company are arranged somewhat differently from those of the appellee, and are said to be more efficient in removing the impurities from the water by adopting what counsel call the "stalactite principle." They are so made and placed that the hot water, after it has deposited a sediment of impurities inside the pan, overflows and runs under the bottom of the pan towards its middle, and then falls to the pan below. The result is an incrustation on

the bottom of each pan. The pans are thus made under a patent issued to John J. Hoppes. After the appellant had used the purifier for a short time, complaint was made to the Hoppes Company that it did not do the work for which it was sold. On the supposition that not enough steam was furnished by the boiler through the connecting steam pipe to the purifier, an additional steam-pipe connection was made between the boiler and the purifier. This did not increase materially the proper deposit of scale and other impurities in the purifier, and after five months' use the second boiler connection was cut off, and for that Hoppes, of the Hoppes Company, substituted a pipe from the top of the purifier to the steam pump. This was the only pipe furnishing steam to the pump. The effect of the change was to make the purifier a part of the pipe connecting the boiler and the steam pump. The evidence is that after the change the deposit of impurities was improved, though the feeding of the water to the boilers continued to be imperfect. The cause of the latter trouble was found to be a structural defect in the boilers themselves, and new boilers were put in.

The double steam-pipe connection between the boiler and the purifier, which was maintained for a few months only, is not relied on as an infringement of the patent, and was not the basis upon which damages were awarded to the complainant. The real issue in the case is between the Hoppes Company and the appellee, as to whether a live-steam purifier, which uses a gas-escape pipe connected to the steam pump, is an infringement of appellee's patent. On that issue the court below found for the appellee. If this finding cannot be sustained, the decree must be reversed.

The patentee, in his specifications, says:

"One object of my invention is to connect the top of the heater or purifier with the top of the boiler or steam dome by a pipe, so as to allow the direct escape of gases generated in the heater."

Again:

"L" represents a branch steam pipe, admitting steam at or near the bottom of the series of shelves, which passes up over the pans in the opposite direction to the course of the water. By employing pipes, L', L", of large area, say of two to four inches in diameter, the water in the purifier is kept at or near the same temperature as that in the boiler, and the space above overflow, G, forms in fact a part of the steam dome of the boiler. As a consequence, deleterious gases escaping from the water as it is being freed from impurities rise into the space, and, as steam is taken from the steam dome, these gases pass through pipe, M, directly into the steam dome, without passing through the boiler."

And again:

"The principal features of my invention, which consists in connecting the top of the heater with the steam dome of the boiler, or with the steam space of the boiler, can be employed with a combined heater and purifier, or with either a heater or purifier. Thus this escape pipe would perform its office irrespective of the manner in which the heater would be constructed. For instance, either the shelf or the filter might be removed, so long as the feed water was heated by a current of live steam in a vessel

directly connected to the boiler itself. The escape pipe, M, can be advantageously used in such construction, which is embraced in the first clause of the claims herein."

And the claims, to state them again for the sake of clearness, are:

"(1) A live-steam feed-water purifying or heating apparatus, D, connected to the boiler by means of water pipe, K, steam-feed pipes, L, and gas-escape pipe, M, substantially as herein set forth."

"(2) A live-steam heater or feed-water purifier having a series of pans vertically above the filter, and a space or chamber above the pans, and water inlet connected to the steam dome by a pipe, so as to discharge gases from the top of the purifier directly into the boiler, substantially as herein set forth."

It is to be observed that these are, in effect, combination claims. The second claim covers a live-steam purifier having pans placed on a filter, and a gas-escape pipe connected to the steam dome of the boiler. This claim is not infringed by appellant's purifier, which is without pans vertically arranged over a filter. Appellant uses no filter. It is well settled that the omission in the alleged infringing device, of an element named in a combination claim of a patent said to be infringed, is a complete defense to the charge of infringement. Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. Rep. 507.

The first claim, however, in view of the statement in the specification that the gas-escape pipe will perform its office irrespective of the manner in which the purifier and heater is constructed, ought not to be limited to a combination of the heater and purifier exactly as described in the patent with the other parts named, but will include a combination of any live-steam purifier connected to the boiler by means of a water pipe and two steam pipes, as described. Now, appellant's device is a live-steam purifier, and if it is connected to the boiler by three pipes, as described in the first claim, it is an infringement of the claim. It has the water pipe, K, and the steam pipe, L. Some point is made that the description of the claim uses the plural, "the steam pipes, L." This probably refers to the fact that the pipe, L, enters the boiler by two branches. The appellant does not branch the pipe, L. It is contended that the use of a single pipe without branches for introducing the steam is an omission of an important element of the combination claimed, because this division of the pipe, L, into branches is mentioned in the specification as bringing about a more effective distribution of the hot steam over the water surface in the purifier. We do not decide this question, because the decree must be reversed on another and more satisfactory ground.

In our opinion, the gas-escape pipe of appellant is not covered by the gas-escape pipe claimed in the patent of appellee. The specifications connect the gas pipe, M, either with the dome of the boiler or the steam space of the boiler. "The steam space of the boiler" is any place within the shell of the boiler where steam is, and it does not include the steam space inside the pipes which lead from the boiler. The ordinary meaning of the phrase would have this limitation, and it is very clear from the evidence of the expert called

by the appellee below that he understands the words in this sense. Moreover, the first claim describes the purifier as "connected to the boiler by means of * * * gas-escape pipe, M." The purpose of connecting the gas-escape pipe with the boiler was to make the purifier as much as possible a part of the boiler. As is apparent from statement of appellee itself, hereafter quoted, the idea of the inventor was not only to produce circulation of the gases, but to produce as near as possible an equilibrium between the purifier and the boiler. A connection with pipes leading away from the boiler would not serve so well to maintain the equilibrium. We are forced to the conclusion that the inventor, in drawing his specifications and claims, did not intend to cover anything but a pipe connecting the top of the purifier with the steam dome or other part of the boiler.

We are confirmed in this opinion by the history of the case. The patent in suit was issued in 1883. In 1884 a patent was issued to J. H. Berkshire for a live-steam feed-water heater and purifier connected to the boiler by a water pipe, K, and a steam pipe, L, while a gas-escape pipe, M, connected the top of the purifier with the pipe, M, leading from the boiler to the engine, or with any other circulating pipe." The Hoppes Company own the Berkshire patent. August 12, 1890, a patent was issued to Ralph B. Day for a live-steam purifier, with a gas-escape pipe connecting the top of the purifier directly with the steam pump,—the exact device used by the appellant. The Day patent was assigned to the appellee, and was originally set up in the bill of complaint in this case. J. J. Hoppes instituted interference proceedings in the patent office against the Day patent, based on an application for a patent which he had made for the same device in 1888, and the controversy resulted in Hoppes' favor. A patent was issued to him for his device August 4, 1891. After this the appellee dismissed that part of its bill which alleged infringement of the Day patent. In the competition between the appellee and the Hoppes Company, in the sale of live-steam purifiers the former published the following caution to the trade in 1890:

"Caution. We offer a word of caution to all intending purchasers of live-steam purifiers. We were the first to place on the market a practical live-steam purifier. In our experiments we discovered that two steam connections between the purifier and the boiler were necessary in order to obtain a perfect equilibrium of pressure between the two vessels, and perfect circulation, both of which are absolutely necessary to prevent the accumulation of dangerous and deleterious gases in the purifier, and to insure a regular and uniform feed from the purifier to the boiler. The patents granted to our Mr. Stilwell broadly cover the two steam connections with the boiler. When our would-be competitors put their purifiers into actual use, they also discovered the necessity above referred to. With the pressure of this necessity upon one hand, and the Stilwell patent confronting them upon the other hand, they have sought to escape the dilemma in which they were thus placed by suggesting to their customers that the necessary relief could be obtained by carrying steam from the purifier to the steam pump, or some other machine, and in that manner getting up the necessary circulation. The desired end is in this way partially accomplished, and the per-

formance of the purifier rendered much more satisfactory; but, unfortunately for them, the arrangement indicated is broadly covered by a patent issued to R. B. Day, and which has been assigned to us. We do not indulge in threats, but we shall insist on our patented rights being respected."

It would seem to be clear from this that the appellee, even at so late a day, and after the very controversy here involved was mooted, conceded that the Stilwell patent covered only the connection of the escape pipe with the boiler, and that the Hoppes Company (which is the competitor referred to) did not infringe that arrangement by connecting the escape pipe with the steam pump. In appellee's view it was the Day patent, and not the Stilwell patent, which the steam-pump connection infringed. As we have seen, the Day patent proved invalid, and now complainant seeks to broaden the claims of the Stilwell patent beyond what was intended or expressed by the patentee, and beyond what, until the Day patent failed, the appellee ever asserted.

It has been said by counsel at the bar that theories do not control the decision in patent cases; that it is facts and results which are all-important. This is true in the sense that if a man describes in his specifications a machine by which to get a certain result so that any one skilled in the art can reproduce the machine and the result, he cannot be deprived of his exclusive right in the machine by a demonstration that his theory, stated in the patent, of the causes producing the result, is untrue. But a correct and certain knowledge of the principle by which the result is reached will often enable the patentee, or his solicitor, to cover, with general words, many different devices in which it may be applied. If he fails to use broad enough language to do so, then one of two things is true: either that he does not fully understand the true principle, and the other devices are not part of his real invention, or else, knowing the principle, and its possible wider application, he has chosen to limit his claim for a monopoly to one particularly described device, and has abandoned the others to the public. Whichever horn of the dilemma he chooses, the court has no power to broaden the claims. In the case at bar, therefore, even if the connection of the gas-escape pipe with the steam pump is only another and similar device for the application of the same principle which is embodied in the Stilwell patent in suit, as contended by counsel for appellee, the patentee did not cover that device in his patent, for he limited his claim and specification to a connection with the steam dome of the boiler, or some other part of the boiler; and a connection with the steam pump is not a connection with the steam dome or the steam space of the boiler. They may now appear to be equivalent, but they were not known to be such when appellee's patent was issued, and the patentee did not mention them as such in his specifications. The doctrine of equivalents, therefore, does not aid the appellee. Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. Rep. 507.

As the patentee has expressly limited himself to a connection with the boiler, he has given to the defendant below, and to the

world, so far as he is concerned, the right to make the connection at any point outside the boiler and the steam dome, without infringing his patent. This rule in the construction of patents is so well established as hardly to need authority. One of the leading cases is that of Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274. In that case the patentee claimed an invention for wide and thin drilled eye bars applied on edge for use in the lower chords of iron truss bridges. The alleged infringement was round or cylindrical bars, flattened or drilled at the eye for the same use. It was held that, as the patentee had specified wide and thin bars in his claim, he was limited to that description, although the same function was performed by the alleged infringing devices. Mr. Justice Bradley said, (page 278:)

"When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent, and an application for a reissue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. Since the act of 1836 the patent laws require that an applicant for a patent shall not only, by a specification in writing, fully explain his invention, but that he 'shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery.' This provision was inserted in the law for the purpose of relieving the courts of the duty of ascertaining the exact invention of the patentee by inference and conjecture, derived from a laborious examination of previous inventions, and a comparison thereof with that claimed by him. This duty is now cast upon the patent office. There his claim is, or is supposed to be, examined, scrutinized, limited, and made to conform to what he is entitled to. If the office refuses to allow him all that he asks, he has an appeal. But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct, (as they always should be,) the patentee, in a suit brought upon the patent, is bound by it. Merrill v. Yeomans, 94 U. S. 568. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent, or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

See, also, Harris v. Allen, 15 Fed. Rep. 106; Manufacturing Co. v. Rosenstock, 30 Fed. Rep. 67; Smith v. Putnam, 45 Fed. Rep. 202; Otley v. Watkins, 36 Fed. Rep. 323; Burns v. Meyer, 100 U. S. 671; Klein v. Russell, 19 Wall. 433.

But it is said this is a pioneer patent, one which constitutes a decided step in the art, and that as such the courts should be liberal in construing it to cover what the patentee really invented. In our opinion, all the patentee really invented was the gas-escape pipe connection with the boiler. There is nothing to show in his specifications or in the evidence that he had in mind, as feasible,

the connection which was made in the Day or the Hoppes patent with the steam pump. And even if there were, the words the patentee used in his claim are too plain to admit of construction. He set limits to his monopoly in language the effect of which no liberality in construction can avoid.

We must therefore reverse the decree, with instructions to dismiss the bill.

On Rehearing.

(October 2, 1893.)

A motion for rehearing has been made in this case. The chief argument for the motion is based on the fact which the record discloses, that a short time after the issuance of the Stilwell patent the appellee erected a purifier for the Dayton Manufacturing Company's works, in which the gas-escape pipe was connected not with the steam dome, but with a live-steam pipe, near its boiler outlet, which supplied the steam-heating apparatus and the feed pump. This tends to weaken the conclusion of fact reached in the foregoing opinion that Stilwell, when he obtained his patent, did not know that anything but a connection with the boiler direct would accomplish his purpose; but we cannot see how it affects the reasoning and result reached in the opinion, which are based on the language of claim,—one which excludes from the monopoly of the patent anything but a connection with the steam space of the boiler. Even if we were to concede that a connection with a live-steam pipe near its boiler outlet was a connection with the steam space of the boiler, it is to be noted that the escape pipe of appellant does not connect with the boiler or any outlet from the boiler. It is an outlet of the purifier away from the boiler. It is true that it connects with a steam-using device, but it furnishes the steam to this device itself. In other words, the purifier, with its single boiler connection and the escape pipe to the feed pump, makes a single live-steam connection between the boiler and the feed pump. This is a different device from that described in the patent, and no construction of the language of the latter can bring the former within it.

Before closing, reference should be made to the averment of the original bill filed by appellee in this action in reference to the Day patent, which, as has been said, was identical with the device used by appellant:

"And your orator further complains and says, on information and belief, that heretofore, and before the 9th day of June, 1890, Ralph B. Day, of Mansfield, Ohio, was the original and first inventor of a certain new and useful improvement in live-steam purifiers, fully described in the letters patent hereinafter mentioned, and which had not been known or used by others in this country, and not patented or described in any printed publication in this or any other country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor."

This averment does not work an estoppel against the appellee and complainant below, for when the interference proceedings between Day and Hoppes resulted in the issuance of Hoppes' patent, and the consequent defeat of Day, the averment was withdrawn in an amended bill; but it has much probative force to show that the complainant below did regard the Day device as different from that patented to Stilwell, and owned by it. This, too, is the only effect of the circular referred to in the opinion. Counsel for appellee seem to think that the court has treated the circular as an estoppel. In this they are mistaken. Reference was made to it as evidence of the construction given to its own patent by the complainant below.

The motion for a rehearing is denied.

FORGIE v. OIL-WELL SUPPLY CO., Limited.

(Circuit Court, W. D. Pennsylvania. July 10, 1893.)

No. 18.

PATENTS FOR INVENTIONS—INVENTION—COMBINATION—OIL-WELL TOOLS.

Letters patent No. 422,879, issued March 4, 1890, to W. Forgie, for a wrench for oil-well tools, consisting in the adaptation of a lifting jack to produce a circular horizontal pressure against the arm of a wrench, for the purpose of screwing and unscrewing the tools, are void for want of invention, as this was only an adaptation of the jack to an analogous use, and as neither it nor the wrench perform any new function.

In Equity. Suit by William Forgie against the Oil-Well Supply Company, Limited, for infringement of a patent. Decree for defendant.

William L. Pierce, for complainant.
James I. Kay, for defendant.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. W. Forgie brings this bill against the Oil-Well Supply Company, Limited, for alleged infringement of a patent for wrench for oil-well tools, applied for January 28, 1888, and to him granted March 4, 1890, and numbered 422,879. The respondent is the selling agent of the Duff Manufacturing Company, which latter is the manufacturer of the alleged infringing machine, and the real respondent in the case. The device in dispute is a jacking apparatus for screwing and unscrewing oil-well tools. The respondents allege their device is made under patents issued to one Barrett, and a suit against Forgie for alleged infringement thereof in his device was argued with this bill, and is disposed of in our opinion at No. 54, November term, 1891. 57 Fed. Rep. 748.

The present case turns upon two questions: (1) Was Forgie the inventor of the device? and (2) if so, is the device patentable? Tools

for drilling oil wells weigh from two to three thousand pounds, and the sections of the drill rod consist of a tapered or conical screw and socket, which must be tightly screwed together. The drilling is done by raising and dropping them constantly, oftentimes on solid rock, and they are liable to be jarred loose; in which event serious damage may follow. They must be frequently unscrewed, to sharpen the bits, or to use other tools. Under the old system this was thus done: To the floor of the derrick, concentric with, and about three and a half feet from, the hole, a quadrant iron bar was bolted, having at one end a strong pin, and from thence to the other end, at regular intervals, holes adapted to engage the end of a pinch bar. Two powerful wrenches were then placed at right angles to each other on the suspended drill rod, one above and one below the screw joint it was intended to tighten; one wrench stationary, and in engagement with the pin, the other free to be moved from the other end of the quadrant towards the pin. This was done by inserting the end of the pinch bar in the holes of the quadrant, and forcing the movable wrench, step by step, towards the pin, until the joint was tightened. The same process, the relative position of the wrenches being changed, unloosened the joint. While the process was crude, laborious, and at times required a number of men, the evidence does not show any effort to improve it, although powerful jacking mechanism was in common use for raising weights, and also for moving bodies vertically. Some time prior to February, 1887, Forgie conceived the idea of adopting a jacking mechanism to this use. The practical working out of this idea resulted eventually in the construction of the devices in these suits. In Forgie's device No. 1 the same wrenches we have described perform the same function, and accomplish the same result. The circular bar is provided with teeth, which are used as a shifting base for a movable jack, for the application of power, instead of the holes being used for that purpose with a pinch bar. Upon both sides of the bar a flange is placed, which fits into, and keeps from flying the track, a movable carriage, which contains the jacking mechanism. By means of this simple device, tools of much greater weight, and therefore more effective in drilling, are used, handled with greater ease, and with fewer men. It has gone into general use, and practically superseded the old method.

This brings us to the question, who was the inventor of this device? In February, 1887, Forgie first met Barrett, who was connected with the Duff Manufacturing Company. He was the patentee of the Barrett lifting jack, a powerful mechanism, then manufactured by that company, in common use, and a standard article. This jack was provided with a base, in which was a stationary jacking machine, and from which extended a lifting bar, which was forced upward against the weight desired to be moved. This lifting bar was kept in place by a rectangular slot in the cage surrounding the mechanism. The internal mechanism of the Barrett jack was adopted in Forgie's device, the cage being adapted to move on the circular track, instead of remaining stationary. Forgie claims

that when he applied to Barrett he had perfected his invention, and simply wanted it made; while Barrett contends that, apart from the abstract idea of applying a jack to oil-well wrenches, he had evolved nothing.

In considering the testimony we have not overlooked the second testimony of Forgie, taken without leave of court after the case had been closed, for objection thereto was waived at bar. In this Forgie enters with detail into the completeness of his invention, where he first met Barrett; a detail of facts which does not appear in his former testimony, and upon which the case was closed. His explanation of this is that his former counsel had not asked him these questions, but, in view of the fact that it was explicitly claimed in the answer that "Barrett was the inventor and originator of all the material and useful parts of said improvement, and that he communicated the same to William Forgie, and that said William Forgie surreptitiously applied for a patent upon the improvement of Josiah Barrett, and unlawfully obtained letters patent therefor;" that Barrett's testimony was given in detail to support these facts; that Forgie was then called in rebuttal, when he gave what we have called his first account,—we think we are justified in giving more weight to the first than to the second. If Forgie had invented the device previous to this meeting, the evidence fails to disclose any experimenting on his part, any sketches, drawings, models, or other footprints which usually mark the inventor's pathway; and, indeed, a year after, when he made application for a patent, there was no suggestion of any other mechanism than Barrett's jack. Whether Forgie knew of the mechanism of Barrett's jack before they met is not certain. In his answer to the bill in the other case, Forgie says, speaking of this meeting: "I was aware at said time that the said Barrett had not covered by his claims in his said letters patent the use of the appliances, otherwise than a lifting jack." In his first testimony, in answer to the question whether he had before that time known of the Barrett jack the company was then making, he says: "No; I don't believe I ever saw a Barrett jack before I went to them;" that in describing his invention to some one they sent him to Barrett, giving as a reason, "because he was making a jack similar, and would be a likely man to make them for me." When his later testimony was taken, he says the first time he saw it was in the fall or winter of 1886, at Kay's store, or at the Fairbanks Company, in Pittsburgh. Whether, as stated in the answer, he was acquainted with the very claims of Barrett's patent at the time of this meeting, or whether, as stated in his first testimony, he had not seen it before, and only went because some one suggested his going, or whether he saw it first in the fall or winter of 1886, one thing is certain,—that before this meeting he had made no study with a view of adapting the Barrett jack to unscrewing oil-well tools. Barrett's account of the meeting is as follows:

"Question. Please state the circumstances of your first meeting with Mr. Forgie. Answer. Mr. Forgie came to me about February. He said he had been di-

rected there from Kay Bros. & Co., Water street, and said he had seen my jack, and had an idea that it could be applied for wrenching and unwrenching oil-well jacks. He then proceeded to describe the old method of the circle plate and pinch bar, and described how difficult it was to unwrench and wrench the tools with this appliance. He then, at different points of his conversation, interjected that all he wanted would be the privilege of selling the jack, if I would get it up for that purpose. He then began to expatiate on the great power of my jack, and said if it could be applied to this purpose, it would do this work of wrenching and unwrenching the tools with ease, he thought. He then asked me if I couldn't get it up for this purpose. I told him that I had had some experience in oil-well drilling some years back, when I was trying an invention of mine on an oil-well, and I thought it would not be very difficult to do. There was a jack standing alongside of us on the floor, with the rack partly raised in the base, the foot of the bar projecting, of course. He pointed to that, and said, 'Could the wrench be placed between these two points?' and he pointed with his foot to the parts, and asked if the power could be applied, and the wrenches forced together. I said, 'Yes;' I thought it could be. Then he said, 'Could the rack be curved?' And I said, 'Yes; that wouldn't be impossible.' He then said: 'How would you construct this jack? What is your idea in regard to it?' I took this jack, and laid it on the table horizontally, (the jack being of the same construction as the model I have before me, only that it was a full-sized jack,) and told him I would shorten the base, and leave sufficient of the base project to allow the bars to rest upon it; that in its travel on the rack that the bars would not come in contact with the teeth of the rack, and I would increase the portion of the jack in thickness below the jaw of the base, where the handle enters. This would form an abutment for the wrench to rest against when pressure is brought to bear on them. I told him I would fasten the rack upon the floor of the derrick, and allow the carriage to travel on this rack. He then said: 'How would your carriage travel on the rack, when the base of the carriage surrounds the rack?' I told him I would make the rack T-shaped. Says he, 'How?' I took a pad off the desk, made a cross section of the rack, like that, [witness makes sketch,] and I would make a slot in the back of the base, with inwardly projecting flanges, to fit into this T-shaped portion of the rack. I would then extend little lugs or bosses out from this lower bottom flange, for bolts to go through, and fasten to the derrick floor sufficiently far to allow these bolts to pass this carriage in its travel on the rack, and reverse the foot on the bar the other way; that it would form an abutment for the other wrench to rest against. He then asked me if I thought it would work, and was practical. I told him I thought it was practical, but the best way would be to construct one, and put it on trial. I concluded to adopt No. 3 size of jack; that is the size we are making of an upright jack. By so doing we would require but two patterns to make, and two castings, and the strength of the rack could then be regulated by the bottom flange. I made arrangements then with Mr. Forgie that, in consideration of the fact that we would allow him the sole agency of this jack, I would expect him to furnish these two extra patterns and these castings, which he agreed to. I informed him that the best man I thought to make these patterns would be Mr. Rankin, as he had made all my jack patterns for my other jacks. I requested him to go and see Mr. Rankin, and make arrangements for having these patterns made, and I would go up and give him sketches and sizes, and all the necessary information, making these two patterns, which he evidently did. This was not all said and done at one meeting, but it all occurred within the first week of our meeting. Mr. Forgie was not there more than two or three times before I sent him to Mr. Rankin."

Mr. Forgie's account, when called in rebuttal, is as follows:

"Question. Please state exactly what was said by you and what was said by Mr. Barrett at this first meeting. Answer. Well, I described the machine, and we talked over several plans to accomplish the work. Mr. Barrett's sug-

gestion that I would adopt a straight ratchet bar, pivoted to the floor at a center of forty-five degrees angle from the tools, and let it pass the pivot, and to shove at a better angle, being opposed to the circle, claiming, as everybody else did, that the cage would shove itself off the track; but I prevailed upon using my own method, and he says, 'All right; go ahead.' Then we began to talk about the reversing apparatus; I demonstrating to Mr. Barrett how I could use a lever pivoted near one end, and a spring to hold it in place, for the reverse motion; but Mr. Barrett said, if he made the machine, that would necessitate him in making, in order to duplicate the part, new templets and jigs; and he says: 'Why not go on, and use this machine of mine. I have everything necessary to do the work with, and can do it much cheaper, and I know it will do the work.' Consequently we agreed upon that method, and I went to the pattern maker, and got the patterns made accordingly."

It will be observed that this account is confirmatory of Barrett's to a great extent. Both show that Forgie had no definite plan. Forgie says they talked over several; that the conclusion was that Barrett suggested the adopting of his own jack, and asserted, "It will do the work." This is in accord with Barrett's statement that he took up one of his jacks, and explained to Forgie how he would adapt it to the proposed use. The interior mechanism of the jack was concealed. Forgie had never seen one before. There is no evidence that it was taken apart, and the mechanism exposed; therefore, the person most competent to suggest its possibilities for adaptation was its patentee and constructor. If Forgie had any other mechanism in view, he neither suggested it then, nor, as we have seen, when he applied for a patent a year later, but embodied Barrett's jack in toto in his application. Nor is the fact to be lost sight of that Barrett placed his patent date on the pattern which Forgie had made under the arrangements between them; that, when Forgie replaced it with his own name, Barrett not only made him grind it off, but pay for a plate to replace it, on which was a reference to the Barrett patent. This branding the device as the embodiment of Barrett's ideas went without protest from Forgie when face to face with Barrett; conduct utterly at variance with the to-be-expected actions of an inventor of a successful machine, every distinctive feature and adaptation of which, outside the jack, was, according to his second account, thought out before he saw Barrett, and fully explained when they first met. This stamping of the jacks and the delivery of them by the Duff Company to Forgie continued almost a year. Barrett is corroborated by Rankin, a pattern maker, who says Forgie was a stranger to him; that he came to him, and told him to see Barrett, who was to give him instructions how to make the patterns; that Barrett gave him the plans; that he got no instructions from Forgie, except to go to Barrett; that there were some sketches made by either witness or Forgie; but that he could not have made a working plan of the cage from what Mr. Forgie said. "Mr. Forgie could not explain to me how the Duff Manufacturing Company or Barrett jack was made." We think also the evidence of complainant's own witnesses, Touhill and Zahnizer, as far as they go, corroborated Bar-

rett's contention. The former was a machinist in the Duff Company works, whom Barrett and Forgie went out to see. His testimony shows that Forgie had the idea of a circular track, that no other apparatus than Barrett's was discussed, and that Barrett thought he could use his. The latter was a machinist and oil-well tool maker. He says, in the fall of 1886 Forgie explained to him the idea of applying a jack to oil-well tools; said he did not have the mechanical parts completed; that he had three or four ideas at the time; that his whole idea was the principle of the jack applied to oil-well tools. After a careful examination of the proofs and facts of the case, we are of opinion that Forgie was not the sole and only inventor of the device embodied in his patent; that the idea of applying jacking mechanism to oil wrenches, and by circular motion, was his, but the plan and mechanism by which this was practically done, and for which his patent claims were allowed, was not his invention.

But, assuming the device in suit was Forgie's sole work, does it show patentability? It is to be noted that a jacking mechanism was old; indeed, that, when occasion required, it was used horizontally, as well as vertically; that when so used it was a matter of indifference whether the lifting bar moved, and the jacking mechanism was stationary, or vice versa. The device was adapted to both conditions, and whether the lifting bar or the jack frame moved depended on the comparative resistance of the bodies at either end. It should also be noted the lifting bar in the Barrett jack was kept in place by a suitable slot. Nor was a carriage, with a forcing mechanism, and moving on a toothed rack, a new thing in mechanics. In Poole's patent, No. 333,667, (1886,) we find a toothed track, a carriage with forcing mechanism moving thereon, and confined by a T-shaped flange and a corresponding slot. The forcing mechanism consisted of a cam plate engaging with the cogs, but there is no inherent difficulty in applying the principle of a jacking mechanism thereto. The wrenches were old, and their use in both methods is identical; and the quadrant bar as a base, shifting in an arc, for the application of power, was in common use. If there had been none of these, assuredly there would have been invention, and that of a high order, in the device in suit; but when Forgie conceived the abstract idea of adapting a jack mechanism to a circular forcing path, (and that is all he did,) the perfecting of this idea, with the means and appliances already in use, was to our mind in the sphere of construction, and not of invention. It is an element, though not a controlling one, that there were no previous attempts to reach this result. The old method was blindly followed, until Forgie thought of the use of a jack in place of human strength. As soon as this was suggested to one skilled in the construction of jacking mechanism, it was worked out at once. How rapid this was is shown by the fact that in ten days from the first meeting the very patterns were designed and completed, and the device, substantially in the form as afterwards manufactured, complete. That

the application of a jacking mechanism to oil-well wrenches was a decided step in advance must be conceded, and to Forgie must be given the credit of suggesting its use; but advance, or even discovery, is not synonymous with invention. While he has made an advance, he is not such a pioneer in a new field as should make an entire industry subject to tribute. The wrenches were old, and still perform the same function, and in the same way. A segmental bar affixed to the floor of the drill house, having apertures, with which the end of the pushing bar engaged, was also old, and the essence of the improvement was the mere substitution of the operating mechanism of the jack. Such a jack was taken in all its mechanical details, and adapted to the uses analogous to the purpose for which it had been used. The wrenches still operate simply as oil-well wrenches, the jacking mechanism simply as such; neither modifies the operation of the other. It is still the same jack, adapted to analogous uses, but performing no new functions, and the jack thus adapted not even the product of the alleged modifier's brain. We are of opinion the patent is void for lack of patentability.

ACHESON, Circuit Judge, concurs.

DUFF MANUF'G CO. v. FORGIE.

(Circuit Court, W. D. Pennsylvania. July 10, 1893.)

No. 54.

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—LIFTING JACKS.
   Letters patent No. 312,316, issued February 17, 1885, to Josiah Barrett, for an improvement in lifting jacks, and which are restricted both in the specifications and claims by the use of the words "in a lifting jack," and the additional term "a lifting bar," cannot be extended so as to cover an adaptation of such jack to the production of a horizontal circular motion, for the purpose of unscrewing oil-well tools.

2. SAME—JACKS.
   In letters patent Nos. 455,993 and 455,994, issued to said Barrett on subsequent applications, he states that his inventions relate "to the same general class of jacks as are set forth" in his preceding patent, No. 312,316, and have "practically the same object in view;" but elsewhere in the specifications he states that his invention "includes any device embodying its principle, whether the power is exerted in a vertical, horizontal, or other line." In No. 455,994 there is express reference to a contemplated "curvilinear" movement. In the claims of both patents the broad generic expression "in a jack" is used. *Held*, that these claims are broad enough to cover an adaptation of such jack to the production of a horizontal, curvilinear motion for the purpose of unscrewing oil-well tools.

In Equity. Bill for infringement of patents. Decree for complainant.

James I. Kay, for complainant.
Wm. L. Pierce, for defendant.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. The Duff Manufacturing Company files this bill against W. Forgie for alleged infringement of a jacking mechanism for screwing and unscrewing oil-well tools. Two devices manufactured by respondent, and known as Forgie Devices No. 1 and No. 2, respectively, are alleged to infringe as follows: No. 1, all the claims of patent No. 312,316, issued February 17, 1885, to Josiah Barrett, for improvement in lifting jacks, and now owned by complainant; and No. 2, the third claim of said patent, the third claim of patent No. 455,994, and the first, second, and sixth claims of patent No. 455,993, both of said patents being issued to Josiah Barrett, July 14, 1891, and are also owned by complainant. A suit by Forgie against the selling agents of complainant at No. 18, November term, 1890, was heard, and decided at the same time as the present case. See Forgie v. Supply Co., 57 Fed. Rep. 742. As both cases involve the same subject-matter, we refer to the opinion therein for a statement of the parties, subject-matter, state of the art, and the devices of the different parties. Passing over these preliminary matters, we may say that the question in device No. 1 is whether the claims of patent No. 312,316 are broad enough to cover the mechanism therein employed. If so, infringement is admitted.

It is contended by respondent that the patent is for a lifting jack, and that the claims are all limited by the term "in a lifting jack," and all save one by the added term "a lifting bar;" that neither of Forgie's devices are lifting jacks, nor have they a lifting bar. It must be noted the patent is not a pioneer one; it purports to be and is simply an improvement; nor in its specification or claims is it asserted that it pertains to any mechanism other than one variety of a large class, viz. to a lifting jack. Knight's Dictionary enumerates many different kinds of jacks, all designated by name, and a number of additional ones are noted in the Century Dictionary, where it is also stated that the character of the jack is specified by the use of a fitting word, so that the compound word designates the function of the particular jack. The specification says:

"My invention relates to an improvement in lifting jacks, the object of said invention being to provide for a continuous movement of the lifting bar, said movement, either up or down, being effected equally by both the up stroke and the down stroke of the operating lever; and to this end my invention consists, in general terms, in the construction and combination of parts, all as more fully hereinafter described and claimed."

The words employed throughout the specification, "lifting jack," "to lower the lifting bar," "the down stroke," "the lower limit of its motion," "a toothed lifting bar," all show that the only species of mechanism, power, or application in mind was in an up and down motion; that it was adapted to a lifting jack; and that the

patentee had no purpose to apply it elsewhere. There is not the remotest hint in specification or claim of its application to any other form of mechanism or variety of jack, a very different state of facts from that appearing in the case of Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. Rep. 670. It is not a case where, as in Rev. St. § 4888, the patentee has explained "the principle thereof, and the best mode in which he has contemplated applying that principle;" but it is one where Barrett has explained the principle thereof, and the only mode to which he has contemplated applying it. While the doing of this in the specification would not of itself narrow the scope of his patent, yet, when he has carried the same thing into his claims, he cannot complain that he is now hampered by these self-imposed limitations. It is but equity for this court, when his principle has been applied in mechanism other than a lifting jack, to restrict his rights under the patent to a lifting-jack mechanism; and this, although the adapted mechanism is analogous to a lifting-jack mechanism, in the sense that all jacking mechanisms are analogous, but still not analogous when measured, in this instance, by the narrow limits of a claim restricted to lifting jacks alone. That is, the new use is analogous, as we held in the other opinion noted, to the uses possible under the mechanism devised by Barrett; it is not analogous when measured by the narrow and restricted claims of his patent. What he claimed, he should be allowed in letter and in spirit; what he did not claim, either in letter, spirit, or suggestion, he must be held to have abandoned. Advance in the applications of jacks has shown that his claims, perhaps, might have been made broader; indeed, that to the particular use now in question his mechanism might then have been applied; but his claims were limited, "sic ita scripta est," and patent rights rest on claims made, not claims omitted. That the respondent's device is in no sense of the word or in mechanical function a "lifting jack" is plain. It does not lift, and while a lifting-jack mechanism may be placed horizontally, and move bodies, it remains a lifting jack still, in name, but its function is no longer that of lifting. The principle of its construction, as we have seen in the other case, could be adapted to a forcing jack for unscrewing oil-well tools, but when so used it is not used "in a lifting jack." It is, indeed, shown that Barrett's lifting jack, if placed in a horizontal position, is capable of moving bodies horizontally. But in so acting the jack is not changed in form or otherwise. Its application, then, to such use, might, with reason, be said fairly to come within Barrett's claims, or at least within the scope of his invention, if properly claimed. But the jack as described in the patent cannot be employed to couple and uncouple the drill rods of oil wells. To do that work the apparatus must be reconstructed. To us it is very clear that the use to which the plaintiff here seeks to extend the patent was neither suggested nor contemplated by the specification or claims. In a lifting jack the weight above keeps the lifting bar in place

automatically; and the more firmly, the heavier. It cannot fly the track, and the inertia of a heavy weight which it was desired to move would have the same effect when the jack was used horizontally to push. But the forcing of wrenches, on different planes, and free to move up or down, presents a different problem. As was said in the testimony, and the statement was self-evident, and will bear no contradiction:

"The Barrett jack, having a stationary base and a movable rack bar, is particularly adapted for lifting; while if you place it on the floor of the derrick, and attempt to wrench a drilling-tool joint, one wrench being engaged with the tools much higher than the other, the outer ends would not come in line. Consequently the outer end would be hoisted in the air, and let go its hold, and leave its position; and, if you did succeed in holding it to the floor by any possible device, you would have to change the position of the base several times in the process of wrenching up a joint which would make it practically useless."

We are of opinion the claims of patent No. 312,316 are so limited that the respondent's devices do not come within them, and infringement is not made out.

In Forgie's device No. 2 infringement is claimed of sundry claims in patents Nos. 312,316, 455,993, and 455,994, as above noted. We have already disposed of the question involved in the first patent. On May 10, 1892, after the issue of the other two patents to Barrett, Forgie made an application (serial No. 432,471) for a patent for the No. 2 device, in which his first, second, and third claims are in the identical language of the claims already allowed Barrett in the first, second, and sixth claims of No. 455,993, and his fourth claim is identical with the third claim allowed Barrett in No. 455,994. The application has been placed in interference with Barrett, and is undetermined, but, as the case stands, the prima facies of Barrett's patents must prevail over the proofs of priority before us. The construction placed upon device No. 2 by Forgie and his counsel in these claims thus made and still being followed up may be regarded as virtually such an admission of infringement as renders a discussion of the mechanism of this device with the identical claims in the Barrett's patents, alleged to be infringed, unnecessary. Suffice it to say, we are satisfied no anticipation has been shown and infringement is made out, unless—First, the claims of both the Barrett patents are so restricted by reference to the lifting-jack patent No. 312,316, before referred to, as not to embrace the variety of jack used by Forgie; or secondly, because the curved track as used in the Forgie device is not embodied in the claims of the said patents. The first objection is met by the fact that while patent No. 455,993 states, "My invention relates to the same general class of jacks as are set forth in letters patent No. 312,316, granted to me February 17, 1885, and has practically the same object in view," yet in other parts a broader meaning or definition is given by the applicant to the term "lifting jack" than we have felt constrained to put on it in considering that patent. This broader meaning he has a right to put upon

it so as to explain the scope of his invention, and the specification must be read in the light of that definition. He says:

"My invention relates to what might generally be termed 'lifting jacks,' that is, to power mechanism in which a step by step movement back and forth is obtained, said mechanism being actively operated in one direction to move or raise a load, and passively operative in the other direction to control the movements of a load, such as in lowering a load lifted by the jack. By such terms it is, of course, to be understood that the invention includes any device embodying its principle, whether the power is exerted in a vertical, horizontal, or other line."

In No. 455,994 the language is still broader in some respects, and by the insertion of a contemplated "curvilinear" movement in express terms. In both patents the claims now contended for are "in a jack," using the broad generic term. We think the patents come within the spirit of the decision in Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. Rep. 670, and that the claims should not have the narrow construction contended for. We are unable to read into the claims, from the mere reference made in the specifications to patent No. 312,316, the limitations of a "lifting jack" and a "lifting bar" contained in the claims of that patent. In regard to the second point, we are of opinion that the use of a curvilinear track is such an analogous use as comes within the claims. Indeed, such a motion is expressly stated in the specification of one patent, as we have seen. We are therefore of the opinion device No. 2 infringes the first, second, and sixth claims of patent No. 455,993, and the third claim of patent No. 455,994. Let a decree be drawn.

ACHESON, Circuit Judge, concurs.

CENTRAL TRUST CO. OF NEW YORK v. BRIDGES et al.

McBEE et al. v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1893.)

No. 88.

1. CIRCUIT COURTS—JURISDICTION—CITIZENSHIP—RAILROAD RECEIVERS—ANCILLARY BILL.
Where a suit is pending in a federal court for the appointment of a receiver and the foreclosure of a railroad mortgage, the court will take jurisdiction, without regard to the citizenship of the parties, of another bill filed by lien claimants, since their right to enforce their liens in the state court will be cut off when the federal court takes possession of the property; and their suit may be regarded as in substance an ancillary bill.

2. RAILROAD COMPANIES—CONTRACTORS' LIENS.
Under the Tennessee statute of March 29, 1883, relating to railroad contractors' liens, the contractor must deal directly with the company in order to secure a lien for his work and material; or, if a subcontractor, he can have no lien unless he serves notice on the railroad company of the principal contractor's failure to pay him, and unless, at the time of such notice, the company shall owe money to the principal on the contract which the subcontractor has helped to perform; and the lien is limited to the amount so due the principal contractor.

3. SAME—CONSTRUCTION OF CONTRACTS—SUBCONTRACTORS.
The fact that one who makes a construction contract with a railroad company is its principal stockholder, and dominates and controls its action, does not render him an agent of the company, so as to make his individual subcontracts in law the contracts of the company, when neither he nor the company hold out to the subcontractors the existence of any such agency, or, as between themselves, had any intention of establishing such agency.

4. SAME.
While construction contracts made by a dominating stockholder with a railroad company for his own benefit are looked upon with suspicion, and frequently condemned by the courts when drawn in question by other stockholders, bondholders, or by the corporation itself, yet their legal existence cannot be questioned by third persons who are not injured thereby, as in the case of subcontractors who dealt with the contractor in his individual character.

5. SAME—VENDOR'S LIEN—CONVEYANCE OF RIGHT OF WAY.
Persons who convey a right of way in Tennessee directly to a railroad company are entitled to a lien for the purchase price prior to that of the mortgage bonds of the company.

6. SAME—CONSTRUCTION CONTRACT—FRAUDULENT JUDGMENT.
The dominant stockholder in a railroad company, having made a construction contract with the company in his individual character, failed to pay his subcontractors. Thereafter, in order to give to the subcontractors and material men a lien on the road under the Tennessee statute of March 29, 1883, their representatives, acting with the principal contractor, and by means of his control over the board of directors, obtained an acknowledgment on the minutes of the company of an amount still due him, vastly more than was really due him, and more than sufficient to cover all the claims. The contractor sued for this amount in a state court, and the company's attorney consented to a judgment therefor. *Held*, that this judgment was fraudulent as against persons injured thereby, and was of no evidential force when the claim was contested by holders of prior mortgage bonds of the company in a foreclosure suit in a federal court.

7. SAME—RAILROAD MORTGAGES—VALIDITY.
Two railroads, owned by companies A. and B., were constructed to form one line, and as a common enterprise, the controlling interest in the stock of each being held by the same parties. Company B. agreed with the contractor who built its road to pay him in mortgage bonds at a fixed rate per mile. The bonds actually delivered to and sold by him were, however, issued by company A., but company B. gave a mortgage on its road to secure them. *Held*, that the persons acquiring these bonds had an equitable mortgage on the road, such as would entitle them to contest a fraudulent judgment which gave to subcontractors fictitious liens on the road.

8. SAME—RIGHTS OF SUBCONTRACTORS—FRAUDULENT CONVEYANCES.
The subcontractors could not object to the mortgage on the ground that it was given by the railroad when insolvent, and was therefore void under the Tennessee law; for, if they had any claim at all against the company, their claim was a lien prior to the mortgage, and, if they had no claim against the company, but only against the principal contractor, then they had no interest in any disposition the company might make of its property.

9. SAME—RIGHTS OF GENERAL CREDITORS.
A general creditor, whose claim came into existence subsequent to the execution of the mortgage, could not object thereto on the ground of an unlawful preference.

10. SAME—RAILROAD MORTGAGES—LABOR AND MATERIAL CLAIMS.
The Tennessee statute of 1877, (chapter 72, p. 92,) providing that no railroad company shall have power to execute any mortgage or other lien which shall be valid as against judgments for work and labor done or timbers furnished, etc., applies only when the labor and materials are furnished in such manner that the railroad company would be liable to pay the contractor or material man for them, and not when they are furnished to a principal contractor in his individual capacity, without establishing a lien in the manner prescribed by the Tennessee statute of March 29, 1883; and if, in the latter case, judgments are nevertheless fraudulently obtained against the company, the statute will not prevent a court of equity from disregarding them.

11. SAME.
The fact that the money obtained on a draft given by a railroad company to its principal contractor for construction of its road was used by him to pay for labor and material will not create a labor or material man's lien on the railroad in favor of the holder of the draft, it having never been paid.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

In Equity. Suit by the Central Trust Company of New York to foreclose a mortgage given by the Marietta & North Georgia Railway Company. A subsequent suit was brought in the same court by the firm of McBee & Co. and others, seeking to restrain the prosecution of the foreclosure suit and of other claims against the same property, on which they claimed liens, and praying for a sale and payment of their claims from the proceeds. The two suits were consolidated, and all creditors were directed to file their claims in the cause. A motion by the Central Trust Company to dismiss the bill of McBee & Co. for want of jurisdiction was denied. 48 Fed. Rep. 243. Various lien claimants filed intervening petitions. A decree was made for a sale and distribution of the proceeds. The Central Trust Company appeals from so much of the decree as postponed the lien of the mortgage to claims for

construction of the railroad. Cross appeals were taken by lien claimants whose liens were postponed to the mortgage. Decree reversed on complainants' appeal, and cross appeals dismissed.

Statement by TAFT, Circuit Judge:

These are cross appeals from a decree of the circuit court for the eastern district of Tennessee. The decree ordered the sale of a railroad, and established, marshaled, and adjudged priority between the liens thereon. The railroad sold, known as the Knoxville Southern, runs south from Knoxville 90 miles to the North Carolina line, and is a part of the line of the Marietta & North Georgia Railroad Company, a consolidated railway corporation of Georgia and Tennessee. The main controversy in the court below was between the holders of certain mortgage bonds, represented by the Central Trust Company of New York, as trustee under the mortgage, and 50 or more contractors, material men, and others, who had assisted in the construction of the railway. The litigation began in January, 1891, when the Central Trust Company of New York filed a bill of complaint against the Marietta & North Georgia Railway Company, alleged to be a corporation created by and existing under the laws of Georgia and North Carolina, having a railway and owning property and having a place of business in Tennessee, and in the eastern district of Tennessee. The bill sought to foreclose a mortgage given by the Marietta & North Georgia Railway Company in January, 1887, to secure bonds issued on its line of railway constructed and to be constructed in Georgia, North Carolina, and Tennessee. The bill recited that a similar bill had been filed in the northern district of Georgia to foreclose the part of the road which lay in that district.

Several days later, in the same month, McBee & Co., a firm composed of citizens of the state of North Carolina; Wilson, a citizen of North Carolina; and Burgin, also a citizen of the same state,—filed their bill in the same court against the Knoxville Southern Railway Company, a body corporate under and by virtue of the laws of Tennessee; against Eager, a citizen of Massachusetts; and against a number of lien claimants, residents of Tennessee; against the Marietta & North Georgia Railway Company, alleged to be a corporation under the laws of Georgia; the Central Trust Company of New York, and others, none of whom was a resident of Tennessee,—in which they set up mechanics' liens for claims amounting in the aggregate to about $25,000. They averred that many of the named defendants asserted some interest as subcontractors under George R. Eager, principal contractor, or otherwise, against said Knoxville Southern Railroad; that the said railroad company was insolvent, and that the property was in danger of wasting by reason of many suits brought for the enforcement of liens; referred to the bill above described as already filed by the Central Trust Company; averred the execution of a mortgage by the Knoxville Southern in July, 1890, after the debts due the complainant and some of the defendants were contracted, to secure the bonds sued on in the suit of the Central Trust Company; attacked the mortgage as illegal and a fraud in so far as it attempted to create a mortgage prior or equal to the lien of complainants, and made similar allegations with reference to a subsequent consolidation of the Knoxville Southern Railroad Company and the Marietta & North Georgia Railway Company. The prayer was for a receiver; for an injunction against all the defendants from prosecuting claims to execution against the Knoxville Southern Road and a wasting of its property thereby, and especially against the Central Trust Company's prosecution of its bill of foreclosure; for the determining of the amounts due the several creditors therein set forth, as well as those who might become parties to the bill; for a decree declaring the pretended consolidation of the two roads and the mortgage of 1890, so far as it affected the rights of lien creditors, nullities; and for a decree that the road be sold, and out of the proceeds the complainants and other lien claimants be paid their claims.

It was ordered that these two causes be consolidated on the hearing of a motion for a receiver. A receiver was subsequently appointed. The bill of McBee & Co. was ordered to be treated as an insolvent bill, and all the creditors of the Knoxville Southern or George R. Eager were directed to file their

claims in the cause. Creditors who had already commenced suit in the state courts were permitted to prosecute their suits to judgment, should they so desire, and no further; and the transcripts of judgments thus obtained were directed to be filed as evidence of their claims in the circuit court.

Subsequently the Central Trust Company filed an amended bill, in which it stated that the defendant corporation named in its bill was formed by the consolidation of the Marietta & North Georgia Railway Company, duly chartered under the laws of Georgia, and the Knoxville Southern Railway Company, a corporation duly chartered under the laws of Tennessee, and set out at length the mileage of the defendant corporation, including that of both roads, and prayed as in its bill.

Subsequently the Knoxville Southern Railway Company, the Central Trust Company, and the Marietta & North Georgia Railway Company all answered the bill of McBee & Co., in which they denied that the Knoxville Southern Railway Company was indebted to McBee & Co., denied that the complainants had any lien against the company, and averred that none of the lien claimants made defendants in the bill had a lien prior to that of the Central Trust Company. Thereafter the Central Trust Company moved to dismiss the petition of McBee & Co. for want of jurisdiction, on the ground that when the parties in interest were arranged as parties plaintiff and parties defendant, according to their interest in the controversy, there would be found among the plaintiffs citizens of Tennessee, and among the defendants also a citizen of Tennessee, the Knoxville Southern Railway Company. This motion to dismiss was overruled.

The lien claimants all came in and filed intervening petitions setting up claims against the Knoxville Southern Railway as garnishee, and Eager as principal contractor, in which form their claims had generally been reduced to judgments in the state courts; but afterwards, by amendments, they stated their claims to be against the Knoxville Southern Railway Company as principal debtor. Eager, as principal contractor, filed a claim against the Knoxville Southern Railroad for something more than $370,000, and for a lien for work done and material furnished, and set up a judgment in the state court of Tennessee for this amount against that company. The answers of the Central Trust Company to all these petitions denied any indebtedness due from the Knoxville Southern Railroad to the petitioners, or any lien therefor. The case was referred to a master to take the testimony, to consider the issues, and report upon the claims of all the parties.

The master heard much evidence on the numerous issues raised by the pleadings. He found that the lien claimants, all of them, had made their contracts with Eager as principal contractor, and not with the Knoxville Southern Railroad Company; that nothing was due from the railroad company to Eager on his contract for its construction, but that everything due had been paid; that the judgment in his favor against the company was fraudulently and collusively obtained, and not binding on the Central Trust Company; that the lien claimants were not, therefore, entitled to any lien as subcontractors under the railroad lien law of Tennessee of 1883. But he found that Eager was the principal stockholder of the Knoxville Southern Railroad Company; that the directors were his tools, quick to do his bidding, and that, although the forms of a separate corporate existence were maintained, Eager was so far the company that the contracts of the lien claimants with Eager as principal contractor were in fact with Eager as the agent of the company, an undisclosed principal, and therefore directly with the company; that the lien claimants were entitled, therefore, to claim as principal contractors, and to assert liens as such; that the Central Trust Company mortgage was an equitable lien on the road subordinate to all liens for construction, work, or materials; that certain other lien claimants—as, for instance, banks which had advanced money to contractors and others—did not come within the statute, and must be postponed as general creditors of the railroad company. The circuit court confirmed the master's report, and ordered the road sold, and the proceeds distributed as therein directed. A decree for sale pro confesso had already been entered in favor of the Central Trust Company, on its mortgage, against the Knoxville Southern Railroad Company and the Marietta & North

Georgia Railroad Company. The Central Trust Company appeals from the decree postponing its lien to any claim for construction. The lien claimants who were postponed by the decree to the mortgage debt, as general creditors, filed cross appeals.

The questions raised by the parties can hardly be understood without a somewhat detailed description of the construction of the Knoxville Southern road and of the Marietta & North Georgia Railroad, of which the Knoxville Southern road subsequently became a part. The first Marietta & North Georgia Railroad Company was a corporation of Georgia, and owned and operated a narrow-gauge road, 20 miles in length, from Marietta. In 1881 it became consolidated with the Georgia & North Carolina Railway, of North Carolina, under the name of the Marietta & North Georgia Railroad Company, and the narrow-gauge line was extended to Murphy, N. C. George R. Eager, a railroad contractor, whose home was in Massachusetts, acquired an interest in the second Marietta & North Georgia Railroad Company. As the president and principal stockholder of the North Georgia Construction Company, a corporation of New Hampshire, and also as an individual, Eager made contracts with the Marietta & North Georgia Railroad Company for widening the road to a standard gauge, and increased his stock and interest in the company, so that he soon secured a controlling interest. The plan of Eager and others interested in the Marietta & North Georgia Railroad Company was to extend the line of its road to Knoxville, Tenn., by way of Murphy, N. C. Accordingly, in January, 1887, the Marietta & North Georgia Railroad Company executed a mortgage to the Central Trust Company of New York to secure bonds to be issued at the rate of $16,000 a mile upon its road in Georgia, and at the rate of $20,000 per mile upon an extension of its road from Murphy, N. C., to Knoxville, to be thereafter constructed. The $16,000 a mile on the Georgia & North Carolina part of the line was to be used to take up about $1,200,000 of old indebtedness thereon, and to improve and continue its construction. The grant in the mortgage was of "all the corporate property and franchises of said railway, all and singular, the railway of said company, now completed or hereafter to be completed, extending from Marietta, in Cobb county, Georgia, southerly to the city of Atlanta, Fulton county, in said state of Georgia; also a branch line extending southwesterly from said Marietta to a junction with the Georgia Pacific or the East Tennessee, Virginia and Georgia Railway at or near Austell, in said Cobb county; also extending northerly from said Marietta, through the counties of Cobb, Cherokee, Pickens, Gilmer, and Fannin, in said state of Georgia, to the crossing of the boundary between the states of Georgia and North Carolina, and through the counties of Cherokee, Macon, and Graham, in North Carolina, to the boundary between the states of North Carolina and Tennessee; also through the counties of Monroe, Blount, and Knox to the city of Knoxville, in the state of Tennessee; also a branch line extending from a point on the line above described in Fannin county, Georgia, through said Fannin county, to Ducktown, in Folk county, Tennessee, together with such other branch lines or extensions of said railway in either of said states as the company may be authorized to construct, and which it shall so construct."

The mortgage contained a covenant that the company would do all further acts and make all further conveyances reasonably required for the better and more effectual vesting and confirming of the premises thereby granted or intended to be granted. It was further provided that the bonds should be equally secured by the mortgage, although made at different times. It was further provided that the trustee should have the right to permit the issue of bonds in the proportion and at the rate above stated, upon the completion of the several sections of the railway, and not otherwise; and that the evidence of the completion of any section should be the certificate, sworn to by the engineer of the mortgaging company having in charge the construction of the railway, and delivered to and received by the trustee. This mortgage was recorded in every county through which the Tennessee extension to Knoxville was afterwards built. Some months after the execution of the mortgage it was found that the more practicable plan for extending the Marietta & North Georgia Railroad to Knoxville was from the intersection of the Hia-

wassee river with the North Carolina and Tennessee state line,—a change which did not vary greatly the general direction of the proposed line, though the amended line passed through two or three more counties in Tennessee and two or three less in North Carolina.

During the year 1887 the city of Knoxville offered to subscribe $275,000 to the stock of any road that constructed a line south towards Atlanta, upon which trains should run from Knoxville to Atlanta on or before August 13, 1890. Eager and his associates, in order to secure this subscription, and to extend the Marietta & North Georgia Railroad Company to Knoxville, organized the Knoxville Southern Railroad Company under the laws of Tennessee by a charter dated June 21, 1887. The charter stated the object of the company to be the construction and operation of a railway from Knoxville, Tenn., to connect with the Marietta & North Georgia Railway Company at the state line between the states of Tennessee and North Carolina, in the valley of the Hiawassee river, in Polk county, Tenn., and also to construct and operate a branch of said railroad from some convenient point in its said line above described to a point in said state line where the Little river crosses the state line, which is on the line between the counties of Blount and Monroe, in the state of Tennessee, by the most practicable routes between said terminal points, passing through the counties of Knox, Blount, Monroe, and Polk, in said state of Tennessee. The charter provided that the board of directors might fix the amount of the capital stock, and might at any time increase the same if the necessities of the corporation, in their estimation, required it. The corporation was given the right in its charter to borrow money and to issue notes or bonds on the faith of the corporate property, and to execute a mortgage or mortgages for the further security of money thus borrowed. The Knoxville Southern Company was organized with friends and employes of Eager as incorporators and directors and officers, though Eager never became anything but a stockholder. At a meeting of the directors of the Knoxville Southern Railroad Company, November 7, 1887, a resolution was adopted, as follows: "That the president be, and he is hereby, authorized to enter into a contract for the building of the road from Knoxville, Tenn., to a connection with the Marietta and North Georgia Railroad, with such person or persons, and on such terms and conditions, as in his judgment he may think for the best interest of the company; said contract, when made, to be ratified by the board of directors and spread upon the minutes."

At a meeting of the stockholders on July 21, 1888, the president reported that satisfactory progress was being made in the construction of the railroad by the North Georgia Construction Company, with which company a contract had been made to construct and equip the road on or before August 13, 1890. The Knoxville Southern road was built as an extension of the Marietta & North Georgia Railroad, and work was done on the whole line as if it had been one road. The Marietta & North Georgia mortgage bonds were issued on this theory. The Georgia part was first completed. The certificates of the engineer would seem to show that the work on the Knoxville end did not begin until 1889. The contract for the Georgia end was much of it with the Georgia Construction Company, of which Eager was president and principal or sole stockholder; and the work on the Knoxville end was probably done chiefly in the name of Eager as an individual, principal contractor. However this may be, the construction company transferred all its rights and liabilities as contractor to Eager some time before the labor and construction herein involved were furnished. The work which Eager did in constructing the road he did with the proceeds of the bonds of the Marietta & North Georgia Railroad Company, which he disposed of in London, from time to time, at 10 per cent. discount from their face value.

On the 21st of May, 1890, at a meeting of the board of directors of the Knoxville Southern road, a contract purporting to have been made on the 20th of August, 1887, between the Knoxville Southern Railway Company and George R. Eager, was presented to the board of directors, read, ratified, and ordered spread upon the minutes. The contract was signed for the Knoxville Southern road by A. A. Arthur, vice president, although Arthur was not elected vice president until some time in 1888. The contract by Eager was to build

and complete a railroad commencing at a point on the south side of the Tennessee river, where the road of the Knoxville Belt Railroad Company and the said road connects, within one mile of the city limits of Knoxville, in the state of Tennessee, to a connection with the Marietta & North Georgia near where the Hiawassee crosses the North Carolina and Georgia state line, in accordance with the specifications thereto annexed, upon such route as had been or might thereafter be designated by the party of the first part. By the third section the railroad company agreed to lay out the road, and acquire all necessary real estate by condemnation, and to make application for necessary legislative authority, and to give Eager the right to use the corporate name when necessary.' By the fourth section the railroad company agreed that it would execute and cause to be recorded in all counties through which the road was or was to be constructed a first mortgage upon its main and branch lines of railroad then or thereafter to be completed, and its franchises, rolling stock, and all other equipment, to secure the payment of bonds of the railroad, or to secure the bonds of any other railroad company taken or used by Eager as part of his compensation for building the road, or any portion thereof, under this or any other contract; and to execute any other mortgages or instruments which Eager might be advised by counsel might be necessary or proper to secure any first or other mortgage issued to aid in the construction or equipment of said road, or to pay any expenses connected therewith or with the management or operation of the road or the marketing of its securities; such mortgage to be in such form as Eager or his vendees should approve. By the fifth paragraph the railroad company agreed to pay Eager for the work $20,000 in bonds and the same amount in stock per mile, deducting the Knoxville subscriptions and any other individual stock subscriptions. The stock was to be paid as the mile was graded, and the bonds were to be paid as the mile was built and ready for the operation of trains. By the sixth paragraph the company conveyed all its property except its railroad, which it had mortgaged, to Eager as part of the compensation. By the seventh paragraph it was provided that the road should be completed by August 13, 1890. By the eighth paragraph there was a mutual covenant to execute all necessary papers to carry out the contract, and by the ninth paragraph the contract was made binding upon the successors and assigns of both parties. At a meeting of the stockholders, May 21, 1890, this contract was ratified, and a resolution was passed that the company should execute all instruments necessary to fully protect any lien of all first mortgage bonds issued by this or any other company, and taken or used by Eager as compensation for building the road.

At the seventh meeting of the directors, held July 9, 1890, a resolution was passed directing the execution of a mortgage to the Central Trust Company. This mortgage recited the fourth provision of Eager's agreement, stated above; recited that Eager had duly performed the parts of the agreement on his part to be performed; and then stated that, in consideration of the premises, and in order to secure the first lien for the bonds of the Marietta & North Georgia Railroad Company issued or to be issued on account of the construction or equipment of said Knoxville Southern Railroad up to $20,000 per mile, (the terms and effect of which were more particularly described in the indenture of mortgage made between the Marietta & North Georgia Railway Company and the Central Trust Company of New York, bearing date of January 1, 1887, and duly recorded in the counties of Knox, Blount, Monroe, McMinn, and Polk, in the state of Tennessee,) the Knoxville Southern road conveyed and granted to the Central Trust Company all the corporate franchises and property of said company in and to any railroad now completed or hereafter to be completed from a point in or near Knoxville, Tenn., or elsewhere, to a connection with the Marietta & North Georgia Railway Company, together with such other branch lines or extensions of said railway which the company might be authorized to construct, and which it should construct. The defeasance clause was as follows: "Provided, nevertheless, that if said corporation shall well and truly pay the principal and interest of all of the bonds issued and to be issued by the Marietta & North Georgia Railway Company for the construction and equipment of said Knox-

ville Southern road as hereinbefore specified, according to the true intent and meaning of said agreement with said Eager, as particularly specified in said mortgage made by the Marietta and North Georgia Railway Company, and the bonds therein mentioned, then this indenture and the estate hereby granted shall cease and determine."

At the meeting of stockholders, July 11, 1890, whereat 12,051 shares out of 12,053 were represented, a resolution was adopted approving the action of the board of directors in giving the mortgage, and directing the president and secretary to execute the same. The mortgage was executed by the signature of Pulsifer, president, and Bradley, secretary, and by the acknowledgment of Pulsifer, president, and Bradley, treasurer; Bradley being at the time both secretary and treasurer. The evidence seems to show that there was no publication in the daily papers of Knoxville, Nashville, and Memphis of notice that either at the directors' meeting of July 9, 1890, or the stockholders' meeting of July 11, 1890, the question of giving a mortgage upon the property was to be considered, as required by the general statutes of Tennessee. At the meeting of the board of directors on the 22d of November, 1890, there was presented a proposed agreement of union and consolidation between the Knoxville Southern Railway Company and the Marietta & North Georgia Railway Company. The indebtedness of each company was assumed by the consolidated company. A total amount of stock was issued equal to the capital stock of both companies. At the annual meeting of the stockholders, held the 29th of November, 1890, these articles of consolidation were approved, and the road has since been operated under the control of the consolidated company.

All the work done and materials furnished for which liens were claimed, with the exception of those included in the bill of McBee & Co., were furnished to Eager or the North Georgia Construction Company as principal contractor. Substantially all the work and material were furnished in the summer and fall of 1890. The railroad, 90 miles in length, was constructed by Eager, and he received, in accordance with the contract already referred to, $20,000 a mile in bonds of the Marietta & North Georgia Railroad Company. He also received $20,000 a mile in stock as the road was graded, but, as the stock of the Knoxville Southern Railroad Company had been fixed at $1,500,000, there was not enough stock to pay Eager $20,000 a mile. In November, 1890, it became apparent that Eager had not paid about $300,000 of debts contracted by him in the construction of the road, and his creditors were moving to secure themselves. R. N. Hood represented claims against Eager amounting to a large sum. At a meeting of the stockholders of the Knoxville Southern Railroad Company, held November 10, 1890, Hood appeared as the owner of one share, and introduced and moved the adoption of certain resolutions upon the subject of Eager's debts, which, after reciting that there remained due to George R. Eager, on his contract with the Knoxville Southern, the sum of $300,000 of the stock of said company; that Eager had acted at all times for the railroad company in letting contracts to build the road and in making contracts for materials furnished in its construction; that in order to pay Eager this amount it would be necessary to increase the capital stock of the company, which it was not desirable to do; that Eager was the principal and majority stockholder of the Knoxville Southern Railroad Company; that Eager assented to the resolutions, and that the Knoxville Southern desired to honestly and fairly discharge its legal obligations to the contractors for work done and materials furnished in its construction,—finally resolved that the stockholders refuse to increase the capital stock of the company; that Eager, in making contracts for work done and materials furnished was acting for and on behalf of the company, and all contracts made by him were in fact made by the company; that the company acknowledge itself indebted to the persons, firms, and corporations contracting with Eager to the extent of $300,000, and that the same should be settled and paid by the directors in cash. These resolutions were referred to a committee, to make report thereon. At a subsequent meeting the committee reported that the statements in the resolutions that Eager was acting at all times for the Knoxville Southern Company in letting contracts and building the road were not true, but that Eager acted for himself, in

accordance with the contract of August 20, 1887, as an independent contractor. They found due to Eager, however, for extra work, $61,925, and for work done on the permanent line, $40,000, and also $300,000 full value of stock over and above the capital stock of $1,500,000. The committee reported that the company could not, under its charter, issue $300,000 of stock, and they therefore interviewed Eager, and suggested that he take stock in the consolidated company. This he declined to do. The committee reported that they could not agree with Eager as to the valuation of the stock, and that Eager suggested an arbitration on that question, to be left to the presidents of three of the largest banks in Knoxville, their valuation to be conclusive to both parties. At a subsequent meeting, three men,—Hood, Luttrell, and Fisher,—each of whom either had a personal interest as a lien claimant or represented such claimants, reported that their valuation of the $300,000 of stock was $270,000 in cash, whereupon the committee were instructed to settle with Eager upon the basis of their report and this arbitration. As a matter of fact undisputed, the stock of the Knoxville Southern Railroad Company was worthless at this time.

Subsequent to this report, all the lien claimants, except the complainants in the bill of McBee & Co., brought suits in the state courts of Tennessee against Eager as principal contractor and the company as garnishee, to establish a lien against the company on the indebtedness thus owing from the company to Eager, under the mechanic's lien law of Tennessee, passed in 1883. Judgments were allowed to go in favor of these lien claimants. Eager also recovered judgment against the company for $383,764, as due him under the contract. The chief and only evidence of the indebtedness of the Knoxville Southern Railroad Company to Eager in the suits against it as garnishee and in Eager's suit was the admission of this indebtedness as spread upon the minutes of the company in the manner above stated. The attorneys of the railroad company, employed by Bradley, president of the railroad, and one of the settling committee, agreed to the amounts due each plaintiff in these suits, and also to the amount due Eager, as admitted by the stockholders' meeting.

It should be said that when S. B. Luttrell, as the assignee and trustee of Eager for the benefit of his creditors, filed an intervening petition asking for distribution out of the proceeds of the sale of the Knoxville Southern Railroad Company to pay his judgment for $383,764, the Central Trust Company filed an answer defending against the same on the ground that it was obtained by fraud, and that in any event it was not binding on it as the mortgagee and trustee for the bondholders, because recovered in an action to which it was not a party. The company also filed a cross bill against Luttrell, trustee, and Eager, praying the court that the judgment might be set aside as a nullity, on the ground that the same was obtained by fraud and collusion. As already stated, the master reported that there was no actual indebtedness of the Knoxville Southern Railway Company to Eager, and that the judgment in favor of Eager against the railroad company was collusively and fraudulently obtained, and that the said judgment was not conclusive upon the Central Trust Company; but reported that the cross bill of the Central Trust Company, asking to have the judgment set aside, should be disallowed and dismissed.

Butler, Stillman & Hubbard, Henry B. Tompkins, and Tillman & Tillman, for appellant.

Washburn & Templeton, Greene & Shields, J. W. Caldwell, and Hood & Cates, for appellee.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court:

The Central Trust Company, after answering the bill of McBee & Co., challenged the jurisdiction of the circuit court to entertain

it, by a motion to dismiss, and the denial of its motion is one of its assignments of error. The jurisdiction was sustained by Judge Key in the court below on the ground that the bill was ancillary to the bill of the Central Trust Company against the Marietta & North Georgia Railway Company. It was said by him that, as the bill of the Central Trust Company prayed the court to take possession of and sell the property in which McBee and other lien claimants asserted an interest, and thus prevented the latter from pursuing their usual remedy against the property in the state courts, they must have the right to appeal to the federal court to save their rights and protect their interests, either by enjoining the trust company from proceeding under its bill, or by adjusting priorities between them and the trust company, even if the lien claimants, as between themselves and the Knoxville Southern Railroad Company, might not have had the requisite citizenship to entitle the court originally to take jurisdiction of McBee's bill as an independent bill in equity. We think this was a correct view of the law under the decisions both of the circuit and supreme courts of the United States. See Conwell v. Canal Co., 4 Biss. 195; Minnesota Co. v. St. Paul Co., 2 Wall. 609; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Pacific R. Co. v. Missouri Pac. Ry. Co., 1 McCrary, 647, 3 Fed. Rep. 772.

By the consolidation, McBee & Co. and the other lien claimants were put in the position of interveners in the original action brought by the Central Trust Company. Certainly, in that capacity, the circuit court for the eastern district of Tennessee would have jurisdiction to consider their claims. It comes with a bad grace from the Central Trust Company to object to the jurisdiction of the federal court to do equity to lien claimants in respect to property which by its own application has been taken into the custody of that court, and out of the reach of lien claimants, by ordinary process in the state courts. It is by no means clear that the bill of McBee & Co. could not be considered by the federal court as an independent bill; but, as the jurisdiction can be sustained on the ground already stated, it is unnecessary to consider the bill in this aspect.

The liens of the contractors and material men are asserted under an act of the legislature of Tennessee, passed March 29, 1883. The first section of the act provides that when a railroad company contracts with any person to construct or repair any part of its railroad, or to furnish material for such construction or repair, or to superintend the same, the person so contracted with shall have a lien for the amount of the debt thus contracted for and incurred, to continue in force for six months after the performance of the work or the delivery of the material, and until the termination of any suit commenced within the six months for its enforcement. The second section directs in what courts, how, and in what manner, the suit shall be brought to enforce the lien conferred in the first section. The third section of the act provides that when "any principal contractor [by which is meant one who contracts directly

with the railroad companies] shall refuse to pay any subcontractor, material man or other person employed by him to assist in the fulfillment of his contract, such subcontractor or other person may, by giving notice to the railway company of this fact, and the amount and value of the material and labor furnished, bind any amount (not exceeding the amount claimed) then due and owing from the company to the principal contractor, and the amount so claimed shall be a lien in favor of the claimant superior to all others, to continue ninety days from the service of such notice and until the termination of a suit begun within the ninety days to enforce it." Provision is made for the railway company to relieve itself, if sued by the principal contractor, by paying the amount claimed into court, where the contractor and subcontractor, duly summoned, shall try the issue between them. The claim provided in this section may be enforced by the subcontractor or other person by suit against the principal contractor as debtor and the railway company as garnishee. The fourth section makes provision for the employes of the subcontractors, and permits them, in a prescribed way, to acquire a lien on the debts due from the principal contractor to the subcontractor.

Under this law, the contractor must deal directly with the company to secure a lien for his work or material, or, if a subcontractor, then he can have no lien on the railroad, unless at the time that or after he serves notice of his claim upon the company the company shall owe money to his principal on the contract which his subcontract has helped to perform; and his lien is limited to the amount so due and owing to his principal. In other words, the security of the subcontractor is the balance due the principal contractor from the company when the company receives notice of the subcontractor's claim, and, after notice is given, the lien of the subcontractor is transferred from the balance due on the contract to the corpus of the railroad, pro tanto; but, if there is no balance due on service of the notice, there can be no lien.

In the consideration of the liens adjudicated below two questions, therefore, arise: First, did the lien claimant deal directly with the company, as principal contractor? Second. If the lien claimants were subcontractors under Eager as principal contractor, was there any sum due Eager, as such principal contractor, from the Knoxville Southern Railroad Company, after the company was notified by the subcontractors of their intention to claim liens?

1. The theory upon which the master and the learned court below held that all the intervening petitioners dealt directly with the Knoxville Southern Railroad Company as principal contractors was that Eager was an agent of the railroad company in making the contracts. One may be liable for the acts of another as his agent on one of two grounds: first, because by his conduct or statements he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such. The master reported to the court below that in no case did Eager, under or in the name of the Knoxville Southern Railroad

Company, make any contract with any one doing work or furnishing material for the road; that the men who contracted with Eager knew very little of Eager, saw him only occasionally, made no inquiry into his real relation to the company, what interest he had in it, or how he obtained money to carry on the work. In substance, the master reported that the intervening petitioners believed that they were dealing with Eager as principal contractor. The proof fully sustains this conclusion. All the estimates introduced in evidence upon which payments were made, bear the name of Eager as principal contractor, and every circumstance in the case rebuts the idea that the intervening petitioners either believed or had reason to believe that they were doing their work or furnishing their material to the company instead of to Eager. The most conclusive evidence on this point is that nearly every one of the intervening petitioners subsequently brought suit and recovered judgment on his claim in the state court against Eager as principal contractor and against the company as garnishee. It is said that this does not estop the lienholders from showing that Eager was actually the agent of the company, because Eager and the company had fraudulently misled them into thinking that there was no such relation of agency between him and the company. Conceding that no estoppel arises from the judgments, they have great probative force in establishing that neither Eager nor the company did anything or said anything from which the petitioners could infer the existence of the agency. Indeed, the very argument upon which the effect of the judgments as an estoppel against the present contention of the petitioners that Eager was the agent of the company, is sought to be explained away has for its premise that the petitioners had no reason to suppose that Eager was anything but the principal contractor, and were led to believe, both by him and the company, that no such agency existed.

It follows, necessarily, that Eager was not the agent of the company in contracting with the petitioners for the construction of the road, unless the company had in fact conferred authority upon him to act as its agent in the matter. An agency is created—authority is actually conferred—very much as a contract is made, i. e. by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them. Now, did the relation in fact exist? There certainly was a contract between Eager as an individual and the Knoxville Southern Railroad as a corporation, entered into before May, 1890, and probably much earlier,—certainly before any of the construction, lien claims for which are here involved, was contracted for,—in which Eager agreed to construct the road at a price of $20,000 in bonds and $20,000 in stock per mile, and other considerations. It is said

that this contract was a sham and a fraud, dated back nearly three years, to save the bondholders of the Marietta & North Georgia Railroad Company, and to cheat the petitioners out of their claims. The fact that the contract was signed by Arthur as vice president shows that it must have been executed some months after its date, because the date is August 20, 1887, and Arthur was not elected vice president until 1888. Moreover, it was during 1888, that the president reported to the stockholders that the work was progressing under the North Georgia Construction Company as contractor, instead of Eager. But the contract was spread on the minutes of the company in May, 1890, so that it must have been executed before that time. The evidence of one or two witnesses points to its existence before March or April of that year. All of the work and labor sued for below was contracted for by Eager after March, and substantially after May, 1890. Even if the reduction of the contract to writing was delayed until 1890, this by no means shows that there had not been before that time a verbal contract, the terms of which had been fully understood between the parties. All the circumstances point to the existence of such a contract. Eager was principal stockholder and president of the North Georgia Construction Company, which was referred to on the company's minutes as contractor in 1888; and Eager says that this company transferred its contract liabilities and rights to him. This is entirely consistent with the probabilities, and there is nothing in conflict with it. Now, whether the contract of the company was originally made with the Georgia Construction Company or Eager is immaterial in this discussion, if neither was the agent of the company, but was an independent contractor. The delay in the execution of the formal contract with Eager was doubtless due to the fact that, in the minds of the individuals whose duty it was to attend to it, the Marietta & North Georgia Railroad Company and the Knoxville Southern Railroad Company were the same enterprise, and Eager's contract with the former was supposed to cover his work on the latter road, just as the bonds and mortgage of the former were evidently supposed to be, in effect, the bonds and mortgage of the latter. There is not, however, anywhere in the proof, a single circumstance or statement that either the company or its directors intended, or that Eager intended, his relation to the company in constructing the road to be anything other than what he always said it was, and what the petitioners understood it to be,—that of principal contractor. The proof is undisputed that Eager received the bonds at the rate of $20,000 per mile of completed road from the trust company as contractor, and that he sold them as contractor, and this during the years from 1887 to 1890. He never accounted to either railroad company for the proceeds of the bonds. Neither company ever demanded such an account from him. He took them as his property,—as his compensation under a contract for work done. Such conduct is not to

be reconciled with his being an agent either in the work or in the negotiation of bonds.

We are clearly of the opinion, therefore, that the contract of August, 1887, whenever executed, correctly represents Eager's actual relation to the company in constructing its road. The contract was one out of which Eager hoped to make profit for himself. It is said that it is one of those contracts frequently condemned by the supreme court. This is true; but the vice of such contracts is not that they do not represent the real relation between the parties, but that they are contracts made by a corporation with one who exercises such an undue influence over the directors, by reason of his relation to them as principal stockholder or otherwise, that it is inequitable and unconscionable for him by such influence to secure individual profit to himself at the expense of the corporation and its other stockholders and bondholders. On this ground, the other stockholders or the bondholders or the corporation itself may call upon a court of equity to set aside the contract against the other party, but no third person can deny its legal existence so long as those who are parties to it do not object to it. It is manifestly absurd to say that the petitioners who supposed they were dealing with Eager as an individual were injured by a contract made by him with the company for his personal benefit and profit, on the ground that he unduly used his influence with the directors of the company to secure this advantage to himself. As they were not injured by it, they cannot complain of it.

The reasoning by which the master, and presumably the court below, reached the conclusion that Eager was the agent of the company, may be seen from the following passage in his report:

"Above it was said that the Knoxville Southern Railroad Company had only a formal existence because of Eager's ownership and control and direction of all its affairs and its officers and agents. This is true; but still in trying to discover and enforce the rights of the parties who may have dealt with said company and with Eager it is impossible to ignore the legal existence of said company. Eager's omnipotence was exercised through formal legal methods, and his power was derived from and based upon the large stock he held in the company, which he received as part pay for the building of the road. But this interest of Eager in the road, and his control of the company and all its officers and agents, made him its general agent,—its plenipotentiary; and whatsoever he did in the building of the road, whatever contracts he made, or were made by agents of his, for material or work for and upon said road, must be regarded as acts and contracts of the company itself, and binding upon it. He could not, by hiding his true relation to the company, shield the company from liability to those he dealt with, as soon as the facts were known that liability might be asserted."

We are wholly unable to concur with the foregoing. Whether Eager hid his true relation to the company depends on whether he was its contractor or its agent. He said he was its contractor, and nothing stated by the master shows otherwise. The corporation was a legal entity different from Eager, having its existence under the statutes of Tennessee, and governed by its directors

in accordance with the law of its creation. Its directors made a contract with Eager. They intended that to be a binding contract on the company. Eager intended it to be. The company, through its legal and authorized governors and agents, therefore, made a contract with Eager. There is no law which makes it impossible for a majority stockholder to enter into a contract with his company. Wright v. Railway Co., 117 U. S. 72, 95, 6 Sup. Ct. Rep. 697. As already explained, the company may appeal to a court of equity to set such contract aside, if it is unfair or unconscionable, for fraud or undue influence; but until this is done the contract expresses the true relation between the parties. The fact that a man has controlling influence with another does not make him that other's agent unless the other intends such relation to exist, or so acts as to lead third persons to believe that it exists. What is true between individuals is true between an individual and a corporation. In the case at bar the master fully admits that there was no holding out of agency in Eager by the company. His finding that an agency in fact existed rests simply on the influence which Eager had over the company, and not in any intention of either that Eager should act as its agent in the construction of the road; and his conclusion is reached in the face of the fact, which he fully admits, that they both intended Eager to be an independent contractor. The master's conclusion cannot be supported.

What has been said does not apply to McBee & Co. or to the co-complainants in their bill, or to the intervening petitioners, if any, who did not reduce their claims to judgment against Eager, for McBee and the others contend that they made their contracts directly with the Knoxville Southern Railroad Company, and refused to deal with Eager. The master made no express finding on this question. The evidence is conflicting. It was not necessary for the master, in the view he took of the case, to consider it. As the case must go back for other reasons, we shall not discuss this question of fact before it has passed under the consideration of the master, to whom it should be referred for report. Nor do our remarks apply to the four petitioners below who recovered judgments against the company for rights of way conveyed directly to the company. We think they are entitled to a lien for the purchase price, and that the decree in their favor should be affirmed.

2. The second question is whether there is anything due Eager, as principal contractor, from the company for constructing the road. If there is any balance due, then, under the act of 1883, already referred to, to the extent of that balance, the intervening petitioners have a lien on the corpus of the railroad and the proceeds of its sale. It is said on behalf of the petitioners that the indebtedness of the company to Eager is conclusively established as against the Central Trust Company by the judgment which Eager recovered against the Knoxville Southern Railway Company in the state court for about $383,764. The master reported that this judg-

ment had been fraudulently and collusively obtained, as averred in the answer and cross bill of the Central Trust Company, and that nothing was due Eager. An examination of the evidence, especially of the minutes of the Knoxville Southern Company, leaves no doubt that the judgment was the result of a conspiracy between Eager, the representatives of certain of the intervening petitioners, and the pliant officers of the Knoxville Southern Railroad Company, to place upon the minutes of that company an acknowledgment of an indebtedness to Eager of a sum sufficient to pay all the intervening petitioners out of the corpus of the road, and a surplus to Eager, although no such indebtedness in fact existed. However meritorious the claims of the petitioners against Eager as principal contractor, it was a manifest fraud for Eager, Bradley, Hood, and others using Eager's controlling voice among the stockholders, to make an admission for the company of its indebtedness to Eager that was false to the knowledge of every one taking part in it. One thing done in the scheme is enough to characterize the whole transaction. By the contract Eager was entitled to $20,000 of stock a mile for 90 miles. The capital stock of the company was only $1,500,000. This left $300,000 of stock which the company could not deliver except by increasing the stock to $1,800,000. Its charter gave the company full power to do so. Eager refused to permit this to be done, and refused to accept $300,000 of stock of the consolidated company about to be formed. The committee reported, in the face of the plain words of the charter, that the company had no power to increase its stock. It was then solemnly decided to refer the question of the amount due to Eager, in lieu of this stock, to three arbitrators, who were all of them interested and active in securing payment of the subcontractors' claims against Eager. They reported that they had concluded to fix the amount due, in lieu of $300,000 of stock, at $275,000. It is undisputed that at that time the stock was worthless, and that the road was insolvent. Eager had 11,505 shares of a total of 15,000 at that time. What pecuniary advantage could it have been to him to have received 3,000 shares more in an insolvent corporation of which he already had nearly three-fourths of the capital stock? The arbitrators' report Eager and other stockholders accepted as proper, and directed the company's officers to settle with Eager on this adjudication, and the previous report of the stockholders' committee that he was entitled to about $100,000 for extras. The officers of the company followed the directions of this vote of the stockholders, employed counsel, who appeared in all the suits brought by Eager and his subcontractors, and admitted the indebtedness of Eager to be as voted by Eager and his fellow stockholders at the meetings above referred to. No court of equity would allow judgments thus obtained to have any evidential effect against one whose interest in the property of the railroad company vested before the action of the stockholders' meeting so that his rights were prejudicially affected thereby. Freem. Judgm. (4th Ed.) § 250.

We are thus brought to the question whether the Central Trust Company had any interest in the property of the Knoxville Southern which entitled it to object to and dispute the amount and validity of the judgments of Eager and the other petitioners establishing liens against the road. The mortgage of January, 1887, did not secure to the mortgagee therein any title to the railroad in Tennessee, because the Marietta & North Georgia Railroad Company, a corporation of Georgia, is not shown to have had any power under the laws of Tennessee or of Georgia to mortgage after-acquired railroad property in Tennessee. The mortgage bonds under that mortgage, however, were given to the contractor of the Knoxville Southern Railroad Company by the Marietta & North Georgia Railroad as his compensation for building the road, which both companies intended should ultimately become a part of the railroad of the Marietta & North Georgia Company. The Knoxville Southern Railroad Company agreed with its contractor, who negotiated the bonds for the purpose stated, that it would give a mortgage on its road to secure those bonds. The Knoxville Southern Railroad Company had power under its charter to issue bonds and mortgage its railroad to secure them. It would be yielding to a mere technicality to say that it could not, under such a power, mortgage its road to secure the bonds issued to build its road, simply because the bonds were issued in the name of some other company. The debt was really the debt of the Knoxville Southern Railroad Company, and the bonds represented the debt. When the Knoxville Southern Company agreed with Eager to give a mortgage to the Central Trust Company to secure the bonds used by him in building its road to the extent of $20,000 a mile, it did what it had the right and power to do, and what it was its duty to do. This agreement created an equitable mortgage upon the Knoxville Southern Railroad Company as old as the contract between Eager and it, of which it was a part. The contract goes back by its date to August, 1887, and by the evidence at least to March or April, 1890. It is said that the mortgage executed in July, 1890, in accordance with the agreement with Eager, was defective, for the reason that the meeting of stockholders at which it was authorized was not called by advertisements in a newspaper at Knoxville, Nashville, and Memphis, as required by statute. The mortgage was approved by all but two shares out of a total of nearly 12,000 shares of stock. We shall not stop to consider this objection. It is enough to say that the resolution of May 20, 1890, and the mortgage, whether defectively executed or not, gave the Central Trust Company, representing the bondholders, an equitable lien on and interest in the railroad of the Knoxville Southern. Some point is made that the road as described in the 1887 mortgage is not the same as the one which was built, but we do not regard this as material. The language of the granting clause of the mortgage is ample to include any extension of the Marietta & North Georgia Railroad Company, as the Knoxville Southern in fact was. Nor do we think there is any difficulty in the description in the mortgage

of July, 1890. It identified the road intended to be mortgaged beyond dispute, and nothing else is needed in a description. It granted all the property of the company "in and to any railway now completed, or hereafter completed, from any point in or near Knoxville, Tennessee, or elsewhere, to a connection with the Marietta and North Georgia Railway Company, together with such other main and branch lines or extensions of said railway as the company may be authorized to construct, or which it shall construct." This description can only apply to the Knoxville Southern Railroad as built, and it sufficiently describes that. If the Central Trust Company acquired an equitable lien and interest in the property of the Knoxville Southern Railroad Company as early as March or April of 1890, then it certainly will be protected in a court of equity against fraudulent and collusive judgments establishing prior liens upon the property rendered long subsequent to the time when it acquired its interest. It was held in the case of Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. Rep. 590, that a judgment in a state court against a railway company, recovered in accordance with a statute securing a contractor's lien thereon, was not even prima facie evidence in a foreclosure suit against the mortgagee, because the statute under which the lien was recovered made no provision for such a general notice as to give it validity as a proceeding in rem. It was there held that it was essential to a proceeding in rem that there should at least be constructive notice by some form of publication or advertisement to adverse claimants to appear and maintain their rights. As in the Texas statute, so in the Tennessee statute applicable to this case, no notice, either personal or constructive, to other than the parties, was provided for. If the judgments, therefore, against the Knoxville Southern Railroad Company are to be taken simply as judgments in personam, it would seem to follow that the Central Trust Company was not bound by the findings and conclusions thereof, unless it was privy to the Knoxville Southern Railroad Company at the time the judgments were rendered. Freem. Judgm. § 154.

It is said, however, that as the interest of the Central Trust Company was only an equitable one, and the Knoxville Southern Railroad Company represented the legal title, the trust company is bound by the judgments as privy to the railroad company. Whether this distinction can be supported we need not determine. We do not rest our conclusion as to the effect of these state court judgments upon the principle laid down in Hassall v. Wilcox, but rather on the actual fraud and conspiracy of the officers and stockholders of the railroad, instigated and connived at by Eager and the representatives of the intervening petitioners in allowing such judgments to go against the company in order to defeat the equitable claim of the Central Trust Company, and to obtain an unlawful priority over it.

It is objected to the mortgage of July, 1890, that it was a preference of one creditor by an insolvent corporation, and therefore void under the law of Tennessee. If the intervening petitioners below

have any claim at all against the Knoxville Southern Railroad Company, their claim is a lien prior in right to that of the Central Trust Company, and therefore they are not injured by the mortgage. If they have no claim against the Knoxville Southern Railroad Company, then they certainly cannot object to any disposition which that company may make of its property. There are no general creditors in this case entitled to make this objection to the mortgage. The only general creditor of the Knoxville Southern Railway in the whole case is the Mechanics' National Bank for $3,000 on a draft discounted after the mortgage was given. It cannot object to previous conveyances by its debtor to secure a valid debt.

With reference to the question whether there was any indebtedness of the company to Eager or not, we have examined the record with care. The committee of stockholders reported that there was $100,000 or more due for extras, in addition to the $275,000 already alluded to. As this was the committee which took part in the fraudulent settlement already alluded to, the evidential weight of their report is not considerable. The amount due, if any, depends upon the exact terms and requirements of the contract between Eager and the company. That refers to certain specifications, which are not set forth in the record. The view which the master took below of the relation existing between Eager and the company enabled him to reach the conclusion that the intervening petitioners were entitled to liens against the company without regard to the indebtedness of the company to Eager. We do not think that the question of the company's actual indebtedness to Eager was as fully presented on the evidence, or as fully considered by the master, as the importance of the issue, under our view of the relations of the parties, requires. For that reason we do not pass upon it, but remand the case to the court below, with instructions to refer the question of the indebtedness of the company to Eager to the master for further consideration and report, with leave to all parties in interest to adduce such further evidence as they may desire.

We have thus far considered this case in the light of the provisions of the act of 1883. Under that act we conclude that the intervening petitioners can only claim as subcontractors, and have no lien against the railway company, unless they can establish an existing indebtedness on the principal contract from the company to Eager, and then only to the extent of that indebtedness. There are two other acts of the legislature of Tennessee to which reference has been made by counsel for the appellees, and upon which reliance was had by the master and the court below. They deserve notice here. The first act was approved February 24, 1873, (Acts 1873, p. 8, c. 8,) and gave authority to certain railway companies of the state to issue consolidated or income bonds, and to mortgage their property to secure the same for the purpose of paying off their indebtedness. Section 5 of the act provided that the provisions of the act should in no way impair any lien or mortgage or priorities

of lien that the state of Tennessee, or any individual, or any corporation, had upon any of said railroad companies, or upon the property of such companies, and contained a proviso also that no such mortgage should bar any judgment against any "such" railroads for work or labor done, or damages done to person or property. The other act was passed in 1877, (chapter 72, p. 92,) to amend the law in relation to the consolidation of railways, and contained this proviso at the end of section three:

"Provided further, that no railway company shall have power under this act, or any of the laws of this state, to give or execute any mortgage, or other kind of lien, on its railway property in this state, which shall be valid and binding against judgments and decrees, and executions issued therefrom, for timbers furnished and work and labor done on, or for damages done to persons or property in the operation of its railroad in this state."

The effect of this proviso was considered by the supreme court of Tennessee in a learned and convincing opinion by Judge Lurton in Frazier v. Railway Co., 88 Tenn. 138, 12 S. W. Rep. 537. It was there decided that the proviso applied to all railroads of the state, and had not been repealed by a general act in 1881, authorizing railroad companies to issue mortgages; that the legislature had the right to impose the limitation as a condition precedent to the exercise by the companies charged with public functions of the power to mortgage all their property. The case there considered was a suit to fasten as a lien upon the property of the East Tennessee, Virginia & Georgia Railroad Company a judgment for damages sustained by the plaintiff from the operation of the same road when it was owned by a railway company against whom a mortgage had since been foreclosed, and from whom title had passed to the defendant. It was held that the lien was valid and binding, under the act of 1877, upon the road in the hands of the purchaser.

We do not think that these acts, or the principles announced in Frazier v. Railway Co., have application to the case at bar. The judgments, decrees, and executions for timbers furnished and work and labor done on, or for damages done to person or property in the operation of, its railroad, referred to in the act, are judgments, decrees, and executions against the railway company; and therefore the timber furnished and the work and labor done must be so furnished and done that under the laws of Tennessee the company would be liable to pay for them to the contractor or material man. If, as we have found, under the act of 1883, the subcontractor or material man had no claim against the company except after notice, and then only for the balance due the principal contractor, a judgment or decree could not be properly rendered against the company in favor of a subcontractor if no balance was due the principal contractor. If, however, such a judgment is obtained by a fraudulent statement of that balance, the statute of 1877 was clearly not intended to prevent a court of equity from disregarding it, and examining the evidence, and determining therefrom whether any balance in fact existed. It is obvious, therefore, that under the circumstances of this case the acts of 1873 and 1877 add nothing to the force of the act of 1883.

We have considered the validity of the mortgages under which the Central Trust Company claims, and the right which the Central Trust Company derives therefrom, only for the purpose of determining that it has a sufficient interest in the property to give it a standing in this cause to object to the validity and enforcement of the claims of the intervening petitioners against the property of the Knoxville Southern Railroad Company. The right of the company, as the mortgagee under the Knoxville Southern mortgage, to have the property sold, cannot be contested by the intervening petitioners, unless they have themselves an interest in the property; that is, unless they have a lien under the act of 1883. If they have a lien under the act of 1883, it is indisputably prior to the rights of the mortgagee, the Central Trust Company; and after the sale of the road, which they pray, and which is also prayed by the Central Trust Company, their liens, if any exist, should be satisfied before the Central Trust Company receives any of the proceeds. If they have no lien upon the road, then it is immaterial to them what the exact right of the Central Trust Company is, and they cannot object to the equitable relief which has been accorded to the Central Trust Company by the decrees pro confesso against the Knoxville Southern Railroad Company and the Marietta & North Georgia Railroad Company, namely, of the foreclosure of the mortgage, sale of the road, and distribution of the proceeds. It follows, therefore, that after the payments of the liens which are found to be valid against the railway company in favor of the intervening petitioners, the proceeds must go to the Central Trust Company upon its mortgage.

These views render it unnecessary for us to consider the consolidation of the Knoxville Southern Railroad Company and the Marietta & North Georgia Railroad Company, its validity or its effect.

The decree is reversed, with instructions to the court below to take such further proceedings as shall be in accordance with this opinion.

Cross Appeals.

A number of lien claimants filed cross appeals. One of them, the Mechanics' National Bank of Knoxville, sought to have a lien declared in its favor for three drafts. The first, for $2,000, was drawn by George R. Eager in favor of the North Georgia Construction Company upon H. A. Eager, treasurer, Herald Building, Boston, Mass., and was indorsed by the construction company, by George R. Eager, president. No liability appears on this draft against the Knoxville Southern Railroad Company, and no reason is shown why recovery should be had against that company thereon. The third draft, for $2,535, was drawn by George R. Eager to the order of the North Georgia Construction Company upon H. A. Eager, treasurer, Herald Building, Boston, Mass., and indorsed by the North Georgia Construction Company, by George R. Eager, president. There is nothing upon the face of this draft, and noth-

ing in the evidence, to indicate that this is an obligation of the Knoxville Southern Railroad Company. The two foregoing drafts are within the class of debts already referred to in the opinion, made with Eager as contractor and an individual, but held by the master to be debts of the company, on the ground that he was acting as agent for the company. The second draft, for $3,000, was drawn by the Knoxville Southern Railroad Company, by Melvin R. Gay, treasurer, in favor of itself, on the North Georgia Construction Company, Herald Building, Boston, Mass. It was accepted by the improvement company, by H. A. Eager, treasurer, and indorsed by the Knoxville Southern Railroad Company, by Melvin R. Gay, treasurer, and George R. Eager, president. This draft was duly protested, and entitled the holder to a judgment against the Knoxville Southern Railroad Company as an indorser. The fact that the money on the draft was deposited to the credit of Eager, and was used by him to pay for labor and material in the construction of the road, cannot by any theory of law give to the holder of the draft a lien under the act of 1883. It makes the holder simply a general creditor of the company, and entitled to share in the proceeds after those who have liens upon the property shall have been paid, if any surplus remains. The appeal of the Mechanics' National Bank is therefore dismissed.

The appeal of the State National Bank is also dismissed, for the reasons that the drafts upon which it sought to have a lien adjudged to it against the Knoxville Southern Railroad Company show that they were drafts drawn by George R. Eager and accepted by H. A. Eager, and did not have upon them any indorsements or acceptance of the Knoxville Southern Railroad Company. They are not, therefore, claims against the railroad company, and the appeal of their holder, the State National Bank, is dismissed.

We have considered all the other assignments of error that have been brought to our attention. There are some general assignments of error based on exceptions which appear in the record, but which are not referred to in the briefs of counsel, and which, in such a voluminous record, it is not possible for us to consider without having our attention called to them specifically, in accordance with the rule requiring that assignments of error shall fully point out the action of the court objected to. For these reasons the cross appeals are all dismissed.

HOLLADAY et al. v. LAND & RIVER IMP. CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 58.

PARTNERSHIP—SETTLEMENT—EQUITY—LACHES.

After the death of one of two copartners engaged in land speculation, a settlement of the copartnership affairs, which had been begun during the lifetime of the deceased partner, was consummated by his executor and the surviving partner, and a deed of the land given by the executor to the surviving partner. The executor had been the confidential agent of the

deceased partner for years, and was especially charged in the will with the duty of settling up the deceased partner's affairs. *Held* that, in the absence of proof of actual fraud, the settlement thus made was conclusive on the heirs and devisees of the deceased partner, when attacked for the first time nearly 24 years after the settlement, and after the executor and the surviving partner were both dead, and all books and papers relating to the partnership affairs had been destroyed. Woods, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

In Equity. Suit by the Land & River Improvement Company against Lavinia H. Holladay and others to quiet title to certain lands. Decree for complainant. Defendants appeal. Affirmed.

Statement by FULLER, Circuit Justice:

The Land & River Improvement Company, a corporation organized under the laws of New Jersey, filed its bill of complaint in the United States circuit court for the western district of Wisconsin on the 4th day of September, A. D. 1890, to quiet title to lots 1 and 2, and the S. W. ¼ of the N. E. ¼ of section 14, in township 49, range 14 W., in the county of Douglas and state of Wisconsin, containing 113.80 acres, against Lavinia H. Holladay, Jesse Holladay, Minnesota E. Tytus, John B. Tytus, Charlotte E. Webb, William F. Webb, and George W. Ewing, the heirs and legal representatives of George W. Ewing, deceased. The bill set up a partnership for dealing in real estate between Madison Sweetser and George W. Ewing and claimed the entire interest in the lands in controversy, under Madison Sweetser, through a settlement with the executors of George W. Ewing, in pursuance of which a deed of Ewing's interest therein was given by them to Sweetser, dated December 11, 1866. The answer admitted the partnership, but asserted title to an undivided one-half interest in the real estate; it being contended that the deed of December 11, 1866, was unauthorized, fraudulent, and void. By stipulation, it was agreed that defendants might have the same relief upon their answer as if they had filed a cross bill.

The original agreement between George W. Ewing and Madison Sweetser bore date May 25, 1855, and read as in the foot-note.[1]

[1] Whereas, the said Madison Sweetser has, as shown by his statement dated the 21st inst., and hereunto attached, contracted for and partially secured the right and title and ownership of certain half-breed Sioux Indian lands, and also hopes and expects to secure the right, title, and ownership, by pre-emption or squatter or claim title and otherwise, to certain other lands at Traverse des Sioux, and at other points and places within the territory of Minnesota, and in other states and territories; and whereas, the said Sweetser is desirous of securing the co-operation and advice and assistance of the said George W. Ewing, party of the second part aforesaid, in consummating and securing said purchase of lands, lots, etc., now partially secured, and which he may hereafter secure, directly or indirectly:

Now, then, therefore, be it known that we, the said Madison Sweetser, party of the first part, and the said George W. Ewing, party of the second part hereto, do and have, this day and by these presents, entered into this agreement for the purpose of making and consummating said purchases and said claims, and of such other lands and lots as they may deem it advisable to purchase and secure in said territory of Minnesota and elsewhere. The said Sweetser will spend most of his time up in Minnesota territory, and will give this land business his personal attention; this being deemed important and necessary in effecting purchases from half-breeds and others, and also in perfecting the claims which he has or may hereafter make or purchase or trade for, or otherwise procure, from or through other persons. And more especially is it important and necessary that the said Sweetser shall watch closely, and give his personal attention to securing and consummating and perfecting the title to the lands and lots now and hereafter to be claimed by him at and near the town of Traverse des Sioux, in Nicollet county, in the territory of Minnesota, and also the claim made at Swan lake, in said territory. These said claims and purchases, and any and all other claims and purchases, or rights or titles, obtained, procured, and to be procured hereafter, by the said Sweetser, either directly or indirectly, whether in his own name or in the name of the said Ewing, or of any other person or persons, are all to belong, jointly and equally, to the said Madison Sweetser and to the said George W. Ewing, each to own and to have

The statement attached was dated May 21, 1855, and signed by Sweetser, who therein asserted: "In the treaty with the Sioux of July 15, 1830, and ratified February 24, 1831, provision is made for the half-breeds of said Indians in article 9; for a tract of country, say thirty-six miles long by fifteen wide, containing say 540 sections or 551,640 acres of land. I now control five miles, or the interests of five half-breeds, to wit, A. J. Campbell, Scott Campbell, Batrice Campbell, Rosaline Campbell, and Hyppolite Campbell, &c., &c."

the one equal half thereof, and they are to be so held in trust one for the other. And upon request the titles are to be made so (one to the other, as the case may be) by executing proper deeds or other bonds or conveyances, or, if held for joint and mutual benefit, then the party holding any such title, shall, upon request, give and make to the other the proper and necessary declaration of trust, fully stating that fact. This may be desired where the said parties mutually agree to sell, or hold for sale, any particular tract or part of tract. Where they do not agree to sell, then the titles shall be made equal half to each, in the way and manner hereinbefore provided.

This agreement for purchasing and securing lands for joint account through the personal attention of the said Sweetser is to continue for three years, unless sooner discontinued by mutual agreement of the parties. It is believed that $3,000 will be all that will be required to enable the said parties to secure what joint lands they now have in view. If, however, they find it profitable, and they are able to do so, and willing, they can increase the aggregate amount of their joint purchases and joint investments. Each party is to advance his equal half of the funds necessary to make their joint purchases contemplated by this agreement; and, should the said Ewing advance more than the said Sweetser does, then and in that case the said Sweetser will have to reimburse him the one-half thereof, with interest thereon. If found advisable, some of the lands and property thus jointly procured may (both parties consenting thereto) be sold, and the proceeds be equally divided, or again reinvested in lands or town property on joint account. The funds advanced by either party for making any of these said joint purchases, or for defraying necessary expenses, etc., shall in all cases be refunded to the party advancing the same, with interest thereon, as soon as the same can be realized from sales of any of the joint property.

The said Sweetser to open and keep a set of joint land books, and keep regular accounts showing all proper expenses and costs of making purchases, securing claims, etc., and he will take necessary vouchers for all moneys, etc., paid out for and on account of this said joint property, real-estate business, where the amount exceeds say $20, all of which he is to report and submit to the said Ewing for his examination, and whenever called on so to do; and, also, he is to report to the said Ewing, from time to time, each and every purchase, when and as made, showing what it is, its cost, description, and what the title is, how derived and how held, etc., and that the same is for and on account of this said joint land business. At the expiration of this said agreement, or before,—that is to say, when it is discontinued, and brought to a final close,—then, if not done before, all the debts due from the joint concern to either the said Sweetser or the said Ewing, or to any other person, must be settled and paid; and then the lands, lots, or other joint property, and any and all moneys or notes or bonds or other things, belonging to the said joint real-estate business, must be equally and fairly divided between the said Sweetser and the said Ewing, each to have and own the equal one-half thereof.

It is understood that the said Ewing is not expected to give their joint land business any of his personal attention in Minnesota territory, or where any of the said joint purchases may be made, (as this part of the business is to devolve on said Sweetser;) but the said Ewing is to aid by advising and corresponding with said Sweetser, when called on so to do, and he is to assist in anything that may require attention at Washington city, or elsewhere where he may be, so far as it may be in his power so to do. And it is expected that the said Sweetser and the said Ewing will consult and correspond fully and freely in relation to all they do in this joint land-purchasing business.

All necessary expenses incurred by either party in attending to this joint business shall be mutually borne and paid by them jointly, and, of all these and all other outlays and expenditures, the parties are to keep correct accounts and make full exhibits, one to the other, upon request.

If the title to any joint property procured under this agreement shall be in the name of Madison Sweetser aforesaid, or George W. Ewing aforesaid, the same shall be held in trust by the one holding it, and half of the same shall belong to the other; and, if any titles shall be in the name of any other person or persons, it is to be for the said Ewing & Sweetser and in trust for them, and the half thereof to be surrendered and made over to either, upon request from them or either of them, or from their legal representatives.

And it is further agreed that the said Madison Sweetser is to have and be allowed for his said personal services and attention to this said joint land business a salary of $600 per annum, to be taken from the joint funds, so that said Ewing will pay the one-half thereof, or $300 per annum, as his part of said salary.

August 12, 1857, a supplemental agreement was executed by Sweetser and Ewing, as given below.[2]

[2]The purchases and arrangements and negotiations for purchases, and interests, made and making and in contemplation by the said Madison Sweetser, under our said annexed agreement, being larger and more extended than was at first contemplated, and the said George W. Ewing having advanced to said Sweetser, in all, a much larger amount of money than it was first supposed would be needed, (the amount so furnished, up to this date, being eight thousand dollars, or more, as said Sweetser's several receipts to him therefor will show,) and the said Ewing may (if needed, and he feels willing hereafter to do so) advance some more money, and as some of the half-breed lands and town-site property already purchased have been and can and may be sold by the said Sweetser, if deemed advisable, and thereby add to our cash means, it is now thought advisable, and agreed to between us, that the said Sweetser shall continue to extend and add to our said joint land and town property purchases, either by increasing our shares and interests, direct and indirect, in town sites, or in the Dakota or other land companies and associations formed or forming here or elsewhere for the purpose of securing lands and town sites in this territory and elsewhere, by making settlements thereon, or by pre-empting, or by claiming under the general town law or under licenses to trade with Indians, or by laying on half-breed Sioux Indian land scrip upon the government lands, or in any other way or manner deemed most advisable to secure the same, or any shares or interest therein. And it may be well to purchase a few more of the said half-breed Sioux land scrip, or to purchase lands or town property, in some way, so far as the joint means within said Sweetser's hands now or hereafter may enable him to do, and in this way prudently to extend and add to our joint real-estate interests under our existing agreement, which the said Sweetser can do with the concurrence of the said Ewing.

The joint Wabasha interest, our large interest at and near Traverse des Sioux, Swan lake, and half-breed Sioux Indian land, and town sites and lands, thus far secured and contracted for (under our agreement) by said Sweetser, it is hoped, will result favorably; and the said Sweetser is to aim to perfect, as fast as practicable, our titles thereto. He is to cause our land scrip to be located to the best advantage, and, when necessary to accomplish this, he can sell an interest in a part, say one-half, at say five dollars per acre, on like terms as he is about arranging with Messrs. Gilman and Wait. Our Wabasha interest is believed to be, prospectively, quite valuable, and this is to be carefully looked after, in order to enable said Sweetser to consummate all of said purchases, and the titles thereto, and also such other purchases as he may make, and to secure other landed and town-site interests as herein, and under our original agreement, are contemplated. It is agreed to continue and extend our agreement two years longer, which will make it terminate on the 25th day of May, eighteen hundred and sixty, (1860,) unless the same should be previously discontinued by consent and agreements between the parties, or by the death of one or both of them. And for all the time this agreement shall continue in force from and after the 25th day of May, A. D. 1858, the said Sweetser is to be allowed for his services at the rate of ten hundred dollars per annum, instead of six hundred dollars, which is his salary under the original agreement, and payable in the same way and manner. As the said George W. Ewing is not expected to be the resident or acting partner under this joint real-estate agreement, nothing herein contained shall be so construed to preclude or prevent him at any time, should he desire to do so, from purchasing real estate for himself or for other persons with his own or their funds, within this (Minnesota) territory or elsewhere, during the existence of this agreement, but in doing so he would not, of course, interfere with any purchases which the said Sweetser might desire to make for the joint interest under this agreement; and, should the said Sweetser desire to purchase some residence property for himself with his own individual funds, he can do so, not interfering with purchases made for joint account. Should either or both of the parties to this agreement die before the business under it is finally closed up, it is believed and intended to have it so full, plain, and explicit that their legal representatives could go on and close it up fairly, and carry out our intentions, as meant and intended by us, in good faith, which is to say that half of all the profit or gains, either in property or money, or whatever may be remaining on hand, (after the joint debts are paid, and all moneys advanced by either are paid back with,) shall belong to each, and shall be so made over promptly and in good faith. Most, and perhaps all, of the titles, agreements, obligations, growing up in this business, will be made in the name of Madison Sweetser, the acting partner. These he will hold in trust for himself and for said Ewing, or his legal representatives or assigns, all of which he is to surrender and make over upon request, as stipulated and provided in this agreement. Said Sweetser being a resident and active party in this real-estate business, it is thought best that the titles and other papers shall be made to him, and in his name, to facilitate the transaction of the business. In all large and important transactions of either purchases or sales, the said Ewing is to be first consulted, and his consent obtained, before making the same, unless where there is an emergency, and it would be unsafe to defer it for this purpose.

March 3, 1860, the lands in controversy, the legal title to which was in Hyppolite Campbell, were conveyed to Ewing by Sweetser under power of attorney from Campbell. July 28, 1860, Ewing attached to certain lists of lands, including those in controversy, the following memorandum under his hand and seal, witnessed by William Lytle and B. D. Miner, and acknowledged that day before Lytle as notary public: "The foregoing described lands and real estate, lying in the states of Minnesota and Wisconsin, were acquired by Madison Sweetser as per agreement between him and myself dated 25th of May, 1855, and the subsequent amendments thereto; and they are now deeded to me by said Sweetser in trust for himself and me jointly, subject to all the conditions contained in said agreement and amendments thereto."

During the latter part of 1865 and the early part of 1866, Mr. Ewing seems to have been urging Sweetser for a full settlement of all their transactions. January 7, 1866, Sweetser wrote Ewing a letter, in which he said: "You propose to sell me your interest in our landed operations under our agreement for original cost and interest. I now accept your proposition, and will be ready as soon as time will permit us to examine the matter, and determine the amount. With this view, I wish you would have Mr. Lytle prepare a statement of account, including only such as properly belong to expenditures for real estate."

January 30, 1866, B. D. Miner, acting as the agent for Ewing, wrote to Sweetser, stating that Col. Ewing continues in ill health, and "is very anxious to close out all business affairs with you and all others; and, with this view, he has fully empowered me to arrange his affairs so as to make full and complete settlements of all his unsettled affairs. Acting under this authority, I now propose that he shall quitclaim to you all of the interests he may have acquired by conveyances made to him by you, as attorney for other parties, of lands in Minnesota and Wisconsin, described as follows, to wit, [then follows a list of lands, not including those in controversy,] at and for such sum as may be agreed on between you and I. You will therefore, if you wish this matter settled, state what you will give in cash down, or on short time with approved security, for such quitclaim. You, better than any one else, know what the property is worth. This complicated matter must be adjusted in some way or other, and I am determined that we will be rid of the annoyance and perplexity attending it, and have already, according to previous notice to you, ceased paying taxes. If you make such a proposition as is acceptable, I shall require of you the surrender of the declaration of trust, and the canceling of the original agreements and amendments, and a release from all further claims against Colonel Ewing on account of the same, so that we may be relieved from all further trouble, litigation, or expense in relation thereto. If you make such a proposition as may be acceptable, the proceeds, when and as paid to me, will be used to refund to Colonel Ewing, as far as it may reach, the large amount of money which he has furnished you, from time to time, to be invested in that country. This proposal to be good for 30 days, and no longer."

By letter of February 8, 1866, Sweetser withdrew the offer contained in the letter of January 7th, and, referring to the fact that it had been stated by Miner and Ewing that, by their operations, Ewing and Sweetser had failed to acquire title to any property, said: "I accept that as the conditions of that concern, with the remark that this result has been reached by refusal to carry into effect the written and implied agreements to furnish means. * * * If you will make me a proposition what Mr. Ewing will take for all interest acquired, whether personal or real, by Ewing and Sweetser, I will then consider the matter. * * * If neglected much longer, all will be lost. Remember, I do not propose to purchase a release of the lands alone mentioned in your schedule. I mean all acquired by Ewing and Sweetser, whether in his or my name. You should know that I know what they are, and, when you furnish me another list, let it be a correct one. You understand me; to make your proposition for all your interest; and let your communications be confined to business, if you expect them to receive attention."

A letter from Sweetser to Ewing followed on the 17th of March, in which he protests that the letter from Miner of the 30th of January does not give a schedule of all their joint property, and says: "I understand you desired to get rid of all our matters. This is the only way I can conceive to settle the matter. Do you desire to sell or purchase all our interests? If so, what will you take, or what will you give? I will be prepared in the spring to close the matter in some form. I cannot consent it shall rest as at present. I cannot afford to give my time and furnish money to pay the expenses for taking care of the property. If there is no other way, the property must be sold to pay the debts; but I will either purchase or sell, and arrange the matter to relieve you of further trouble. It strikes me we should be able to do this, in and of ourselves. With this view, will you have a full and complete account made of your expenditures in our joint interest, and forward the same to me? * * * I propose to sell all, or purchase all; not a part. Close at once all interests, for we have been quite long enough joint owners, and I understand this to be your wish. At least, you have so stated repeatedly. * * * Let us, in good faith, close."

March 26, 1866, Ewing wrote to Sweetser, (the letter being in the handwriting of William Lytle, but signed by Ewing,) saying: "Under my special direction, Mr. Miner, my general business agent, on the 30th of January last, made you a written proposal in reference to the affairs of Ewing and Sweetser in relation to lands in Wisconsin and Minnesota. He has not assumed any authority not vested in him. The list of property furnished therein was full and complete, except as to that then and now in litigation. You were requested to affix to each tract such a price as you were willing to pay therefor. This was done at your suggestion, as you have frequently stated to me that you desire to purchase my interests. I know of no better way for you to acquire my interest. The offer of the 30th of January last, above referred to, was made in good faith, and I expected that you would affix to the descriptions such prices as you would pay for them, if they are of any value. I have already notified you that I will not furnish any more money to be used in any manner connected with that real-estate business. I have furnished you with a large sum of money, and have had no returns. The title to the lands described in the schedule furnished you on the 30th of January last, by you put in, are mainly worthless. Where the titles are not worthless, the property is. This is the condition in which I find myself, after having expended so large an amount of money. I now ask you to take back your titles, and surrender to me the declaration and agreements between us in relation thereto. You can have your titles at your own price, and on your own terms. What remains, not included in the schedule, can be settled hereafter. I have determined to rid myself of all mixed interests, and with this view I made you the offer of the 30th of January last, which I now renew. If not arranged within the next sixty days, I shall sell the property for whatsoever it will bring, and apply the proceeds to the payment of the debts of the concern."

March 30, 1866, Sweetser wrote to Ewing and Miner that he had had an interview with a gentleman from New York on the subject of purchasing Mr. Ewing's interest in the affairs of Ewing & Sweetser; that he supposed Mr. Ewing proposed, in good faith, to sell his interest at cost and interest, to save his advances, which might be lost unless protected, "which he declines aiding to do to save his interests, as well as to protect, to some extent, my labor and advances. I have been trying to protect all by a sale, with the promise to further labor, if the sale should be made, to develop the property. This is a matter of business, and not favor. Do you still desire to sell? And, if so, I am authorized to offer you your entire advancement, with the interest; to pay you $5,000 in hand; notes, with interest, and bond and mortgage, for payment of the balance, with such payment as you may agree upon. I can, by sacrifice, make this arrangement. Do you accept? I am prepared to make any sacrifice to close this whole matter. The gentlemen gave me 15 days for answer."

On the 6th of April, Sweetser wrote Miner that he desired to purchase all of Ewing's interest, not a part; but, referring to the letter of January

30th, he would say that he would give Ewing $100 for all the property mentioned in the list of that date. On the same day, and in answer to a letter from Miner, Sweetser wrote, "I am not able, if I were disposed, to make the purchase; but since I came east I have given the subject my attention, to carry out what Mr. E. said he was desirous of doing, and what I said I would do, i. e. pay him his money with interest. I have been negotiating for that purpose; not to make money myself, but to get him out, as he seemed to desire, and to get other parties in his stead, who would do their part in protecting the property, and in the end save a small interest to myself, and to compensate me for years of expense and hard labor. Now, you and he can say to me, in a proper writing, that you will take the proposition of principal and interest with four or five thousand dollars in hand, and the balance in payments. Then I have something to act upon. But I must have a definite and certain something, to get gentlemen to advance their money. I am, in other words, negotiating for him. If something is not done, the property will go to waste. No one need expect me to do the work and pay the money. Should you agree to send me a written, fixed, proposition I will then be able to act. I have reason to know I can carry into effect my proposition to you. Any personal interest between us, I will arrange myself, in making out the cash advanced. I want included therein the last mortgage given him on my house. The concern owes me that amount, and more,—also, the $100 advanced me to go to New York, and attend the Bratt case."

Under date of April 8, 1866, Mr. Sweetser again wrote to Mr. Miner that the gentleman whom he had been expecting to purchase Mr. Ewing's entire interest had not returned, but that he hoped, through another party, to arrange the same matters, and said: "I will give you $20,000 for all interest he has in the Ewing and Sweetser matters, his releasing mortgage on my house and lot, excepting the original mortgage for the purchase money, which I will arrange besides, pay him down on the purchase say $4,000 or $5,000, and more, if I can; the balance secured by notes and mortgage on the property." Or, he says, he will give up all agreements and papers of every kind relating to the business, and release all interest in and to the property, by Ewing placing him where he was when he commenced. He adds: "I have borrowed some money, say $3,000, which has been expended in and about that business. The payment of any amount shown to be expended by me since this business commenced will apply to the payment of the original mortgage on my property, the balance to be paid me, whatever it may be. All I desire is to be placed in money and property where I commenced, with the loss of my labor for twelve years. Answer. Will you accept either proposition? I desire, as much as you or he, to have this matter closed, if it can be, and I have been laboring to that end for the last six months."

Ewing replied April 14, 1866. He refers to Sweetser's letters of April 6th and 8th, and says, referring to that of the 6th: "The proposition made you in January last by my agent, B. D. Miner, was made in good faith, and by it I will abide. So your proposition is accepted, and I will give you twenty days to make the payment. On the payment, I will quitclaim and relinquish to you all the interest that I hold in and to the property named in said schedule of January last, by your complying with the requirements and stipulations therein contained. I had hoped you would have come out to Fort Wayne, as proposed by Mr. Miner, when you and he could have negotiated, and closed up the whole matter. The proposition contained in your letter of the 8th, above referred to, I cannot accept. The security for the money I have loaned you at different times I consider amply good. Your note secured by mortgage on the property named in your list of January last would be of no value to me, as you have indicated in the offer you have made for it. I shall have the quitclaim deed prepared at once, and have it executed. I will leave it in the hands of my agent, B. D. Miner, at Fort Wayne, with directions that he deliver it to you on your complying with the requirements of the said January letter, which also contains the list of the property to be deeded you under this arrangement. I trust that

you will come forward without delay, and take back the worthless titles you have placed in me. What remains can be settled and adjusted by us at some future day, as I have heretofore advised you."

April 30, 1866, Ewing executed his quitclaim deed to Sweetser, embracing the lands set forth in the letter of January 30, 1866, by the same descriptions, not including the lands in controversy and some other lands, and reciting a consideration of $100. This deed contained 3,939.11 acres of land, and the deed of December 8, 1866, hereinafter referred to, embraced 543.80 acres, making 4,482.91 acres in all. The memorandum of July 28, 1866, covered 2,324.31, and 160 acres therein described were not mentioned in the subsequent transfers between the parties. The deed of April 30th was presumably left with Miner, and the exact day of its delivery was not shown by direct evidence.

On the 29th of May, 1866, George W. Ewing, who was a citizen of Indiana, residing at Ft. Wayne, died testate. His will bore date February 17, 1866, and was duly admitted to probate in Allen county, Ind., October 2, 1866, and in Polk county, Wis., October 5, 1866. Byrum D. Miner and William A. Ewing were appointed executors. Miner resided at Ft. Wayne; and Ewing, in Ohio. The fourth clause contained a description of certain real estate, which the testator directed to be improved and leased as should be deemed most advisable by the executors, and the income derived therefrom be paid one-third to each of his three children during their natural lives; and the disposal of the real estate was expressly forbidden during the life of any of the children, the same to be in the mean time "under the control of my executors." The sixth clause provided that the executors should, in order to carry out the trust reposed in them, first apply such of the personal estate as they may see proper, and then to make sale of such of the real estate as was not embraced in the fourth clause as should be necessary to carry out and effect the objects and purposes of the will, and thus continues: "Before making such sale or sales of real estate, the same shall be appraised by two respectable citizens of the vicinity of the real estate to be sold, and shall not be sold for less than two-thirds of the appraised value; and my executors are authorized and empowered to make all such necessary sales and conveyances without application to any courts for that purpose. And my executors are hereby also empowered to make conveyances for such real estate as I may have disposed of and not conveyed, and to receive the rents and the profits of all my real estate. And, also, my said executors, out of any moneys in their hands, arising from sales or otherwise, are fully authorized to pay taxes on all my lands, and all other necessary expenses, salaries, and costs of executing this will, or defending and protecting any of the property of which I may die seised." The twelfth clause bequeathed to Ewing's "friend and faithful bookkeeper, William Lytle, any and all claims that I may have against him at the time of my decease, and I relinquish all such claims, and direct my executors to deliver up to him all evidences thereof: provided, and on condition, that he remain and continue in the employment of my executors, in and about the business of the settlement of my estate, for a term of from one to two years, at a fair compensation." By the thirteenth item, "in view of the long and intimate relations existing between myself and my worthy friend Byrum D. Miner," the sum of $2,500 was bequeathed, and it provided that, because of "his long and intimate connection with my general business," Miner should be his active executor, and give his personal attention to settling up and protecting the estate. By the fourteenth clause, the sum of $10,000 was set apart "to be placed in the hands of my friend Byrum D. Miner, as trustee," for the purpose of "the support, maintenance, and education, during their minority, of William E. Miner and George E. Miner, two children of the said Byrum D. Miner." By the eighteenth clause, all the residue of the estate, not otherwise disposed of, was bequeathed to the three children of the testator, share and share alike, but not to be partitioned or otherwise disposed of by them until the executors should determine that it was not necessary for the purpose of improving the property mentioned in the fourth clause of the will.

On the 3d day of October, 1867, at 3 o'clock P. M., the quitclaim deed of

Ewing to Sweetser, of April 30, 1866, was filed for record in the office of the register of deeds for the county of Douglas, Wis., and on the same day, at 3:15 P. M., a quitclaim deed to Sweetser, executed and acknowledged by Miner and Ewing, as executors, December 8, 1866. This deed conveyed an undivided half of the land in question and some other, not included in the deed of April 30th, and its contents are sufficiently referred to hereafter.

December 8, 1866, a release from Madison Sweetser to the executors of George W. Ewing was executed, declaring the contracts ended, the executors and the heirs and legal representatives discharged from liability to Sweetser, or any one else, growing out of the business, and covenanting to hold the estate harmless. This release was witnessed by William Lytle and George W. Ewing, and bore a United States revenue stamp, canceled as follows: "S., 8-12, 1866."

December 11, 1866, Sweetser executed his note for $100, promising to pay B. D. Miner and William A. Ewing, or order, $100 one day after date, with interest. This note was sworn to by B. D. Miner, July 19, 1875, as a claim in favor of Miner and Ewing, as executors of George W. Ewing, and filed against the estate of Madison Sweetser, deceased, on that day.

December 11, 1866, the executors executed another quitclaim deed to Madison Sweetser, conveying the entirety of the lands embraced in the deed of December 8th, and reciting that it was given in full settlement of the partnership affairs, as hereinafter set forth. This deed was witnessed by William Lytle and D. B. Kentner, and acknowledged before Lytle, and was filed for record in Douglas county, Wis., October 3, 1867, at 3:30 P. M.

The deeds of December 8th and 11th, and the release, were in the handwriting of Lytle. Upon the agreements of May 25, 1855, and August 12, 1857; the statement dated May 21, 1855; and the declaration of trust of July 28, 1860,—appeared the following indorsement in the handwriting of William Lytle, and signed by Sweetser, and by Miner as executor, all in red ink: "Canceled by deeds and agreements of December 8 and 11, 1866." This indorsement upon the duplicates of these papers in the possession of Ewing's estate bore also the signature of W. A. Ewing, executor, in black ink, and Ewing testified that he so signed some short time after the others. According to Mr. Holladay, a small carload of letters, papers, and books relating to Mr. Ewing's business in his lifetime was destroyed by Mr. Miner, two, three, or four years before he died, (which was in 1886,) with Holladay's knowledge and assent. The books kept by the executors contained an entry of the $100 note under date December 11, 1866, and, under the same date, of the payment on that day by Sweetser to the executors of the sum of $4,700, in extinguishment of mortgages. There was also an entry of payment, October 15, 1866, of a note of Sweetser for $583.50. The book of deeds kept by the executors, commencing in October, 1870, with deed No. 65, was produced, but the book prior to that, covering the period from June 4, 1866, to October, 1870, was not. No taxes upon the lands in controversy were paid by the executors after December 11, 1866, but they were paid by Sweetser, his heirs or grantees.

B. D. Miner had been in the employment of Mr. Ewing from 1838 to his death; acted as his executor until 1869, when he resigned, but continued in the employment of the estate until 1886, when he died. William Lytle entered the employment of Mr. Ewing in 1856, and continued therein, and in that of the executors, until his death, in about 1885. W. A. Ewing acted as executor until 1876, when, upon his resignation, Jesse Holladay was appointed.

George W. Ewing left surviving him three children: Mrs. Charlotte F. Ewing, the widow of her deceased cousin, then upwards of 30 years of age; Mrs. Lavinia H. Holladay, then about 26, and living in California with her husband, Jesse Holladay; and George W. Ewing, 2d, then about 25, who had married a daughter of Madison Sweetser, the defendant Mary C. Ewing. Charlotte F. Ewing married Mr. Thurston in November, 1866, and died in May, 1871, leaving two children, now known as Minnesota E. Tytus, born in 1865 or 1866, and Charlotte E. Webb, born in December, 1867. Mrs. Holladay continued to reside in San Francisco until 1875, when she came

to Chicago, where her husband joined her the next year. George W. Ewing, 2d, died in December, 1872, leaving his widow, Mary C. Ewing, and his son, George W. Ewing, 3d.

Madison Sweetser conveyed the lands embraced in the deed of December 11, 1866, to his daughter, Edith A. Sweetser, by deed bearing date May 24, 1869; and she conveyed to her mother, Caroline Sweetser, by deed bearing date May 26, 1869, both of the deeds being acknowledged before Lytle as notary public, and filed for record in Douglas county, May 10, 1875. Hyppolite Campbell conveyed to Sweetser the real estate in controversy April 3, 1869, the deed being recorded July 15, 1869.

Madison Sweetser died in 1876, and Caroline Sweetser, November 17, 1877; and her interest in the real estate descended to her daughters, Mrs. Clara E. Root, wife of Louis B. Root, Mrs. Mary C. Ewing, wife of George W. Ewing, 2d, then deceased, Fanny C. Sweetser, and Edith A. Sweetser. Edith A. Sweetser died May 28, 1881, and her interest descended to her three sisters. June 18, 1883, the heirs of Madison Sweetser gave an option to Hammond and Weeks for the purchase of the land in controversy, which was afterwards extended to July 20, 1883, the purchase price being $75,000. July 16, 1883, the Sweetser heirs conveyed their interest in these lands, by deed bearing that date, and containing a warranty against conveyances made by themselves, to Weeks and Hammond, which deed was recorded April 15, 1885, and on August 1, 1883, Weeks and Hammond conveyed to the Land & River Improvement Company, for whose benefit the purchase was made, which issued its stock therefor in the sum of $114,000, the excess over $75,000 going into the treasury. This deed was recorded April 17, 1875. The lands had been vacant and unoccupied until about this time, when they were inclosed by a wire fence by the company. Hammond called on Holladay for the quitclaim of Ewing's heirs in July, 1883.

In the summer of 1890 the heirs and legal representatives of George W. Ewing brought suit for partition of the real estate in question in the circuit court of Douglas county, Wis., to which all the parties to this suit were parties, and about 60 days later this bill was filed. On the hearing, the letters and documents hereinbefore referred to were adduced in evidence, together with the testimony of W. A. Ewing, Jesse Holladay, and others. Evidence was given as to the value of the lands in question in December, 1866; at the time the company purchased; and at the time the suit was commenced; as to when the defendants had actual information of the transaction of December, 1866; when complainant had actual notice of defendants' claim; and as to an attempt between the devisees and heirs to adjust that claim in 1884, etc. Various exceptions to the admission of evidence were taken.

The case came on for hearing on December 21, 1891, and a final decree was entered March 11, 1892. The circuit court held (Judge Bunn, presiding) that the complainant, and those under whom it claimed, had been since December 11, 1866, the equitable owner of the undivided one-half in controversy, and that the defendants, at the time of the filing of the bill, had and held the naked legal title thereto in trust for the complainant, and without any right to set up and enforce the same against the complainant; that the defendants should execute to the complainant a quitclaim and release of and for said lands, and all right, title, interest, claim, or demand of, in, or to the same, as heirs or devisees of George W. Ewing, deceased; that the complainant was the full, absolute, and complete legal and equitable owner of the lands, and that the claim of title by the defendants was illegal, inequitable, and void; and they were perpetually enjoined from setting up any claim of title whatever to the lands and premises, or any part thereof, against the complainant, and title and possession were quieted and confirmed in the complainant, its successors and assigns. An appeal was thereupon perfected to this court, and 37 errors assigned.

Bashford, O'Connor, Polleys & Aylward, (Frederic Ullmann, R. M. Bashford, and William F. Vilas, of counsel,) for appellants.

John C. Spooner and A. L. Sanborn, (S. U. Pinney, on the brief,) for appellee.

Before FULLER, Circuit Justice, and WOODS and JENKINS Circuit Judges.

FULLER, Circuit Justice, after stating the facts, delivered the opinion of the court.

As by the terms of the agreements of May 25, 1855, and August 12, 1857, there was, in effect, community of interest in capital, profit and loss, and subject-matter, Ewing and Sweetser correctly referred to themselves as partners, and the executors to the "land partnership" between them. The enterprise was not limited to a particular adventure, nor merely to the purchase of land to be held for advance in value. Town sites, and interests in town sites, town lots, half-breed land scrip and other scrip, shares in land companies and associations, were to be acquired. If found advisable some of the property might be sold, and the proceeds divided, or reinvested for the joint account. The claims and purchases were referred to as joint capital or joint means. Each was to contribute equally to the expenses of the business. Joint land books, and regular accounts of expenses and costs, were to be kept. One-half of all the profits and gains, either in property or money, after all debts and advances were paid, belonged to each. Sweetser was to cause land scrip to be located, and to sell lands, but to consult with Ewing in large transactions, and so on. The defendants rightly admitted the existence of the partnership in their answer.

The question to be determined is not whether the legal title to the undivided one-half in controversy passed to Sweetser by the deed of December 11, 1866, but whether, through a settlement of the affairs of the partnership by and between Ewing's executors and Sweetser, the latter acquired such equitable right thereto as justified the decree of the circuit court. Unquestionably, this real estate belonged to the firm, and while the duration of the partnership was specified as five years from May 25, 1855, (including the extension,) purchases of many hundred acres were apparently made after that period expired, and the partnership affairs, confessedly, had not been closed up when Ewing died, May 29, 1866. The contention that by the execution of the declaration of trust of July 28, 1860, the lands therein embraced ceased to be partnership real estate does not commend itself to our judgment. Under the agreement of May 25, 1855, the party in whom the title was vested to be held for sale for joint and mutual benefit was to execute a declaration of trust on request. This particular declaration was not executed on any settlement of accounts and adjustment of equities between the partners, and lands were subsequently purchased; but, as far as it went, it furnished proper evidence that the lands named therein belonged to the enterprise, and not that the shares of an ascertained surplus were thereby transferred, and taken out of commerce.

Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay

the debts of the partnership, and to adjust the equities of the partners; and there may be cases of a partnership confined to dealing in real estate, where it might well be held that, being thus a commodity, it should be regarded as converted into personalty, out and out. Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. Rep. 924; Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. Rep. 517; Brown v. Slee, 103 U. S. 828. In any view, until the equities are adjusted and the surplus ascertained, the property is held subject to the same equitable rights and liens of the partners as if it were personalty, and the control of the surviving partner extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy all just claims of the surviving partners; and such sale vests the equitable ownership, so that the purchaser can, in a court of equity, compel the heirs and devisees of the deceased to convey their title. Shanks v. Klein, 104 U. S. 18. If he sells and conveys the same in good faith for a valuable consideration, without an order of court, he passes the equitable title to the purchaser. Walling v. Burgess, 122 Ind. 299, 22 N. E. Rep. 419, and 23 N. E. Rep. 1076. Of course, the power of an executor to convey his testator's real estate must be found in the provisions of the will, or in the order of the appropriate court, upon proper application, under statute. But the executor of a deceased partner, if not a member of the firm, may agree with the survivor that the share of the deceased may be ascertained in a particular way, or be taken at a certain value; and if the executor and the survivor, in good faith, come to an accounting respecting the partnership affairs, and settle the same as a final account, such settlement cannot be overhauled, except on the ground of fraud (or such unfairness as is equivalent thereto) or mistake. Colly. Partn. (6th Ed.) 382; Lindl. Partn. 1069; Sage v. Woodin, 66 N. Y. 578; Roys v. Vilas, 18 Wis. 174; Kimball v. Lincoln, 99 Ill. 578; Ludlow v. Cooper, 4 Ohio St. 1; Arnold v. Wainwright, 6 Minn. 358, (Gil. 241.)

The opinion in Valentine v. Wysor, 123 Ind. 47, 23 N. E. Rep. 1076, discusses the general subject, with much citation of authority. That was the case of a bill filed by the heirs of one Jack to set aside a conveyance by Jack's executors to Wysor, his surviving partner, in settlement of partnership affairs, and for an accounting, complainants offering to pay whatever might be found due. The conveyance was made in 1866, and the suit commenced in 1880. The court held that the power conferred by the will to settle, adjust, and compromise testator's debts, and to settle with his partners, and to sell and convey his real estate, included the power to settle at discretion, and to sell and convey according to the executors' best judgment; that a surviving partner has the right to the control and possession of the property of the firm, and may dispose of it in order to adjust the partnership accounts; that the rights of the heirs are subject to the adjustment of all claims between the partners, and attach only to the surplus which remains

when the debts are paid, and the affairs wound up; that if the transaction was, for any reason, invalid, then the property would remain partnership property, unaffected by what had transpired; that the conveyance by the executors would not be disturbed by a court of equity unless impeached as fraudulent or unfair, or unless collusion were shown; that, a settlement and accounting between the executors and the surviving partner having been had, a court of equity would not, after a lapse of 14 years, unexplained by circumstances, decree the opening up of the account, although it appeared that the settlement had been irregularly made.

By the agreement of August 12, 1857, Ewing and Sweetser declare their intention and belief that, if either or both parties die before the business is finally closed up, their legal representatives should, will be able to, and can do so; and the correspondence shows that Miner was fully authorized by Ewing to conduct the negotiations pending from January, 1866, to Ewing's death, for a complete settlement and adjustment of the partnership affairs.

The will was executed February 17, 1866, and provided for the payment of testator's debts, the improvement and lease of certain real estate, and the distribution of rents, issues, and profits; and the executors were empowered to sell and convey, after appraisal, such of testator's lands in Ohio, Indiana, Illinois, Missouri, Minnesota, Wisconsin, and Kansas as should be necessary to carry out its objects and purposes; to make conveyances for such real estate as had been disposed of, and not conveyed; to receive rents and profits; and out of any moneys in their hands, arising from sale or otherwise, to pay taxes, expenses, salaries, and costs "of executing this will, or defending and protecting any of the property of which I may die seised." By the thirteenth clause "in view of the long and intimate relations existing between myself and my worthy friend Byrum D. Miner," the sum of $2,500 is bequeathed to Miner, and it is provided:

"And, in view of his long and intimate connection with my general business, it is my will and desire that he shall be my active executor, and give his personal attention to settling up and protecting my estate, and carrying out the provisions, meaning, and intention of this, my last will and testament; and in consideration thereof I will and direct that he shall receive forty-five hundred dollars ($4,500) per annum for the term of ten years, should he continue so long my executor."

Miner, accordingly, proceeded with the negotiation which had been commenced in Ewing's lifetime, and was in his charge at the time of the execution of Ewing's will, and of his death, and brought it to a conclusion in December, 1866.

April 30, 1866, Ewing had executed a conveyance to Sweetser of certain lands, which was left in Miner's hands for delivery upon compliance with certain terms and conditions. Sweetser had offered $100 for Ewing's interest, but it is not shown that he had agreed to the conditions prior to December, 1866. On the 8th of December, 1866, the executors made their deed to Sweetser, reciting that, by

the articles between Ewing and Sweetser, title to the lands named in the deed had been acquired; the execution by Ewing of the declaration of trust, and of the deed of April 30, 1866, conveying to Sweetser "all the lands acquired under said contracts, except the lands hereinafter described;" the death of Ewing, and probate of his will, and the power to make conveyances "of such real estate as the testator had disposed of, and not conveyed;" and thereupon, in consideration of the premises, the executors quitclaimed to Sweetser the undivided half of the land in controversy in section 14, 113.81 acres, and of 110 acres in section 24, in Douglas county, Wis., and of 320 acres in St. Louis and Lake counties, Minn., being 543.81 acres in all. By release bearing the same date, December 8, 1866, (the revenue stamp being canceled "8-12, 1866," variously interpreted as the 12th day of the 8th month, or the 8th day of the 12th month,) Sweetser recited the conveyance of April 30, 1866, as executed in settlement of the contract of May 25, 1855, and supplemental contracts, and that "in further settlement thereof" the executors "have this day conveyed to me certain lands in Douglas county, Wisconsin, and delivered to me all the personal property held by them acquired under said agreements;" and thereupon it was declared that the contract of May 25, 1855, and the "supplemental contracts," were wholly and finally ended, and the executors and the heirs and legal representatives of Ewing discharged from further liability to Sweetser "or any one else, growing out of the same," and Sweetser assumed "all the liabilities, of every name and nature, of the late partnership," and to "hold the estate of said Ewing free and entirely harmless from all suits, costs, and expenses in relation thereto." December 11, 1866, Sweetser executed his promissory note, payable to Miner and W. A. Ewing, for $100, the revenue stamp on which was canceled that day. This note was duly entered on the executor's account books on December 11th, and was subsequently proved up as a claim against Sweetser's estate. On the same day, Sweetser paid the executors, as appears from their books, $4,700 due Ewing as an individual loan or loans. On the same December 11th, the executors made their deed to Sweetser, reciting their conveyance of December 8th "by authority vested in them by the sixth clause of the said will;" that "on the 11th day of December, 1866, on a further settlement of the affairs of the late land partnership of said Ewing and Sweetser, growing out of their contract of 1855, and the supplements, in consideration that said Sweetser has taken upon himself to assume to pay any liability of the late partnership that may be unpaid, and released the said estate of and from all claims that he might have against said estate, as per an agreement and release dated December 8th, 1866,"—and proceeded: "Now, therefore, to make a full and final compromise and settlement of all said land operations, and the mutual matters of account growing out of the same, it was proposed by said executors that they would convey to said Sweetser the other undivided half of the lands embraced in said conveyance of December 8th, 1866, except the one hundred and

ten acres in the southwest quarter of section twenty-four, township forty-nine, range 14, in Douglas county, Wisconsin, which is to remain owned one-half by the estate of said George W. Ewing, and the other half by the said Sweetser, which proposition having been accepted by said Sweetser as a full and complete settlement of the matters of account, of one against the other, for all those land operations and expenses incident thereto, the delivery of this conveyance to be a complete bar to all actions at law or otherwise against each other in regard thereto: Now, therefore, in consideration of the premises," the executors quitclaimed to Sweetser the 320 acres in St. Louis and Lake counties, Minn., and the 113.81 acres in question in Douglas county, Wis., and it was then stated: "Thus by the conveyance of April 30, 1866, made by said Ewing, and by the conveyance of said executors of December 8, 1866, and by this conveyance, the representatives of said George W. Ewing are divested of all their title to all the lands acquired under those land operations, except their title in and to the undivided half of the one hundred and ten acres in the southwest quarter of section 24, town 49, range 14 east, in Douglas county, Wisconsin." Upon the contracts of May 25, 1855, and August 12, 1857, the statement of May 21, 1855, and the declaration of trust, appears the indorsement of cancellation "by deeds and agreements of December 8 and 11, 1866," signed by Sweetser and Miner, as executor, and subsequently, as he explains, by W. A. Ewing, as executor.

We concur with the circuit court that these papers are all to be taken together, and form parts of one and the same transaction. The money consideration of the deed of April 30, 1866, was $100, which was satisfied by the note of December 11th, and although the release bore date December 8th, we think that it and the deed of April were delivered with the instrument of December 11th, and on that day.

We conclude, therefore, that there existed a partnership between Ewing and Sweetser; that the land in question belonged to the estate in partnership, and was impressed with that character at the time of Ewing's death; and that the transaction in December, 1866, was in complete adjustment and settlement of all the partnership affairs, and all outstanding indebtedness, and of all claims and equities between the partners. The complainant took possession in 1884 under recorded documents evidencing its equitable ownership, and was not called on to vindicate its rights until, in 1890, the proceeding in partition was instituted. There was some evidence tending to show that there were debts; that Sweetser made claims on his own behalf; that partnership property had been sold or conveyed; that partnership property was in litigation; that there was personalty belonging to the firm, apart from real estate. But all those matters were included in what must be presumed, on the face of the papers, to have been a final settlement upon an accounting,—a settlement prima facie valid and binding, and presumptively properly made, and in the exercise of authority properly

exerted. So that the case is to be determined upon the contention of defendants that the settlement should be set aside for fraud or mistake, or such gross irregularity as vitiated its force and effect. Probably, it might have been wiser if the executors had invoked judicial interposition in affirmation of the settlement, but the settlement was not absolutely void because this was not done; and, regarded as voidable, merely, the general rules apply to an attempt to set it aside.

The averments of the answer (to be treated as equivalent to a cross bill) by which the settlement was sought to be impeached are, in brief, that there were no partnership debts; that Sweetser had no claim after the execution of the deed of December 8, 1866; that Sweetser falsely represented to the executors that there were claims against the partnership, that he had a valid claim, and that the real estate was of little or no value, whereby the executors were fraudulently induced to execute the deed of December 11, 1866. This bill was filed nearly 24 years after the transactions complained of, and these averments fall far short of the distinctness and precision required where fraud and mistake are charged after such lapse of time. Apart from this, we are to remember that Ewing, Sweetser, Miner, and the bookkeeper, Lytle, were all dead, and that the letters, papers, and books relating to the period prior to Mr. Ewing's death were destroyed, or not produced. Inasmuch as Miner had been in the employment of Ewing since 1838; was his confidential friend, and familiar with his affairs; was intrusted with the closing up of these very matters by Ewing, living, and especially charged by Ewing, in his will, to give his personal attention to settling up and protecting his estate,—while his diligence and faithfulness are nowhere impugned, the theory of ignorance on his part is wholly inadmissible, and we find no evidence upon which the position that he was deceived in the premises can be sustained. Both parties, in their correspondence, refer to debts of the concern, and, in one of his letters, Sweetser claimed a balance due to him. So far from undervaluing the lands, the evidence discloses that Sweetser insisted that they were valuable, and that the ill success of the business was attributable to want of expected money advances. Land had been sold. Property was in litigation. In his letter of March 26th, Ewing says that the list of January 30th was "full and complete, except as to that then and now in litigation." A suit with one Bratt, in New York, is particularly mentioned. Miner declares, in the letter of January 30th, the matter "complicated," and that he is determined "we will be rid of the annoyance and perplexity attending it." These and other things appear, but the grave has closed over those who could have stated and explained all the facts, and the record keeps the silence they might have broken. We have not been unmindful of the testimony of W. A. Ewing, Mr. Miner's coexecutor, but he was not at this time active in the management of the estate, and did not reside at its headquarters; and a careful examination of his

evidence, which we do not care to analyze, does not lead to any satisfactory conclusion at variance with the statements in the papers in whose execution he joined. The witness testified 25 years after the transaction, and under the disadvantage of having naturally left the dealings with Sweetser to Miner, who had been particularly charged with their adjustment. Something is said of heavy advances shown by a memorandum book made up by Lytle, under Col. Ewing's direction; of differences of opinion between Col. Ewing and Sweetser "about the expenditure of this money for lands which Col. Ewing thought were either worthless, or the title was not good;" of heavy losses in the Wabasha and Traverse de Sault matters; of Sweetser's claim that more money should have been advanced to protect and save these "vast interests;" of the witness' view that the deed of December 11, 1866, was not valid as a conveyance, was yielded to Sweetser's importunities, and filled with "Lytle's buncombe." But the fact remains, and is corroborated, that Miner was acquainted with the situation in all its details, and had been Ewing's confidential man of business for years, while there was no averment nor evidence against him of fraud or collusion in the premises. And this is also true of Lytle, in commendation of whom, as well as of Miner, the dead man spoke, through his testament, in such emphatic terms. What apprehensions, if any, were entertained in respect of the title to the half-breed lands named in the declaration of trust, which were conveyed to Ewing by Sweetser under power of attorney for the benefit of himself as well as Ewing; whether Col. Ewing's alleged advances were largely in other transactions, or were chiefly made in connection with the lands enumerated in the deed of April 30th; the nature and extent of the claims and counterclaims of the parties, and the reasons that prompted the adjustment arrived at, notwithstanding Sweetser's previous offers when negotiating with others for money advances,—are all matters with which Miner was manifestly thoroughly acquainted when the settlement was made, but which the record, substantially, leaves to conjecture. The memorandum book was not produced, nor were Sweetser's receipts for advances referred to in the agreement of August 12, 1857, nor was the executors' book of deeds prior to October, 1870, in which the conveyances in question were recorded for the information of all concerned. When Hammond applied for a quit-claim of the legal title held in trust for Sweetser's grantees in virtue of the settlement, Miner was still alive, and survived for several years thereafter; and the evidence of Holladay shows that the destruction of the old books and papers took place between 1882 and 1886, they being considered as of no value.

The instrument of December 11th declares that it was the executors who proposed to make the final compromise and settlement upon the basis of that conveyance, and that Sweetser accepted; and we are not constrained, by any adequate proof, to a result adverse to the adjustment so made, which could only be reached

at the expense of the reputations of those who participated, and were permitted to end their labors without assault, until they were no longer personally present to repel it. As heretofore stated, we are of opinion that the transaction of December was one transaction, and that the documents should be taken together, and regarded as delivered on December 11, 1866, in full settlement and adjustment. We cannot accede to the argument of counsel that the deed of April 30th, and the release and deed of December 8th, are to be treated as independent of the deed of December 11th. In his letter of January 30th, Miner wrote, if Sweetser made an acceptable proposition, "I shall require of you the surrender of the declaration of trust, and the canceling of the original agreements and amendments, and a release from all further claims against Col. Ewing on account of the same." But, as we have said, while Sweetser offered $100, it does not appear that he agreed to the conditions as stated, and the release executed covered, not only all liability to Sweetser, but to any one else, the assumption of all the liabilities of the partnership, and an agreement to hold the estate of Ewing "free and entirely harmless from all suits, costs, and expenses in relation thereto." To hold that a release thus comprehensive, the deed of December 8th, which was merely in compliance with the declaration of trust, and the deed of April 30, 1866, were delivered as a consummated, separate transaction prior to December 11th, would be irreconcilable with the giving of the note that day, the recitals of the latter deed, and the terms of the cancellation. Besides, the language of the release itself appears quite conclusive in this regard. It refers to the deed of April 30, 1866, as having been given in the settlement of the affairs of Ewing and Sweetser, and recites that "in further settlement thereof" the conveyance of an undivided half has been "this day" made, and all the personal property of the concern in the hands of the executors delivered; and as it does not refer to the deed of December 8th by its date, and that deed purported to be given under the power to convey real estate which had been disposed of, and not conveyed, and not in settlement, the inference is reasonable that the deed referred to is that of December 11th, intended to be executed December 8th, and, failing that, delivered contemporaneously with the release on the latter day. In the view we take of the case, it is not material whether the deed of December 8th was within the power or not, nor that the deed of April 30, 1866, took effect by relation; and, although the bill averred that the deed of December 8th was delivered on that day in settlement "in part," that averment does not, in itself, essentially affect our conclusion.

It is said in Hammond v. Hopkins, 143 U. S. 244-250, 12 Sup. Ct. Rep. 418:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society,

by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscure by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. Marsh v. Whitmore, 21 Wall. 178; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. Rep. 350; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. Rep. 942; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. Rep. 178; Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. Rep. 408."

We think that the circumstances disclosed here require the application of this salutary rule to the attack upon the settlement. That settlement was made between Sweetser and the active executor, Miner, both of whom are dead. The papers were in the handwriting of the bookkeeper, Lytle, and he is dead. The deeds of December 8th and 11th were witnessed by Lytle and Kentner, and Kentner is dead. The release was witnessed by Lytle and George W. Ewing, one of the heirs, and Ewing is dead. The books and papers which might have shed light upon the transaction were destroyed by Miner with the knowledge and consent of the then trustee, Holladay, before the bill was filed, though not until 16 to 19 years after the settlement. There was no adequate evidence of actual fraud, the instruments were duly recorded, the means of information were originally abundant, no concealment or suppression was shown, and the record demonstrates the utter impracticability of restating an account between the partners. Evidence was given on both sides as to the value of the property in 1866, and thereafter, but it fails to convince us that at the time of the settlement the value of the half conveyed to Sweetser was so great as to raise any serious suspicion of fraud in that connection; and it is apparent therefrom that 17 years after, when the purchase was made by the company, the value had largely appreciated, while the enterprise upon which the company then embarked imparted an immense speculative increase.

By the settlement the property in question lost its partnership character, and became the separate property of Sweetser, and the principle of laches may justly be regarded as fatal to the maintenance of a suit to set aside that settlement, whether brought by the executors or the heirs and devisees; and, moreover, without resting the decision on that point, we hold that defendants failed to overcome the presumptions in favor of the settlement arising upon the documents.

The answer treated as a cross bill did not seek an accounting and adjustment of the partnership affairs, and discharge of the

partnership debts, if any, but a decree adjudging the legal title in them, free from any equities of complainant, and as if no settlement had ever been made, on the ground that the executors had no power to convey, and that the settlement should be avoided because of fraud, and the absence of a state of facts justifying the executors' action. In respect of the issue thus raised, whether by way of defense or of affirmative relief, the burden was upon the defendants. The circuit court was right, and its decree will be affirmed.

(October 4, 1893.)

WOODS, Circuit Judge, (dissenting.) The question in the case is of the validity and effect of the deed of December 11, 1866. I think it invalid, both for lack of consideration, and for want of authority in Ewing's executors to make it. That the deed was made without consideration is clearly enough proven, and is put beyond question by the bill and answer. In considering the evidence, it is not necessary to go beyond the statement made by the chief justice, which is full and fair.

The position of the appellants as defendants should not be confused with their position as cross complainants. As defendants, they are not chargeable with laches, and their claims, if not barred by statutory limitation,—of which there is no pretense,—should not be regarded with less favor on account of lapse of time, death of witnesses, destruction of papers, or other supposed loss or lack of evidence, for which they are not responsible. The appellee was not an innocent purchaser, nor the grantee of one. Its immediate grantors, who bought out the Sweetsers, made the purchase for the appellee, and, recognizing the defective character of the title obtained, sought to perfect it by means of a quitclaim from the appellants. They refused to convey, and if, from the time of that refusal, there was negligence in bringing a suit to determine the ownership, it is attributable to the appellee, rather than to the appellants, who—some of them being under legal disability—lived wide apart, and far from the land which is the subject of dispute. There is no apparent reason why the appellee should not have brought an early suit to establish its title, and its delay to do so until after Miner and Lytle, whose importance as witnesses was as plain then as now, had died, demonstrates either its own negligence, or a prudent purpose on its part to profit by postponing the issue. It is not probable, however, as we shall see, that, if living, Miner and Lytle could have put in a different light any essential point which the pleadings have left open to controversy. Neither is it probable that the books and papers of Ewing, which Holladay and Miner destroyed as "being of no value" would have been of value to either party, and especially to the appellee. That the litigation was likely to come, and would turn upon the deed of December 11th, Holladay and Miner well understood; and as one of them was interested to overthrow, and the other bound in honor to uphold, the deed, it is not to be presumed

that they joined, either purposely or carelessly, in the destruction of important evidence. It is in proof that the memorandum book to which reference has been made was prepared by Lytle for the purpose of showing Ewing's advances and expenditures in the joint transactions in land, and that the amount, as footed, exceeded $65,000. The loss of that book, therefore, did not harm the appellee. So, too, the nonproduction of "Sweetser's receipts for advances referred to in the agreement of August 12, 1857," is unimportant, because the amount of those advances is stated in that agreement; and, there being in the record undisputed copies of the deeds of December 8th and 11th, it is not easy to see what use there could have been for putting in evidence "the executor's book of deeds prior to October, 1870, in which," it is said, "the conveyances in question were recorded for the information of all concerned." There is no evidence that anybody was ever denied access to the book, or that it would not have been produced upon request.

There is, however, in the case, a notable omission of evidence, which the appellee ought to have supplied or explained. Sweetser was to be the active man in the business, and the contract of May 25, 1855, in terms, required him "to open and keep a set of joint land books, and to keep regular accounts showing all proper expenses and costs of making purchases, securing claims, etc., and to take necessary vouchers, etc." It is to be presumed that Sweetser complied with that requirement of the contract, and that his books showed at least his own receipts and expenditures, and that, if favorable to its contention, the appellee would have produced them, or offered some excuse for the failure.

But, passing by matters of conjecture and suspicion, and considering the case as the record presents it, we find no lack of convincing evidence upon the one essential point of inquiry. The contract between the parties shows the original expectation to have been that Ewing would advance the money necessary for the prosecution of the scheme; and it is as clear as could well be—in fact, Sweetser's letters imply, if they do not admit—that the advances which Ewing made far exceeded those of Sweetser, even if his salary for the entire time be included. And the great probability is that the one-half of his salary which was chargeable to Ewing did not remain unpaid. There is no claim to that effect in Sweetser's letters. The supplemental agreement of August 12, 1857, shows that at that time Ewing's advances had amounted to $8,000 or more,—a much larger amount of money than it was at first supposed would be needed,—and, there being no mention of anything due Sweetser, the fair inference is that nothing worthy of mention was then owing to him. It is little less certain that the money expended in the subsequent conduct of the business came from Ewing. Late in 1865, being anxious to have the business wound up, or off his hands, Ewing proposed to sell his share in the property for original cost and interest, and, by his letter of January 7th, Sweetser accepted the offer. This acceptance, though afterwards withdrawn, was equivalent to an admission that Ewing's interest in the property was worth what

it had cost. Of the entire correspondence which followed, it may be said, without quoting, that it shows that Ewing had made large advances without receiving anything in return; that he considered and Sweetser conceded his interest in the lands to be of substantial value; that Sweetser, for himself and another, by his letter of March 30th, offered to pay Ewing for his share his entire advancement, with interest, paying $5,000 in hand, etc., and on April 8th made a definite offer of $20,000 for all Ewing's interest in "Ewing and Sweetser affairs," paying down $4,000 or $5,000, and Ewing releasing a mortgage on his home, or himself to give up all papers, and release all interest, if placed in money and property where he commenced, with the loss of his labor for 12 years, claiming to "have borrowed some money, say $3,000, which had been expended in and about that business." Now, if to this sum of $3,000 Sweetser's salary from May 25, 1855, to May 25, 1866, be added, as if no part of it had been paid him, his entire expenditure in the joint business falls far short of the sum which he was offering to pay Ewing, that sum being far less than Ewing's expenditures are fairly shown to have been. It is therefore morally certain that, upon a just settlement of their accounts and dealings in land, there could have been found nothing due from Ewing to Sweetser, and that, for the conveyance made by the executors to Sweetser on December 11th for the Ewing half of the lands, there could have been no consideration, unless it was Sweetser's promise to pay the debts of the concern. But outside of the funds advanced by either party, which by the contract were to be refunded, with interest, as soon as the same could be realized from sales of any of the joint property, and were therefore debts of the concern, there were no considerable liabilities. The only unpaid debt, of which proof has been made, was for less than $40 due an agent on account of taxes which he had paid; and from the nature of the business, if there had been liabilities to third persons,—as, for instance, for lands bought on a credit, or for costs or attorney's fees incurred in litigation, or for taxes, or of whatever character,—the proof of them, and that Sweetser had paid them, if he had, would not have been difficult. Creditors, knowing Ewing's responsibility, would not have failed to present their demands, and demands presented Ewing would have paid. Besides, if the liabilities had been considerable, it was not business-like on the part of the executors to accept Sweetser's unsecured promise to discharge them.

The debts referred to in the correspondence between Ewing and Sweetser, for the payment of which it was said the lands should be sold, were, without doubt, for the advances made by Ewing. So Miner understood, when, on January 30th, he said of a proposed sale of part of the lands to Sweetser, "the proceeds will be used to refund to Col. Ewing * * * the large sum of money which he has furnished you from time to time for investment in that country." In short, Ewing, while in life, with the knowledge and assistance of Miner, whom he appointed one of his executors, was demanding, and Sweetser was conceding to be due, and was will-

ing to pay him, for his interest in their joint property, as much as $15,000; but a few months later, when nothing had happened to change the respective rights of the parties, except Ewing's death, Miner and his coexecutor, if their deed is to be upheld, gave to Sweetser for nothing the Ewing interest in all of the lands, except 110 acres, upon which no value has been set. That this was done, the living executor, Ewing, has testified, and the fact is otherwise sufficiently proven.

But, if the evidence left the question open to doubt, it is established by the undenied averments of the bill that the deed of December 11, 1866, was without consideration. It is alleged in the bill, not only "that the deed of December 8th was executed and delivered on that day," but that thereafter "on the 11th day of December, the deed bearing that date was executed;" and, without direct averment of the time when the release was executed, that paper is referred to in the bill as "Sweetser's agreement and release executed and dated December 8, 1866." Undenied, these averments must be taken as true, and given full effect. They make it impossible to concur with the circuit court in saying "that these papers are all to be taken together, and form parts of one and the same transaction." No matter what evidence to the contrary, the averments must prevail.

The contrary evidence, however, is not strong. The giving of the note for $100 was a small matter, and may have been overlooked on the 8th. The cancellation of the contracts and declaration of trust, after the execution of the deed and release of December 8th, was a useless matter of form, evidently not done before the 11th, but affording no proof of the time when other papers were delivered. The recitals of the second deed are that "on the 8th of December" the executors made the first deed, and that Sweetser "has taken upon himself, and assumed to pay," etc., "as per his agreement and release dated December 8, 1866." The release itself bears date December 8, 1866. The cancellation of the revenue stamp is of the same date. The conveyance of April 30th is recited as a past or completed transaction, (made so, doubtless, by delivery on that day,) and there follows the recital that "on further settlement" the executors "have this day conveyed to me certain lands" described; and then follow the declaration that the contract of May 25th and the supplemental agreement are ended, and Sweetser's agreement to discharge the executors and the Ewing estate and heirs, and to take upon himself all liabilities, in terms quite as comprehensive as the conditions and obligations which the second deed purports to impose upon him. It was proper, as the parties evidently assumed, that the deed of December 8th should be made under the sixth clause of the will, "in compliance with the declaration of trust;" and the execution of the release by Sweetser at the same time was manifestly just and right, because the liabilities he assumed, it is clear, were less than the amount due from him to Ewing for the excess of the latter's advancements over his own.

It being established, as it is both by the pleadings and the evidence, that the deed and release of December 8th were delivered as a consummated transaction separate from the conveyance of December 11th, there remained nothing further to be settled concerning the dealings in land; and it follows that the second deed was without consideration, and clothed the grantee with neither legal nor equitable interest.

Aside from, as well as because of, its lack of consideration, there was, in my opinion, a want of power in the executors to execute that deed. It is not to be questioned that, by their contracts, Ewing and Sweetser, in their land transactions, were partners, because the partnership is alleged both in the bill and the answer; and it is well settled that "real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is, in equity, treated as personal property, so far as necessary to pay the debts of the partnership, and to adjust the equities of the partners." "But," as is added in Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. Rep. 924, whence the quotation is taken, "the principle of equitable conversion has no further application." And none of the cases cited go to the extent that the surviving partner, without the aid of a court of equity, can take possession of lands, of which both the title and possession were in his co-partner at the time of his death, and dispose of the same as personalty belonging to the firm.

It is not necessary here, however, to inquire into the powers of a surviving partner over partnership property, whether real or personal. Conceding his power to sell to third persons, he could not sell to himself, and if, by the deed in question, Sweetser acquired any interest, it was because of the power of the executors to make the grant. For their powers, we must look to the provisions of the will, as was done in Valentine v. Wysor, 123 Ind. 47, 23 N. E. Rep. 1076, or, if the will is silent, to such statutes as may be applicable. The provision in Ewing's will for the sale and disposition of personal property does not apply, and the direction given "to make sale of such of my real estate in the states of Ohio, Indiana, Illinois, Missouri, Minnesota, Wisconsin, and Kansas as shall be necessary to carry out and effect the objects and purposes of this will," and the further provision that no sale should be made without appraisement, it is manifest, do apply to these lands; and this conveyance, treated as a conveyance of land, was not only not authorized, it was forbidden, by the will.

"But," it is said, "the executor of a deceased partner, if not a member of the firm, may agree with the survivor that the share of the deceased may be ascertained in a particular way, or be taken at a certain value; and if the executor and the survivor, in good faith, come to an accounting respecting the partnership affairs, and settle the same as a final account, such settlement cannot be overhauled except on the ground of fraud (or such unfairness as is equivalent thereto) or mistake." Even by that rule, this settlement should not stand; but the doctrine stated rests on the com-

mon-law rule,—prevalent in some of the states, but not applicable to this case,—that the executor or administrator takes the title to the personal estate, and may deal with it substantially as the owner could when in life.

The law of Indiana since 1852, if not longer, has been different; and, if these lands are to be treated as personalty, it is the law of Indiana, where Ewing lived and died, that must govern. By that law the title of personalty, as well as of real estate, descends to the heir at law, unless otherwise directed by will; and as the executor or administrator has statutory authority to sell only at public auction, unless otherwise ordered by the court, it is held that a private sale, without order of court or testamentary authority, confers no title. Weyer v. Bank, 57 Ind. 198.

It may be conceded that the executors in this case had authority to make a settlement with Sweetser, and, if a balance was found due him, to pay it with money of the estate in their hands, of which it is shown they had an abundance; but, even if they were without money, they had no authority, without an order of court, to discharge the debt owing to Sweetser, or to other creditors, by transfer of property, whether personal or real, and especially not by a transfer of land, though capable, if there was necessity for it, of being treated as personalty, because it is the policy of the law, in Indiana, to protect the interests of the widow and heir at law in real estate, and to that end the personal estate of a decedent is made the primary fund for the payment of all debts, including mortgages and other liens upon real estate. Hunsucker v. Smith, 49 Ind. 114; Elliott v. Cale, 113 Ind. 383, 404, 14 N. E. Rep. 708, and cases cited. Indeed, the statute in force since 1852 requires the payment of "debts secured by liens upon the personal and real estate of the decedent, created or suffered by him in his lifetime," before the payment of general debts and legacies. Revision 1881, § 2378. It was therefore the duty of these executors, under the law, as well as by the requirements of the will, to pay Sweetser whatever was ascertained to be due him, out of moneys of the trust in their hands, and thereby preserve the land in question as real estate, and, if they had not ready money for that purpose, to obtain it out of the personal estate proper under the authority given them by the sixth clause of the will. They had no more right (unless given in the will, which is not pretended) to pay him by transferring Ewing's interest in the partnership lands than they would have had to pay him by transferring real estate which had never belonged to the partnership.

It is further to be observed that by an act of the Indiana legislature approved March 5, 1859, (Sess. Laws 1859, p. 134,) which remained in force until 1877, when it was amended, a surviving partner was required, within 60 days after the death of the copartner, to make a full, true, and complete inventory of the estate, goods, chattels, rights, credits, and effects within his knowledge, and to cause the same to be appraised, and to file with the clerk of the court an affidavit that the schedule filed by the ap-

praisers contained a full and true statement of the partnership property. This statute was not complied with by Sweetser.

There is another reason why it was not competent, on the 11th day of December, 1866, to treat this land as personalty. If that right ever existed, it was extinguished by the transaction of December 8th. By the deed of that date, Sweetser accepted a conveyance of the undivided one-half of the land described, including that in suit, in discharge of the trust under which Ewing had held the title, thereby becoming tenant in common with the legatees of Ewing. By that act the partnership character of the land was lost, and if the account between the partners was not then or thereby settled, or if "Sweetser's agreement and release" of that date was not delivered till later, the account then became a personal one, into the adjustment of which the lands could not be drawn on the theory of being partnership assets. If the title and trust had been in Sweetser, instead of Ewing, and, in execution of the trust, he had conveyed the half interest to the Ewing legatees, he might thereafter, with equal propriety, have taken a conveyance from the executors in adjustment of the partnership accounts and liabilities.

Upon no view of the case can I think the appellee entitled to affirmative relief in equity. If, by lapse of time or otherwise, it had acquired a legal right against the appellants, or any of them, before the suit for partition was brought, it may be set up as a defense to that procedure.

PARK v. NEW YORK, L. E. & W. R. CO.

(Circuit Court, S. D. New York. September 26, 1893.)

RAILROAD COMPANY—LEASE—NONPAYMENT OF RENT—RECEIVER.

Defendant company leased the railroad of petitioner, and operated it for several years. As rental, defendant covenanted to pay 32 per cent. of the gross earnings. The lease provided that a breach by defendant of any of its covenants should be cause of forfeiture, at the option of petitioner, and that thereupon petitioner might enter into possession of the property. On July 25, 1893, on a bill alleging the insolvency of defendant, receivers of its property were appointed. At the time when the receivers entered into possession, defendant was in arrears in payment of the rent already due to an amount of more than $300,000. After the receivers entered into possession, they paid petitioner for the use of the property, out of the assets of the receivership, $331,439,—a little more than the net earnings of the leased property for the same period. This sum, however, was considerably less than the amount stipulated in the lease. On August 8, 1893, upon a petition showing the importance to the petitioner of prompt payment of the sums stipulated by the lease, to enable it to pay its obligations to its bondholders and to subordinate roads leased by it, petitioner asked that the court order the receivers to perform all the obligations of the lease; that they pay the rent then due; that, if without money to make such payment, they should issue receivers' certificates for all rent due or to become due; and that such certificates be decreed a charge and lien upon the property of defendant in the possession of the court and the receivers, prior to defendant's outstanding mortgages. No application was

made to have a forfeiture of the lease, for covenants broken, declared. *Held*, that the receivers did not, by taking possession under the order of the court, become assignees of the term of the lease, committed to an obligation, in any event, to pay the full sum stipulated as rental by the lease; that they had not retained possession for such an unreasonable time, or under such circumstances, as amounted to an election on their part to accept the lease; and that as it appeared that more than the net earnings of the leased property for the period during which the receivers had held it had been paid to the lessor, the court would not instruct the receivers to pay any more out of the general corpus of the property in the receiver's hands.

In Equity. Motion by the New York, Pennsylvania & Ohio Railroad Company, as petitioner, to instruct receivers of the defendant as to the making of certain payments to petitioner. The motion was made upon petition presented August 8, 1893, and adjourned from time to time until September 20th, when it was heard upon an amended petition, reply, and affidavits.

Chas. E. Whitehead, for petitioner.
Jennings & Russell, for respondent.

LACOMBE, Circuit Judge. The defendant corporation, owning and operating an extensive system of connecting railroads, made a contract with the corporation petitioner in April, 1883, by which it leased from the petitioner its main line of railroad, extending from Salamanca, N. Y., to Dayton, Ohio, various branches of said road, and the leasehold estates of the petitioner in a number of roads operated as part of its system. Defendant entered into possession of the property under the lease, and for several years operated it, so far as appears, in accordance with all its terms and covenants. As rental or compensation for the use of the property, the defendant agreed and covenanted to pay 32 per cent. of its gross earnings. An increase of percentage was provided for under certain contingencies, the details of which are not material to the present discussion. It was further provided in the lease that a breach by the defendant of any of the covenants and agreements contained therein should be cause of forfeiture, at the option of the petitioner; that, in the event of such forfeiture, petitioner might enter into possession of the property, —its rights to recover all rent in arrear not to be affected by such forfeiture; and that all damages sustained by petitioner by reason of such forfeiture should be recoverable against the defendant.

It appearing that the defendant was without money to pay its maturing indebtedness, or any immediate hope of raising it; that its property was liable to seizure upon attachments and other process in a multiplicity of suits brought in many different courts, under circumstances which would lead to wasteful strife and contention as to the priorities of rival creditors, and would paralyze the operation of the road, and prevent it from continuing, until the final marshaling of its assets and adjustment of conflicting interests, to discharge its duties as a public carrier of passengers,

freight, and mails, thereby earning money which the interest of all creditors alike required it to do,—this court, on July 25, 1893, appointed receivers of the defendant. They promptly entered into possession of all the property it owned and held, including petitioner's roads. At the time the receivers thus entered into possession, the Erie Company was in arrears in payment of rent already due to the amount of more than $300,000, for the whole or part of which it had accepted drafts payable in the fall. Since the receivers entered into possession, they have paid the petitioner, for the use of the property, out of the assets of the receivership, $331,439.83, which is a little more than the net earnings of that property for the same period. This sum, however, is considerably less than the amount stipulated in the lease, which calls for the payment of $240,000 on August 15th, and $100,000 on the 1st days of August and September, respectively. The rental stipulated in the lease is largely in excess of the net earnings from the leased property, the affidavits showing that the Erie Company lost, in the operation of the roads of petitioner under the lease, $425,888.39 for the fiscal year ending September 30, 1892, and, for the first 10 months of the present fiscal year, $275,681.06.

Upon this state of facts, and upon a verified petition and supplemental petition showing the essential importance to petitioner of prompt and full payment of the sums stipulated by the lease, to enable it to discharge its own obligations to its bondholders, and to the subordinate roads of its system which itself leases, the New York, Pennsylvania & Ohio Railroad prays:

"That the court would declare and order that the receivers perform all the obligations of the said lease; that the covenants and provisions of the said lease, during the time it has existed and may exist, constitute a charge upon and obligation against the defendant company, and all its property, superior to the rights and claims of any mortgagee of said property; that the receivers pay to the petitioner the amount of rent now remaining due and unpaid; that, if the receivers are without money in hand to presently make such payment in full, they have liberty to agree and arrange with the petitioner for an extension of time for payment, and thereupon to issue their certificates as receivers for all rent now, or at any time hereafter, due or unpaid; that such certificates be decreed and declared, upon the face thereof, to be a charge and lien upon all the property and franchises of the defendant company in the possession of the court and the receivers, prior to any and all of the outstanding mortgages upon the said property and franchises of the defendant company; and that the court would grant to the petitioner such other and further relief in the premises as may, upon consideration, appear to be just and equitable."

The petitioner, upon this application, has carefully refrained from declaring a forfeiture of the lease for covenant broken, and does not ask to be restored to the possession of its property. The question to be passed upon at this stage of the proceedings, therefore, lies somewhat within the scope of the oral argument. Whatever may have been the intent of the parties to the lease when they entered into their contract, there is no suit to reform it now before the court, and it must be construed according to its terms It provides distinctly and specifically for the payment of certain

sums of money as compensation for the use of petitioner's property, and reserves to it the right to re-enter into possession if that money is not paid. The right to insist upon the execution of this contract according to its terms—the right to refuse further use or possession of that property to any one who will not or cannot make such payments—is in no way impaired by the fact that the court has taken possession of all the property owned and held by the Erie Company, to administer the same for the interests of all concerned, and has placed its officers, the receivers, as custodians and caretakers, not only to preserve the same, but also to maintain it as a going concern pending the final adjustment. Every piece of such property comes to the receivers' hands in the same condition in which it leaves the hands of the defendant. No lien or contract is disturbed or altered by the court's intervention; and, if the receivers continue to hold a particular piece of property which they found in the possession of the Erie road, and which that road could only continue to hold upon complying with certain conditions, they must, if they so hold it, in like manner conform to these conditions. But the petitioner goes further, and insists that the receivers must continue to hold the property, complying with the conditions, even though their doing so will charge the estate with a burden beyond any possible benefit derivable therefrom. The law, however, is otherwise laid down in Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. Rep. 787; St. Joseph, etc., R. Co. v. Humphreys, 145 U. S. 105, 12 Sup. Ct. Rep. 795. When the receivers took possession of the property now under consideration, the petitioner could not get its rental, because of the insolvency of the defendant. By the mere act of taking possession, the court did not, eo instanti, bind itself or its receivers to carry out the covenants of the lease. The receivers were entitled to a reasonable time to elect whether or not they would adopt the contract, and make it their own, and no action of theirs shows that they have elected so to do. From the papers submitted, it is manifest that the receivers, if they continue to hold and operate the road upon the terms of the lease, will do so at a loss, which could be made good only by diverting to the petitioner the profits which may be earned on other parts of the system. It is conceivable, of course, that such a course might be beneficial for all concerned. The loss to the whole system resulting from the forfeiture, and the retaking of the leased property by its owner, whether such loss be occasioned by disintegration of the system, or by the incurring of some heavy liability for damages, might be far greater than the loss resulting from a continuance of the old lease.

But no facts making out such a case are before the court. The receivers are not asking for instructions as to which course they should elect. Nor, indeed, is such a question one which it is to be expected that the court should decide. It is a question, not of law, but of business judgment, which requires for its intelligent answer an extended experience, a special knowledge, and an inti-

mate acquaintance with every vein and artery of the entire system of defendant's roads, which no court that ever sat or ever will sit could possibly acquire from affidavits, however voluminous, or from arguments, however extended. It is enough to dispose of the prayer of the petitioner to hold that, under the decisions of the supreme court cited supra, the receivers did not, by taking possession under the order of the court, become assignees of the term, committed to an obligation, in any event, to pay the full sum stipulated as rental by the lease; that they have not retained possession for such unreasonable time, or under such circumstances, as will spell out an election on their part to accept the lease; that, it appearing that more than the net earnings of the leased property for the period the receivers have held it have been paid to its owners, this court will not now instruct the receivers to pay any more out of the general corpus of the estate. Miltenberger v. Railway Co., 106 U. S. 286, 1 Sup. Ct. Rep. 140; Kneeland v. Trust Co., 136 U. S. 101, 10 Sup. Ct. Rep. 950; Central Trust Co. v. Wabash, etc., R. Co., 23 Fed. Rep. 863, 34 Fed. Rep. 259.

The prayer of the petitioner is denied.

SCRANTON v. WHEELER.

(Circuit Court of Appeals, Sixth Circuit. September 5, 1893.)

No. 103.

1. CIRCUIT COURTS — JURISDICTION — ACTION AGAINST AGENT OF THE UNITED STATES.

   The circuit court has jurisdiction of an ejectment suit by a landowner against an agent of the United States in charge of a public improvement which is alleged to be built on plaintiff's land, and where defendant sets up and relies upon the government's right and title the court may inquire and determine whether it is the superior title; but its judgment will not conclude or estop the United States, since the latter is not a party, and cannot be made a party without its own consent. Carr v. United States, 98 U. S. 433, followed. Stanley v. Schwalby, 13 Sup. Ct. Rep. 418, 147 U. S. 508, and Hill v. U. S., 13 Sup. Ct. Rep. 1011, distinguished.

2. CIRCUIT COURT OF APPEALS—JURISDICTION.

   Under the judiciary act of March 3, 1891, § 6, (26 Stat. 826, c. 517,) the circuit court of appeals has jurisdiction to review on writ of error the judgment of a circuit court in an action of ejectment by a landowner against the agent of the United States in charge of the St. Mary's ship canal, the piers of which are built upon the submerged land lying in front of plaintiff's lot; such suit involving questions as to the government's ownership and control of such submerged lands on the borders of the St. Mary's river.

3. NAVIGABLE WATERS—TITLE TO SUBMERGED LANDS.

   The title to lands lying under a navigable river entirely within the boundaries of a state is not in the United States, but in the state; and the test of navigability is not the flow of the tides, but navigability in fact.

4. SAME—UNITED STATES LAND PATENTS.

   A patent of the United States, conveying land lying upon the borders of a navigable river within the boundaries of a state, conveys no title to any land lying under the stream, since the United States had no title thereto.

5. SAME—EFFECT OF STATE LAWS.
Where, however, the law of the state, as an incident to the ownership of riparian lands, attaches thereto the legal title to the submerged lands, extending to the thread of the stream, as in Michigan, such title will accrue to one who receives from the United States a patent to the riparian lands.

6. SAME—REGULATION OF COMMERCE.
The title which a state has to lands lying beneath its public navigable rivers is held subject to a high public trust, to forever preserve them as public highways, and is subject to the power of congress to regulate commerce among the states; and, if this title is passed by the local laws to riparian proprietors, they take it subject to the same trust and to the same power.

7. SAME—EXTENT OF POWER—RIGHT TO TAKE SUBMERGED LANDS.
The right of congress to regulate commerce involves the right to regulate navigation, and this, in turn, involves the use of submerged lands, in so far as such use is essential to the maintenance of the public highway; and hence the title of the riparian owner is subject to the right of congress to occupy the submerged land, without compensation, for the erection of structures in aid of commerce between the states, and it is immaterial that such structures are placed in shallow water, near the shore, so as to interfere with the owner's access to deep water.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

At Law. Action of ejectment by Gilmore G. Scranton against Eben S. Wheeler. The circuit court directed a verdict for defendant, and entered judgment accordingly. Plaintiff brings error. Affirmed.

Statement by LURTON, Circuit Judge:

This suit was brought in ejectment in the circuit court for the county of Chippewa, and was removed by the defendant to the United States circuit court for the western district of Michigan, southern division, where it was tried in September, 1892. The premises described in the declaration, and sought to be recovered, are "an undivided one-half interest in private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Mich., including therein that portion of the land beneath the waters of St. Mary's river, from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto, and being a part thereof."

The real controversy is not over any of the dry land embraced within the lines of private claim No. 3, as defined by the survey thereof, but concerns the riparian rights appurtenant thereto, which, it is claimed, have been invaded by the construction by the United States of one of the piers which form a part of the St. Mary's Falls ship canal. The defendant in error has no personal interest in the controversy, and is in possession of the pier in question simply as an employe of the United States, being the superintendent, and in charge, of the canal. For many years prior to 1850, the lands, in part at least, at the locality in question, were occupied by parties who had no title thereto, but claimed equitable rights by virtue of long-continued possession. Repeated attempts were made to obtain recognition of their rights from congress, but prior to said date they were unavailing. In 1850, however, congress passed an act (9 Stat. 469) which provided that the register and receiver of the land office at Sault Ste. Marie should be empowered and authorized to examine and report upon claims to lots at Sault Ste. Marie, according to the provisions of the act, and pursuant to instructions of the commissioner of the general land office. The second section of the act provided that: "The said commissioner shall cause the register and receiver to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie, and it shall be the duty of the secretary of war to direct the proper military officer, on application of the register and

receiver, to designate or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military purposes, as also the position and the extent of any other lot, or lots, which may be required for other public purposes, and also the position and extent of the Indian agency tract, and of the Indian reserve." Section 7 of the act provides that, on the completion of certain preliminary maps and abstracts by the land officers, the surveyor general at Detroit should dispatch a skillful deputy to the Sault Ste. Marie, and "that he shall proceed forthwith to lay off and survey the village of Sault Ste. Marie into town lots, streets, avenues, public squares, out-lots, having regard to the lots and streets already actually surveyed, existing or established, and having regard also to the existing limits and extent of lots covered by the claims which shall have been adjudicated by the register and receiver; and after such surveys shall have been completed, the aforesaid deputy shall prepare a plat, exhibiting, in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and public lots, and also the out-lots, designating the lots reserved for military or other purposes, according to the extent and limits of the same, as fixed by the proper military officers," etc.

This survey was made by Thomas Whelpley in 1855, and by it the land in controversy is located and described as "Private Land Claim Number Three." The plat and survey were approved in September, 1855, as recited in the patent of the land made by the United States in 1874. The pier, as originally built, crossed a part of the riparian frontage of private claim No. 3. The field notes of the survey made by Thomas Whelpley show that private claim No. 3 was described by metes and bounds, and that one boundary was "along the right bank of Ste. Marie river." This claim was patented by the United States to Samuel Peck and the heirs of Franklin Newcomb, October 6, 1874, and was described by reference to said survey. This grant was in these words and figures:

"The United States of America: To all to whom these presents shall come—Greeting: Whereas, under the provisions of the act of congress approved the 26th day of September, 1850, entitled 'An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan,' the claim of Samuel Peck and the heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under the date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid, as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north, of range one west, and in section six, in township forty-seven north, of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the state of Michigan. And whereas, there has been deposited in the general land office of the United States a certificate, No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims: Now know ye: That the United States of America, in consideration of the premises, and in conformity to the provisions of the act of congress aforesaid, have given and granted, and by these presents do give and grant, unto the said Samuel Peck and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described, to have and to hold the same, together with all the rights, privileges, and immunities and appurtenances of whatever nature thereunder belonging, unto the said Samuel Peck and heirs of Franklin Newcomb, and to their heirs and assigns, forever. In testimony whereof, I, Ulysses S. Grant, president of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed. [Seal.]

"Given under my hand, at the city of Washington, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninty-ninth.

"By the president. U. S. Grant.

"By S. D. Williams, Secretary.

"L. K. Lippincott, Recorder of the General Land Office."

By an act of congress approved August 26, 1852, (10 Stat. 35,) there was granted to the state of Michigan a strip of land 400 feet in width through the military reservation at Sault Ste. Marie, to be used for the construction of a ship canal at that point, and by the same act 750,000 acres of land were granted to the state to aid in its construction. The act provided that the selection and location of the site should be subject to the approval of the secretary of war. The site selected under the act was so approved, in 1853, by Hon. Jefferson Davis, then secretary of war. The canal was begun in 1853, and completed, as originally constructed, in 1855. The river in front of private claim No. 3 was navigable in its natural state, but immediately above were the rapids and falls, to avoid which the canal was built. This river, with its connecting waters, forms a very important highway for interstate and international commerce.

By act of congress of August 14, 1876, (19 Stat. 132,) the sum of $130,000 was appropriated for the repair, preservation, construction, and completion of this canal, "to be expended under the direction of the secretary of war." The plan of the work was adopted in the spring of 1877 by the corps of United States engineers and the war office. The construction of the pier in question was commenced in 1877, and completed in 1881. Congress has at all times recognized the national character of the work, making at different times very large appropriations for the canal. 16 Stat. 224, 402. In 1881 the state of Michigan transferred the canal to the United States. See How. St. § 5502. The canal was built entirely within the military reservation belonging to the United States, and, if it infringes upon plaintiff's rights, it is purely because it crosses more of his riparian frontage than did the piers of the canal which was there at the time of the confirmation of his title to private claim No. 3, in 1855. Upon these facts the court below directed a verdict for the defendant.

Harlow P. Davock, (John C. Donnelly, of counsel,) for plaintiff in error.

Lewis G. Palmer, U. S. Atty., and James B. McMahon, Asst. U. S. Atty., for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SWAN, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

There are two preliminary questions for decision: (1) Is this a suit against the United States, or one by which it will be concluded? (2) If the circuit court obtained jurisdiction to entertain and determine the cause, did an appeal lie to this court from its judgment?

1. Upon the submerged land forming the bottom of St. Mary's river, the government has erected a pier in front of the upland owned by him. The pier covers the entire water front of plaintiff, and is upon and within the riparian rights which he sets up. The pier is a prolongation westward, into deep water, of the banks of the government canal, shelters the Lake Superior entrance to the canal, and is such an extension thereof as to cut off the plaintiff's direct access to deep water. The defendant is the superintendent of the canal, and the officer in charge and possession of the pier, holding same for the government. The suit is one in ejectment, and the sole defendant is this agent and official of the government. His defense is that the government had a paramount right to place the pier where it stands; that, under the power conferred by the constitution over interstate commerce, the control of the government

of the United States over navigable waters thereof is absolute and conclusive, and that the title of the plaintiff was and is subordinate to the power of the United States to provide for the safe and convenient navigation of the St. Mary's river; that it might, therefore, lawfully erect within the banks of the river, and upon the permanently submerged bottom thereof, such dams, piers, and lighthouses as will, in its judgment, contribute to the use of said river by interstate and international commerce. Can the merits of this justification set up by defendant be determined, or must we, upon the suggestion that the defendant holds under the right and title of the United States, desist from inquiring whether that title thus interposed is a good and sufficient answer to the title and right of the plaintiff?

Except where congress has provided, the United States cannot be sued. This proposition is axiomatic. But the doctrine has no application to officers and agents of the United States, who, while in possession, are sued in ejectment by one claiming the title and right of possession. When such officer and agent is sued, and he undertakes to justify and defend his possession by setting up and relying upon the title and right of the United States, a judicial question is presented; and the court may inquire into such title, and determine whether it is the superior right and title, and render judgment as the right may appear. This has been the well-settled practice and rule of the United States court, and in the well-considered case of U. S. v. Lee, reported in 106 U. S. 196, 1 Sup. Ct. Rep. 240, the doctrine was thoroughly considered, and the cases elaborately reviewed, by Mr. Justice Miller, who delivered the opinion of the court. When a suit may be conducted alone against the party in possession, as is the rule in ejectment, the person under whom the defendant claims is not a necessary party. The judgment in this case will not conclude or estop the United States, for the reason that it is not a party, and cannot be made a party without its consent. Carr v. U. S., 98 U. S. 433.

In U. S. v. Lee the court said, in regard to the effect of the judgment in that case:

"Another consideration is that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr v. U. S., already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all of the remedies which the law allows to every person, natural or artificial, for the vindication or assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained; or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined, or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the constitution." 106 U. S. 222, 1 Sup. Ct. Rep. 262.

That decision, upon its reasoning, was sound, and meets the approval of this court. The constitutional provision that "no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," finds its strongest safeguard, and most efficient vindication, in the doctrine so ably presented by the learned judge who spoke for the majority of the court in that case. The attention of the court has been called to the late decisions of the same court in the cases of Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418, and Hill v. U. S., (decided May 15, 1893,) 13 Sup. Ct. Rep. 1011.

In the first of these cases, (Stanley v. Schwalby,) the suit was an action of trespass to try title. The property involved was the military post at San Antonio, Tex. The defendants were Gen. Stanley and other officers of the United States. The suit, though it involved the title and possession of the United States to one of its military posts, was maintained. The reporter's headnote to the opinion is somewhat misleading, in so far as he states that, "for purposes of jurisdiction, there is no distinction between suits against the government directly, and suits against its property." The jurisdiction would not exist, unless permitted by congress, where it was directly against the government, while, as decided in that case, if the suit be against one in possession, and he claims under the government, the jurisdiction does exist. In that very case the court said in regard to the latter class of cases that "in these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense, he must show that his authority was sufficient in law to protect him." In this class is included U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240, where the action of ejectment was held to be, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff, as part of the judgment; and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be lawful, and therefore is sufficient as a defense. The statutes of limitation were held applicable, upon the express ground that "as an action could have been brought at any time after adverse possession was taken, against the agents of the government through whom that was done, and by whom it was retained, the objection cannot be raised against them that the statute could not run because of inability to sue." 147 U. S. 519, 13 Sup. Ct. Rep. 422.

The case of Hill v. United States has no application. The action was directly against the United States, for a tort, and was sought to be sustained under the act of March 3, 1887, (chapter 359,) by which congress provided that the United States might be sued either in the court of claims or in the circuit court of the United States, in cases not sounding in tort. The case is in accord with U. S. v. Jones, 131 U. S. 1, 9 Sup. Ct. Rep. 669;

Langford v. U. S., 101 U. S. 341; U. S. v. Great Falls Manuf'g Co., 112 U. S. 645, 5 Sup. Ct. Rep. 306; and Great Falls Manuf'g Co. v. Attorney General, 124 U. S. 581, 8 Sup. Ct. Rep. 631.

2. We are of opinion that the plaintiff's right to an appeal or writ of error to this court was clear. Section 6 of the act of 1891, (chapter 517,) establishing the United States circuit court of appeals, provides "that the circuit courts of appeals * * * shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The preceding section specifies with particularity the cases in which an appeal lies direct from the district or circuit court to the supreme court. The case under consideration does not fall within any of the classes specified. The appeal must therefore be to the circuit court of appeals.

3. This brings us to a consideration of the claim and title of the plaintiff to the locus in quo. The terra firma owned by him is not involved. What is his title to the submerged land in front of his undisputed upland? The canal pier was constructed upon land permanently submerged under some five feet of water. The structure was most manifestly a necessity to the safe and convenient use of the canal. The canal was a necessity to the safe navigation of a great public highway, of which it forms a part. The commerce passing through it is equaled only by that of a few of the great navigable streams of the world. Has the plaintiff such a title to the land lying between the shore of this great highway of commerce and the middle thread of the stream as to make the defendant a trespasser, and the structure placed there in aid of navigation a nuisance, which plaintiff, as the owner of the adjacent shore, may abate and remove? Must the United States, before building piers, lighthouses, and other structures in aid of navigation, condemn and purchase the beds of navigable streams and inland seas upon which such improvements must be supported? If the plaintiff has such a property right in the submerged land beneath the river as cannot be taken or used without just compensation, and by due process of law, for the purpose to which it has been devoted, then the defendant is a trespasser, and he cannot justify his occupation of the premises by the title and right of the government, whose servant he is. At the outset we may say that, if plaintiff's title to this submerged land depends upon a construction of the grant of the United States under which he holds, his pretensions to such a title as will support ejectment must fail. The field notes of the survey called for in the patent to Peck and heirs of Newcomb show conclusively that the land patented to him extended "along the right bank of the Ste. Marie river." The firm upland was alone surveyed and measured.

The rule of the common law was that the title of one owning land bordering on a river in which the tide ebbed and flowed extended only to the margin of ordinary high water. The title to

all land between the shores, and below ordinary high water, was vested in the crown. Above the ebb and flow of the tide, the title of a riparian proprietor extended to the middle thread of the stream. The ebb and flow of the tide in the short streams of that insular country was, in fact and law, the sole test of actual navigability. But in this country the situation is entirely different. A large majority of our rivers are navigable in fact which are wholly unaffected by tide, and many others are equally navigable above the ebb and flow, which affects them near the sea. The common-law test of navigability, said Justice Bradley in Barney v. Keokuk, 94 U. S. 338, "had the influence, for two generations, of excluding the admiralty jurisdiction from our great rivers and inland seas; and, under the like influence, it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy." In the case of The Genesee Chief, 12 How. 443, the common-law test of navigability was considered, and the doctrine established that the admiralty and maritime jurisdiction granted to the federal government by the constitution extended to all public navigable rivers and lakes, where commerce is carried on between the states, or with foreign nations. Subsequently, the same court, in The Daniel Ball, 10 Wall. 563, said, as to the test of navigability of rivers and inland seas, that "they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary mode of travel and trade on water." This definition was followed and affirmed in Packer v. Bird, 137 U. S. 673, 11 Sup. Ct. Rep. 210. Since The Genesee Chief Case, the courts of the United States have steadily held that the test of navigability was not the flow of the tide, but that navigability in fact furnished the standard by which jurisdiction in admiralty and riparian rights were to be determined under United States patents. Railroad Co. v. Schurmeir, 7 Wall. 272; Packer v. Bird, 137 U. S. 673, 11 Sup. Ct. Rep. 210.

The doctrine that the title to the submerged lands within the banks of navigable rivers belongs to the states, respectively, within which such rivers are situated, and not to the United States, was settled at an early day, and has never since been questioned. In Pollard's Lessee v. Hagan, 3 How. 219, it was held that a patent by the United States to lands in the bed of the Alabama river was absolutely void, inasmuch as the United States, by its acquisition of that part of Alabama through treaty with Spain, had never acquired any title to the soil under navigable rivers, and none had been conferred by the constitution of the United States. It was also held that new states coming into the Union entered it with precisely the same reservation as to the soil under their navigable waters as was the case with the states originating the Union. 3 How. 219. To the same effect are the cases of Martin v. Waddell, 16 Pet. 367, and Goodtitle v. Kibbe, 9 How. 471. It is true that

these cases involved the beds of streams affected by tides, but the principles upon which the cases rested applied equally to streams navigable in fact, and above the ebb and flow of the tide. In Barney v. Keokuk, supra, the court said, speaking of these cases:

"In our view of the subject, the correct principles were laid down in Martin v. Waddell, 16 Pet. 367; Pollard's Lessee v. Hagan, 3 How. 212, and Goodtitle v. Kibbe, 9 How. 471. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Genesee Chief, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of 'navigable waters,' and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of the water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

In the late case of Illinois Cent. R. Co. v. Illinois, it was expressly held that the ownership of, and dominion and sovereignty over, lands covered by the waters of Lake Michigan, though unaffected by the tide, belonged to the states within which such submerged land was situated. 146 U. S. 387, 13 Sup. Ct. Rep. 110. The effect and construction of a United States land patent must, in the very nature of the subject, be a question for the United States courts to determine for themselves, without reference to the rules of construction adopted by the states for their grants. Barney v. Keokuk, 94 U. S. 338; Packer v. Bird, 137 U. S. 661, 11 Sup. Ct. Rep. 210. It is deducible, therefore, from the decided cases:

First. That the United States never had or asserted any title to the land under the waters of the Ste. Marie river, and could not, by its grant, convey to a patentee any title whatever.

Second. That the only reasonable construction to be placed upon the acts of congress concerning the survey and sale of the public lands, and the settled line of decisions concerning such patents, would be to limit the effect of the patent under which the plaintiff holds to the terra firma bounded by the margin of the St. Mary's river. Railroad Co. v. Schurmeir, 7 Wall. 272; Packer v. Bird, supra; Barney v. Keokuk, supra.

We then have a case where the grant to plaintiff does not, by construction, extend his title to any part of the soil beneath the waters of the stream along which it lies. This brings us to a consideration of the effect of the law of the state of Michigan upon the title of the plaintiff. The title to the soil under the navigable rivers of Michigan remained in the state, as we have already shown. "If," as observed in Barney v. Keokuk, that state "chose to resign to the riparian proprietor rights which properly belong to it in its sovereign capacity, it is not for others to raise objections." This the state of Michigan has done. As an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream compre-

hended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream. Ryan v. Brown, 18 Mich. 207; Lorman v. Benson, 8 Mich. 18; Boom Co. v. Adams, 44 Mich. 403, 6 N. W. Rep. 857. This, being the well-defined law of Michigan, is the law applicable to the rights of the plaintiff in this case, and controlling as to the locus in quo. Under the law of Michigan, the plaintiff is therefore seized of the legal title to the submerged land upon which the United States has constructed the pier in question.

But while the plaintiff, under the law of Michigan, is seised of the legal title to the soil under the water, yet, in the very nature of the property, such seizure is of the bare technical title. The state of Michigan was a part of the Northwest Territory ceded by the state of Virginia to the United States for the public benefit. The statute authorizing the cession, the deed of cession, and the ordinance of 1787, providing for the government of that territory, alike provided that the navigable waters of that cession should be "common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, without any tax, import or duty therefor." These limitations on the powers of the Northwest Territory, and afterwards upon those of the territory of Michigan, ceased to have operative force upon the state of Michigan, when admitted into the Union, in so far as their force depended upon the deed of cession or the ordinance of congress, or were in diminution of the powers attaching to the other states of the Union. When admitted into the Union, she entered on an equal footing with the original states, and could exercise over her rivers and lakes the same sovereign powers as pertained to the old states with respect to such subjects. But this provision concerning her navigable streams was precisely the limitation under which all such streams were controlled by the older states after the adoption of the present constitution. In Martin v. Waddell, 16 Pet. 410, the court said:

"When the Revolution took place, the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the constitution."

By that constitution the states are prohibited from imposing any tonnage duty without the consent of congress. Article 1, § 10. And by the eighth section of the same article the states granted to the congress of the United States the power "to regulate commerce with foreign nations and among the several states." This power operates whenever congress elects to legislate upon this particular subject, as a limitation upon the power of the states over the channels of interstate commerce within the states.

In Gibbons v. Ogden, 9 Wheat. 196, Chief Justice Marshall said, as to this power to regulate commerce:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all other vested in congress, is

complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In Gilman v. Philadelphia, 3 Wall. 724, the court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open, and free from obstruction to their navigation interposed by the states or otherwise; to remove such obstructions, when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil, and the punishment of offenders. For these purposes, congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the parliament of England."

It must, from these constitutional principles, follow that the state of Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of congress to regulate commerce among the states. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the state, or is in the owner of the shores. A distinction must be recognized between that which is jus privitum, and that which is jus publicum. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation, and the control of congress over that right. This much seems expressly ruled in Illinois Cent. R. Co. v. Illinois. Such submerged lands can only be disposed of by the state when that can be done without injury to the interest of the public in the waters, and subject to the paramount right of congress to control their navigation so far as necessary for the regulation of commerce with foreign nations, and between the states. 146 U. S. 387, 13 Sup. Ct. Rep. 110. The right of access to deep water, which was considered in Atlee v. Packet Co., 21 Wall. 389, and Yates v. Milwaukee, 10 Wall. 497, and Gilman v. Philadelphia, 3 Wall. 724, is likewise a right subordinate to the power of the state and the federal government to control the stream in so far as necessary for purposes of commerce. In Atlee v. Packet Co. it was held that, though the right of access to deep water existed

in the defendant, Atlee, regardless of his title to the soil, and though this right carried with it the right to put in and maintain a pier to utilize the right, yet, if such pier interfered with navigation, it becomes a nuisance, and could be removed without compensation, if constructed without authority of the state or United States. In Yates v. Milwaukee the point of decision was that this right of access could not be arbitrarily destroyed or injured by a city ordinance condemning a pier as a nuisance; that it must be shown, by due process of law, to be a nuisance in fact, as affecting navigation, before it could lawfully be removed. In Gilman v. Philadelphia the doctrine that, in the absence of congressional regulation concerning the navigation of a river wholly within the limits of one state, that it was within the power of the state to authorize a bridge over the stream, as in itself an aid to commerce, was again announced, and Willson v. Marsh Co., 2 Pet. 245, followed and approved. The significance of that case, as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of one owning land on the shores above, whose access to and use of the stream were thereby injured. His property had not been taken. The injury to him was consequential, and he was held to be without remedy. Here the plaintiff has sustained an injury which is wholly a consequence of the erection of a structure by congress in aid of the general and public right of navigation. If congress may lawfully use the soil as a support for such structures without acquiring the naked title outstanding in the plaintiff, then, for such injuries as are merely consequential, it is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the state, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under authority of subsequent congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of Monongahela Navigation Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. Rep. 622. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us had made no improvements for either public or private uses. No property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway.

What is a proper exercise of this power of congress to aid navigation seems to be for congress to determine. The case of South Carolina v. Georgia, (93 U. S. 4,) is an illustration of the great discretion reposed in congress as to the selection of means proper

to the improvement or protection of such public highway. In that case it was decided that congress has the power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will be thereby improved. The case did not turn upon the fact that the bill in the case was filed by the state of South Carolina, but was put upon a construction of the power of congress to determine the means by which the navigation of a river may be improved. See, also, the case of Pennsylvania v. Wheeling I. B. Bridge Co., 18 How. 421, and Wisconsin v. Duluth, 96 U. S. 379.

If the title had remained in the state, the conclusion would be the same. The state would hold subject to the public use, and its property right in the submerged soil of a navigable stream would be subservient to the power of congress to regulate navigation, and the use of such soil as a support for a structure in aid of navigation would not have been the taking of the private property of the state, within the meaning of the constitutional provision inhibiting it without compensation. This point was expressly ruled upon in a very able opinion by the late Justice Bradley in Stockton v. Railroad Co., 32 Fed. Rep. 19. The Hawkins Point Lighthouse Case, reported in 39 Fed. Rep. 77, was a case identical in principle to the one under consideration. The plaintiff, under a grant from the state of Maryland, was the owner of the fee in the submerged land under the Patapsco river. The United States erected a lighthouse supported on the soil owned by plaintiff. Suit in ejectment was brought, upon the theory that the keeper of the lighthouse was a trespasser; the site never having been condemned, nor any compensation paid. It was held, upon elaborate argument, that the United States, in thus erecting a lighthouse in aid of navigation, by authority of congress, was not taking private property without compensation. That plaintiff's title and ownership were necessarily subservient to the use of the same in aid of public navigation.

We have been conscious of the importance of the question, both to the government and riparian proprietors. This must be an apology for the great length to which this opinion has been extended.

The conclusion we have reached is that there is no error in the judgment of the circuit court. The plaintiff has no such ownership of the locus in quo as makes its use for the purposes to which it has been devoted a taking of private property, within the meaning of the constitution.

The judgment is therefore affirmed.

GREAVES v. NEAL et al.

(Circuit Court, D. Massachusetts. August 22, 1893.)

No. 3,453.

1. FEDERAL COURTS—JURISDICTION — ASSIGNEE FOR BENEFIT OF CREDITORS — EXTRATERRITORIAL RIGHTS.
An assignee under the Minnesota statutes regulating voluntary assignments for creditors may maintain suit in a federal court in Massachusetts to recover the value of property acquired by the defendant in Minnesota in violation of Laws Minn. 1881, c. 148, § 4, declaring void preferences made within 90 days of making an assignment. Huntington v. Attrill, 13 Sup. Ct. Rep. 224, 146 U. S. 657, followed.

2. SAME—COMITY.
The enforcement of such statute rights by federal courts is not ordinarily restricted by the local policy of the state where suit is brought, as the question is one of general and international law.

3. SAME—RIGHT OF ASSIGNEE TO SUE.
The right of action having arisen primarily, and vested in the assignee by force of the Minnesota statute, and not by force of the assignment, his right to maintain the suit is not affected by the fact that in a certain sense he sues in a representative capacity.

4. PLEADING—INCONSISTENT ALLEGATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS.
Laws Minn. 1881, c. 148, § 1, as amended by Laws 1889, c. 30, authorizes a debtor to assign "for the equal benefit of all his creditors, in proportion to their respective valid claims, who shall file releases," and section 4, as amended by the same act, declares void preferential conveyances and payments made within 90 days of making an assignment as provided in section 1. *Held*, that a declaration by an assignee to recover the value of property acquired by the defendant in violation of section 4, which set forth that the "assignment was for the equal benefit of all the assignor's creditors who should file releases," and which had annexed and made a part thereof the instrument of assignment, which stated that it was for the benefit of all creditors without any preference, contained inconsistent allegations, which neutralized each other, and failed to show the right of the assignee to maintain the suit.

5. SAME—AIDER.
The inconsistent pleading was not aided by a general allegation in the declaration that the assignment was executed under and in accordance with the laws of Minnesota.

6. SAME—RIGHT OF ASSIGNEE TO SUE—CONDITION PRECEDENT.
It was a condition precedent to the right of the assignee to sue that the assignment should have been made in the precise terms of the act of 1881, which terms are limited to assignments for the benefit of creditors who file releases.

At Law. Suit by Frank W. Greaves, assignee of James T. Harrison, against William H. Neal and others, to recover the value of property alleged to have been acquired by defendants by an unlawful preference. Defendants demur to the declaration. Sustained.

Warren & Brandeis and Ezra R. Thayer, for plaintiff.
J. F. Wiggin and B. M. Fernald, for defendants.

PUTNAM, Circuit Judge. This case came up originally on a motion to dismiss, which the court declined to hear in that form on account of the difficulty and importance of the questions involved. By

consent of the court the same was converted into a demurrer to the first, second, and third counts.

One question relates to the extraterritorial force of rights of action given by statute, and this in its general aspect is settled favorably to the plaintiff by the supreme court in the line of cases ending with Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224. The Massachusetts decisions have felt the force of the line of reasoning of the supreme court, although they have not fully yielded to it, as will be seen by Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. Rep. 534. However, this court has no occasion to investigate the conclusions of the courts of Massachusetts, because Huntington v. Attrill, and the cases to which it refers, have determined that the main proposition involved is one of general and international law. Singularly, the same transaction came before the privy council in Huntington v. Attrill, [1893] App. Cas. 150, in which the same result was reached as by the supreme court, and upon the same general line of reasoning. In cases of this character the state tribunals may regard the local policy, and on account of it may, under some circumstances, refuse to take jurisdiction. In the federal courts, however, the rules laid down by the supreme court seem to leave no room for mere questions of comity, except so far as they may be involved in the underlying principles of jurisprudence, which prevent the enforcement within any jurisdiction of claims contra bonos mores, or claims which violate a well-settled and deep-seated policy concerning something beyond mere mala prohibita. The propositions touching the local policy of the state of Massachusetts presented in the case at bar do not go so deep, and cannot be considered under the broad rules of Huntington v. Attrill.

Neither is the case affected by the fact that the plaintiff sues in a certain sense in a representative capacity. While there is nothing in the decision of the supreme court in Huntington v. Attrill which modifies the settled rule that a statutory or judicial officer, like an administrator or executor or an assignee in insolvency, cannot ordinarily be recognized in a foreign jurisdiction with reference to interests which vest in him merely by succession, yet the alleged right of action in the present case arose primarily in the plaintiff himself, and vested in him, not by force of the assignment from the insolvent, but under the statute. Indeed, the subject-matter is one as to which the insolvent never had any right of action, and never could have any; and therefore this suit is clearly distinguishable on this point from the class of cases on which the defense relies. The transaction was, as a matter of fact, complete in the state of Minnesota, where, according to the declaration, the defendants were personally present, and received delivery of what is now sought to be recovered. If, when the goods were delivered, the violation of the law of Minnesota had been complete also as a matter of law, and was no longer inchoate, the fact that defendants departed from the state with the advantages of the preference which they had obtained would be of no importance in this proceeding. Neither would the peculiar form of action, which it is claimed by the de-

fendants is brought to recover not damages, but property, be of any consequence. Vested rights cannot be made to depend ordinarily upon the mere forms of remedy, which vary according to the local practice of the tribunals in which the litigation is pending. It is plain the statute intended to give the plaintiff the right to recover the property specifically, or its value; and when he seeks the latter, it is of no importance whether the statute looks strictly to an action for damages for a tort or to one in which the value or proceeds are demanded specifically as such. All such matters relate merely to form, and not to substance.

The defendants claim that the statute right was not complete under the laws of Minnesota when the preference was received, nor until the assignee was appointed and had elected to avoid the transaction. On the other hand, there is ground for claiming from the letter of the statute that the transaction was void at the outset; that the authority given the assignee to proceed by suit, if an assignment was made within the specified 90 days, only indicated the party to act, and the limit of time, and that meanwhile the right existed although the person who should maintain the action was not designated. It can easily be shown that there is no legal impossibility in this proposition. But if the position of the defendants is correct, and if everything remains inchoate until an assignee is appointed, and if, meanwhile, the party who receives the preference withdraws from the state of Minnesota with the benefits thereof, it may be a difficult question whether or not the right of action ever vested. Of course, the rule of the supreme court in Huntington v. Attrill, ubi supra, is not without limitations. There is a class of statute rights which, although apparently absolute, yet are in fact qualified, as is the case in several, if not all, of the New England states, with judgments of the first instance against trustees or garnishees. So, also, there are judgments which concern the status of individuals, as to which the court ordering them reserves within its own breast the right to modify them, among which are those touching the relations of husband and wife before or after divorce, and of infants with or without guardians. So, also, there are like judgments in the course of administration of property, as those touching proceedings by executors or administrators. So, also, there are certain rights where certain local forms are in the nature of conditions precedent, so that extraterritorial proceedings are impracticable, as is the fact with reference to ordinary statute proceedings touching bastard children and their maintenance. And there may also be other cases of a peculiar character, where for various reasons extraterritorial enforcement of the right given is impracticable. It is, however, not necessary to determine now whether the claim of the plaintiff in this case takes color from any of these suggestions, because the demurrer must be sustained for another reason; and, if it hereafter becomes necessary during the further progress of this cause, the court may receive more light on this branch of the case than it has yet been able to obtain.

The declaration sets out various statutes of Minnesota on which

the plaintiff relies. It begins with the act of 1878, which is not important in this connection. It then follows with the act of 1881, (chapter 148, § 1,) which provides that a debtor whose property is attached or levied upon, or against whom a garnishment is made, may "make an assignment * * * for the equal benefit of all his creditors, in proportion to their respective valid claims, who shall file releases." Then, further, is set out section 4 of the last-named act, by which preferential conveyances and payments "within four months of making an assignment, as provided in section 1 of this act," are made void. Plainly, by the letter of the statutes to this point, no assignment is effective for the purposes of section 4 unless it is made according to section 1. The whole closes with the act of 1889, which amends section 1 of the act of 1881, already referred to, so as to include any debtor "who shall have become insolvent." This last act expressly repeats the direction that the assignment shall be made for the equal benefit of all creditors who file releases of their demands; and it further amends the act of 1881 by changing the limit of time from 4 months to 90 days.

The counsel on each side have cited statutes of Minnesota not set out in the declaration, and some decisions of the courts of that state to which it does not refer. Perhaps this is ordinarily permissible with reference to the laws of states other than that within which a suit is pending in a circuit court, according to the rule stated in Fourth Nat. Bank of New York v. Francklyn, 120 U. S. 747, 751, 7 Sup. Ct. Rep. 757. Whether or not this rule would apply as against an express setting out in the declaration of the terms of such laws the court need not now determine, noting only that very likely enough of the common-law rule that if a statute is unnecessarily set out and misrecited in a material part the declaration is ill in substance remains to reach a case like this at bar. Gould, Pl. (4th Ed.) c. 3, § 171.

The court thinks, however, that in no event do any of these extrinsic matters referred to aid the plaintiff's declaration. The Minnesota Code of 1891, referred to by counsel on each side, clearly introduces no new element of law. In a case cited by the plaintiff —Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. Rep. 222—it was held, and was a matter in point, that under the laws of Minnesota a preference is not unlawful, except as prohibited by the act of 1881, already referred to. This decision was made February 10, 1892, and therefore meets the point taken by the plaintiff that the statutes of 1889 and 1891, extending to all insolvents the right to make assignments of the form and effect contemplated by the act of 1881, superseded the common law of Minnesota as to voluntary assignments. Independently of this decision, there is no force in this proposition, as there was no repugnancy between those statutes and the law as it previously existed; and they only granted a privilege to the insolvent debtor, without taking away any rights. Neither the case of Mackellar v. Pillsbury nor that of In re Bird, 39 Minn. 520, 40 N. W. Rep. 827, decides any other point here under consideration; and In re Bird expressly reserves them all, including

the question whether an assignment which does not provide for a release can be effective under the act of 1881. In the absence of any decision of the supreme court of Minnesota to the contrary, this court feels bound to follow the plain language of the statute, and sees some reasons why its purpose follows its letter. There is a just necessity for annulling preferences in favor of creditors who cannot avail themselves of an assignment without releasing their demands, which does not arise in favor of those who may share in the debtor's property under an assignment or otherwise, and hold their claims good for any unpaid percentage. The statutes of Minnesota having twice reiterated,—once in 1881 and once in 1889,—and each time in express terms, the requirement of a release of all demands in an assignment which is to be effectual to make preferences void, it appears to this court that for the judiciary to strike out this expression would be to legislate, and not to interpret.

The declaration refers to the assignment, and annexes it in such a way as to make it a part of the pleadings. While the former alleges in terms that the insolvent person assigned "for the equal benefit of all his creditors who should file releases," the assignment is expressed to be "for the benefit of all his creditors without any preference." This discrepancy is unexplained, and so makes a clear repugnancy in pleading in a material matter. This, of course, must be taken to the detriment of the pleader, with the result that the inconsistent allegations neutralize each other, or the one which is for the advantage of the defendants overrides the other. The general phraseology found at one place in the declaration, to the effect that the assignment was executed under and in accordance with the laws of the state of Minnesota, cannot aid the pleader, for reasons which are so clear that they need not be stated. As this court must hold that the statutes of Minnesota, whether as pleaded by the plaintiff or as explained by the extrinsic matters cited by counsel, render it a condition precedent to the right of an assignee to proceed for a preference that the assignment should have been made in the precise terms of the act of 1881, and that these terms are limited to assignments for the benefit of creditors who file releases, the demurrer must be sustained as the pleadings now stand. As the case must, however, go to trial on the fourth count, and as the questions involved are difficult and important, the court is disposed to permit the plaintiff to amend the declaration with reference to the counts demurred to, if he thinks he can do so successfully.

The court notes that it does not find in these counts any allegation in terms that the assignor was in fact insolvent at the time of the alleged preferences. It has considered the questions argued by both parties without reference to the form of demurrer, either at common law or under the Massachusetts practice acts.

Demurrer sustained; first, second, and third counts adjudged insufficient; judgment on the same for the defendants, with costs on the demurrer, unless plaintiff amends, and pays costs on or before the 18th day of September next.

BELL v. HANOVER NAT. BANK.

(Circuit Court, S. D. New York. September 30, 1893.)

1. NATIONAL BANKS—INSOLVENCY—TRANSFER OF DEPOSIT.
Rev. St. § 5242, which declares all deposits, all transfers of deposits, and all payments of money made by a national bank after an act of insolvency, or in contemplation thereof, to be null and void, does not render illegal the retention of a balance standing to the credit of an insolvent national bank with a correspondent on the day of its failure, which has been pledged for the purpose of securing loans made by the correspondent to the insolvent bank.

2. SAME—INSOLVENCY—PLEDGE OF DEPOSIT WITH CORRESPONDENT.
Where a deposit with a correspondent has, long prior to the commission of the act of insolvency by a national bank, been pledged as collateral to secure the payment of loans made to the insolvent by its correspondent, neither the subsequent insolvency of the bank, nor the appointment of the receiver, destroys the lien of the correspondent, or its right to dispose of the pledge to satisfy the debt secured.

3. SAME—POWERS OF PRESIDENT.
Authority of the president of a national bank to contract with a correspondent that a deposit with the correspondent to the credit of the bank shall stand as collateral for loans made by the correspondent to the bank may be established by proof of the course of business, and by the usage and practice which the directors have permitted to grow up in the business of the bank, and by the knowledge which the board of directors must be presumed to have had of the acts of its subordinates in the affairs of the bank.

4. SAME—EVIDENCE.
In an action by the receiver of an insolvent national bank against a correspondent to recover the amount of a deposit by the insolvent bank with its correspondent, the evidence showed that the board left it to the president, as the agent of the bank, to negotiate loans, and to make such contracts as to repayment and security as were lawful and usual. *Held*, that the evidence was sufficient to establish the authority of the president to pledge the deposit with the correspondent as security for loans by it to the insolvent bank.

At Law. Action by Ortha C. Bell, as receiver of the First National Bank of Red Cloud, Neb., against the Hanover National Bank, of New York city, to recover the amount of a deposit by the insolvent bank with the defendant.

Mitchell & Mitchell, for plaintiff.
Moore & Wallace, for defendant.

LACOMBE, Circuit Judge. The retaining of the balance standing to the credit of the Bank of Red Cloud on the day of its failure was not a transfer of deposit, within the meaning of section 5242, Rev. St. U. S., which apparently contemplates a transfer by the insolvent bank. Bank v. Colby, 21 Wall. 613. The deposit had been pledged (assuming the contract of February 1, 1890, to be valid) long prior to the commission of the act of insolvency, as collateral to secure the payment of the loans made to the Bank of Red Cloud by defendant. Neither the subsequent insolvency of the bank, nor the appointment of the receiver, destroyed the lien of defendant, nor its right to dispose of the pledge to satisfy the

debt thus secured. Scott v. Armstrong, 146 U. S. 510, 13 Sup. Ct. Rep. 148. The agreement by which deposits with the defendant were pledged as collateral security for the discounted notes does not appear upon its face to be the contract of the Bank of Red Cloud, but the evidence is sufficient to show that such an agreement was made between the defendant bank and Shirey, the president of the Red Cloud Bank, professing to act on its behalf. It is true that no express authority from the board of directors to make such an agreement is shown, but the contract is not an unusual one, and authority to make it may be established by proof of the course of business, by the usages and practice which the directors may have permitted to grow up in the business of the bank, and by the knowledge which the board of directors must be presumed to have had of the acts and doings of its subordinates in and about the affairs of the corporation. Mahoney Min. Co. v. Anglo-Californian Bank, 104 U. S. 194. The evidence in this case abundantly shows that the board left it to the president, as their agent and the bank's, to negotiate loans, and make such contracts as to repayment and security as are lawful and usual,—sufficiently so, at least, to bind the bank in such transactions with third persons, when the bank has received the benefit of such contract, without objections, for more than a year. Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. Rep. 428.

Whatever set-off or counterclaim may arise from the transactions between the two banks is equitable, and this court would have no right to grant it in an action at law, such as this is. Scott v. Armstrong, 146 U. S. 512, 13 Sup. Ct. Rep. 148. But, independently of any set-off, the particular deposit sued for is pledged for a specific purpose. It is only such balance of it as might be left after the lien upon it is satisfied that either the Bank of Red Cloud or the receiver is entitled to; and that, as the evidence shows, is nothing. Verdict directed for defendant.

PITTSBURGH, C., C. & ST. L. RY. CO. v. RUSS.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1893.)

No. 76.

1. CARRIERS OF PASSENGERS—CONDITIONS OF TICKET—CONSTRUCTION.
   Acceptance of a mileage ticket which is expressed to be upon conditions that "the purchaser agrees to sign his name in presence of conductor each time before detachment is made," and that, "unless the proper signature is given, this ticket is forfeited," does not constitute an agreement that the conductor may decide for the holder, as well as for the company, whether the holder is the purchaser named in the ticket.
2. SAME—WRONGFUL EJECTION OF PASSENGER—REMEDY.
   A passenger who is wrongfully ejected from a train by the conductor, on the claim that he is not the person named in his ticket, is not limited to an action for breach of contract, but may sue the company in tort.
3. SAME—TRIAL—INSTRUCTIONS.
   In an action by a passenger for a wrongful ejection from a train, an instruction to the effect that if he resisted the conductor's efforts to eject

him, and such resistance increased the nervous trouble from which he was suffering, "he cannot recover any damages on account of such increase of said trouble, and his resistance must be considered in mitigation of the plaintiff's damages," is objectionable, as requiring the jury to give defendant a double advantage, by refusing plaintiff any damages on account of injury caused by his resistance to the conductor, and also by considering that resistance in mitigation of the damages otherwise allowable.

4. SAME—EXEMPLARY DAMAGES.
A railroad company is not liable for exemplary damages on account of the malice, wantonness, or oppression of its conductor in ejecting a passenger from a train. Railroad Co. v. Prentice, 13 Sup. Ct. Rep. 261. 147 U. S. 101, followed.

5. SAME—INSTRUCTIONS.
The error of instructing the jury that the company is liable for exemplary damages in such case is not cured by the statement that, in the opinion of the judge, the conductor was not malicious, wanton, or oppressive in his conduct, since the judge's opinion on the facts is not binding on the jury.

6. SAME—RATIFICATION BY COMPANY.
Where a conductor uses unnecessary force in ejecting a passenger supposed to be personating the owner of a mileage ticket, the fact that the company has issued instructions to its conductors that "regulations regarding the acceptance of mileage tickets for passage must be strictly enforced, without fear or favor," and that, "if they find mileage tickets have been transferred, they must lift such tickets, collect full fare, and report the transaction," does not render the company responsible for the wanton act of the conductor.

7. SAME.
Nor is the company rendered liable therefor by the fact that its general ticket agent was upon the train, and that the conductor conferred with him about the ticket, where it is not shown that such agent had authority over the conductor, or that he attempted to influence his action.

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

Action by Charles A. Russ against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company for personal injuries. Plaintiff obtained judgment. Defendant brings error. Reversed.

Statement by WOODS, Circuit Judge:

The defendant in error was the plaintiff below. The substance of his complaint is that he was wrongfully, wantonly, and forcibly expelled by the conductor from a passenger train of the plaintiff in error, which he had entered at Louisville, Ky., for the purpose of being carried to Indianapolis; that in payment of his fare he presented to the conductor a mileage ticket, which was still good for 500 miles or more, and, in the presence of the conductor, signed his name upon the mileage strip, to be detached, as required by one of the conditions of the ticket, but that the conductor, denying his identity and the genuineness of the signature, took up the ticket, and upon the refusal of the plaintiff to pay fare in money or leave the train when it had arrived at Jeffersonville, Ind., laid hands upon him, and removed him by force. The plaintiff, testifying in his own behalf, gave this account of the expulsion: "He simply lifted me up, and he says, 'Is that your baggage on the seat?' I says, 'It is,' and he took hold of the baggage, and pushed me ahead of him to the front part of the coach, and there I sat down in a seat on the same side of the car,—a little short seat that faces the car; I think next to the window. Then he took my valise out and umbrella, and put them on the depot platform, and came back with the brakeman, and without saying anything, only wanting to know if I was going to pay my fare, and I told him 'No,' and he grabbed hold of me, and pulled me or pushed me out onto

the platform, and down the steps, onto the depot platform." It does not appear that more force was used than was necessary to effect the removal, and no bodily harm was inflicted upon the plaintiff unless it was, as it is alleged to have been, by way of "a nervous shock, bringing upon him again the nervous prostration and disorder from which he had previously been suffering," and "rendering him sick and incapable of work for several weeks thereafter, and necessitating the employment of a physician," etc. By force of conditions annexed to it, the plaintiff's ticket was not transferable, and, if presented by any other person, was to be forfeited. Another condition was expressed in these words: "The purchaser agrees to sign his name, in presence of conductor, on the back (close to the top) of mileage strip each time before detachment is made, and the signature must appear but once on each detachment. Unless the proper signature is given, this ticket is forfeited." The defendant company had issued to its conductors the following instructions: "The regulations regarding the acceptance of mileage tickets for passage must be strictly enforced, without fear or favor. Conductors must be particular to know that each person presenting a nontransferable signature mileage ticket is the veritable person named on the same, and they must adopt every special and reasonable method for ascertaining whether or not mileage tickets are presented by original purchasers. They must require each person presenting a mileage ticket to identify himself thoroughly by his signature, and conductors must compare the signature, and if they find mileage tickets have been transferred and are presented by other than the original purchasers, or the parties who properly identify themselves, they must lift such tickets, collect full fare, and report the transaction in the usual manner. Disregard of this order in any particular whatever will subject the offending conductor to dismissal from the service."

The court refused to give the jury the following instructions, asked by the plaintiff in error: "When the plaintiff purchased and accepted the ticket in question, in the use of it for passage on defendant's train, he was bound by all the conditions of the annexed contract, and all reasonable rules which the company might make for the government of its employes in respect to the use of such ticket for passage on defendant's trains. Under the conditions of the contract, and the reasonable rules of the company in respect to the use of the ticket, it was made the duty of conductors of defendant's trains to determine the question, when the ticket was presented for passage, whether or not the plaintiff was the purchaser or owner of the ticket. If, in the performance of that duty, the conductor of the train in question, in good faith, decided that the plaintiff was not the purchaser and owner of the ticket, and refused to accept the same for his passage, but took it up, and demanded that the plaintiff pay his fare or leave the train at Jeffersonville station, it was the duty of the plaintiff to pay his fare, if he had the money, or leave the train at said station, without requiring the conductor to eject him therefrom; and, if you find that he refused to do either, and the conductor ejected him at said station, using no more force than was necessary, then the plaintiff is only entitled to recover the value of the unused portion of the ticket, and the damages sustained, if any, by his detention at Jeffersonville until the next train. When a passenger is rightfully on a train, and is about being ejected therefrom, it is not necessary for him, in order to protect and preserve his rights as such passenger, to resist the conductor in his efforts to eject him, or to compel the conductor to use force to remove him from the train. In such case his rights would be just as complete if he left the train under protest. So if you find that the plaintiff resisted the conductor's efforts to eject him, or required the conductor to use force to do so, and that such resistance or refusal to leave the train aggravated or increased the nervous trouble under which he claims to have been suffering, he cannot recover any damages on account of such aggravation or increase of said trouble, and his resistance to the efforts of the conductor must be considered by you in mitigation of the plaintiff's damages."

The court, of its own motion, gave the following instructions: "It having been admitted by defendant's counsel that the plaintiff was the owner of the ticket in question at the time of his expulsion from the train, and entitled

to be carried thereon on said train, the plaintiff is entitled to recover such proximate damages for his expulsion from the train as will fairly and fully compensate him for the wrong done him by his expulsion. In assessing the plaintiff's damages, you may consider all the circumstances connected with his ejectment from the train as affecting his business, his health, and his peace of mind, and assess such damages as will fairly and fully compensate him for his loss of time, if any, and for his physical and mental suffering or injury caused by such ejectment. In cases of this sort, where the ejectment of the passenger is wrongful, and is done maliciously, wantonly, or with oppression, in addition to the compensatory damages, the passenger would be entitled to recover punitive or exemplary damages. But it is the opinion of the court from the evidence in this case that the expulsion of the plaintiff by the defendant's conductor was neither malicious, wanton, nor oppressive. It seems to me from the evidence that the conductor acted in good faith, believing that he had the right to put the plaintiff off the train. But, while this is the opinion of the court, it is a question for the jury to determine from all the evidence in the case whether the plaintiff's ejectment from the train by the conductor was attended with malice, wantonness, or oppression. And, if you determine from the evidence that it was, you have a right, in addition to what you may find the plaintiff entitled to recover to compensate him, to assess such damages as a punishment, or by way of an example to the defendant, as you believe from the evidence the circumstances of the ejectment would fairly warrant."

S. O. Pickens, for plaintiff in error.

A. J. Beveridge, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP, District Judge.

WOODS, Circuit Judge, (after making the foregoing statement.) We do not assent to the proposition that, by accepting the mileage ticket with its special conditions, the defendant in error agreed that any conductor to whom he should present the ticket might decide for him, as well as for the company, whether or not he was the rightful holder. There is nothing expressed nor fairly to be implied from the conditions to that effect. As the representative of his company, acting under such rules as it has prescribed for him, a conductor, in collecting fares or tickets "necessarily concedes or rejects the right of the passenger to ride." He must determine whether or not money offered him is genuine, or, if it be a ticket or pass, he must decide whether it is valid, or for any reason is not available to the holder; and if he decides incorrectly, to the passenger's injury, the company will be answerable in damages. Bish. Noncont. Law, § 1095. And there is no good reason why the purchasers of tickets like that in question should be subject to a different rule.

It is insisted that the defendant in error should have sought his remedy in an action for a breach of the special contract, and not in an action of tort; but it is well settled that in such cases the action may be in either form, at the election of the plaintiff. Cooley, Torts, 90, 91; Railroad Co. v. Fitzgerald, 47 Ind. 79; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. Rep. 163; Railway Co. v. Hurst, 36 Miss. 660.

The second of the instructions asked and refused, even if sound in theory, is objectionable, because upon a strict construction it

would require the jury to give the defendant in the action a double advantage, by refusing the plaintiff anything on account of injury brought upon himself by resisting the conductor's effort to eject him, and also by considering that resistance in mitigation of the damages otherwise allowable.

Upon the question whether or not a passenger may resist by force an unwarranted expulsion from a railway train or other public conveyance, and be entitled to compensation for injuries, which, but for that resistance, he would not have suffered, the decisions are not in complete accord. In Railroad v. Connell, 112 Ill. 295, the supreme court of Illinois held, in harmony with prior decisions of that court, that a passenger who resists a wrongful removal "cannot recover for the force used by the conductor in putting him off, when no more force is used than necessary." Recognizing the right of the party so injured to recover, besides the amount of direct pecuniary loss, "reasonable damages for the indignity of being expelled from the train," the court, in support of its view of the question, among other things of evident if not conclusive cogency, said:

"When the appellee was notified by the conductor that his ticket was not good and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force. A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for any indignity offered and for all damages sustained."

But in English v. Canal Co., 66 N. Y. 457, it was held that the passenger "was clearly justified in resistance to the extent necessary to prevent his being ejected;" and in Railway Co. v. Wolfe, 128 Ind. 347, 27 N. E. Rep. 606, that "he had the right to make reasonable resistance, as he did, by holding onto the seats until he was forced loose and taken from the cars." This last expression is in substantial harmony with the decision of the supreme court of the United States in New York, etc., R. Co. v. Winter's Adm'r, 143 U. S. 60, 73, 12 Sup. Ct. Rep. 356, where it is said:

"If he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will."

In respect to the measure of damages, the court erred in instructing that the jury might allow vindictive or punitive damages if it found that, in removing the plaintiff from the train, the conductor's action was attended with malice, wantonness, or oppression. In the case of Railroad Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261, decided since the trial of this case, it was held that a railroad corporation is not liable to exemplary or punitive damages on account of illegal, wanton, and oppressive acts of its conductors or other subordinate agents. The decision rests upon

the principle, applicable alike to corporations and individuals, that "no man should be punished for that of which he is not guilty;" and, consequently, that it is enough that the principal is responsible for the actual consequences of wanton or malicious conduct of an agent within the line of his employment, and not beyond that, unless he has been in some way particeps criminis.

It has been suggested that the conduct of the conductor in this instance had the sanction of the railroad company, because of the instructions which had been issued to conductors in respect to mileage tickets, and because the general ticket agent of the company was present upon the train, and assented to the conductor's action. The instructions referred to do not seem to us to have been objectionable. While enjoining upon conductors diligence to prevent improper use of mileage tickets, they require nothing inconsistent with the rights of the passenger, and contain no warrant or even suggestion that, in enforcing the conditions of the ticket or the regulations of the company, the conductor should proceed in a wanton or oppressive manner. While it appears that the general ticket agent of the company was upon the train, though not in the car from which the plaintiff was ejected, and that the conductor conferred with him about the plaintiff's ticket, it is not shown that he had authority over the conductor or attempted to dictate or influence his action towards the plaintiff. Besides, if any question was to be made of the ticket agent's participation in the expulsion, or of the company's responsibility otherwise for the wantonness or malice of the conductor, it should have been submitted to the jury for decision upon the evidence. This court cannot review questions of fact in a case at law.

It is also urged that the erroneous instruction should be deemed harmless, considering the amount of the verdict, because the jury was told that, in the opinion of the court, the conductor was not malicious, wanton, nor oppressive in his conduct towards the plaintiff, but acted in good faith, and it is not to be presumed that the jury went contrary to that opinion. In the federal courts the opposite theory prevails, it being well settled "that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such "expressions of opinion are not reviewable on writ of error." Rucker v. Wheeler, 127 U. S. 85, 93, 8 Sup. Ct. Rep. 1142, and cases cited. The error of law cannot be cured by an expression of opinion upon the question of fact concerning which the law is announced, because the jury is not bound by, and presumably will not follow, the court's opinion concerning the fact if the weight of evidence is to the contrary. The verdict was for $1,000, and it is insisted, but we cannot say judicially, that there was assessed no more than just compensation for the injury which the plaintiff suffered.

The judgment is reversed, at the costs of the appellee, with instruction that a new trial be granted.

ALEXANDER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 17, 1893.)

No. 53.

1. APPEAL—DECISION ON MOTION FOR NEW TRIAL—FEDERAL COURTS—REVIEW IN CIRCUIT COURT OF APPEALS.
The rule that the decisions of the circuit and district courts on motions for new trial are not reviewable applies to review in the circuit court of appeals, as well as in the supreme court. Railroad Co. v. Howard, 1 C. C. A. 229, 49 Fed. Rep. 206, approved.

2. SAME—REVIEW OF DECISION OF TERRITORIAL COURT.
The fact that the decision of a territorial district court on a motion for a new trial is reviewable in the territorial supreme court does not make such a decision by a United States district court reviewable by the circuit court of appeals, although the cause, pending the motion for a new trial, has been removed from the territorial district court upon the admission of the territory into the Union. Bates v. Payson, 4 Dill. 265, distinguished.

3. SAME—TIME OF TAKING — WHEN LIMITATION BEGINS TO RUN — EFFECT OF MOTION FOR NEW TRIAL.
In the territory of Idaho, decisions of the territorial district courts on motions for new trial were reviewable by the territorial supreme court. Judgment was rendered by a territorial district court, and motion for a new trial made, pending which the territory was admitted to the Union, and the cause removed to the newly-created United States district court. *Held*, that the six months to which the time for suing out of a writ of error from the circuit court of appeals was limited by the judiciary act of March 3, 1891, § 11, (26 Stat. 829,) did not begin to run until the motion for a new trial was finally disposed of. Railway Co. v. Murphy, 4 Sup. Ct. Rep. 497, 111 U. S. 488, followed.

4. EXCEPTIONS, BILL OF — STATEMENT ON MOTION FOR NEW TRIAL MAY TAKE THE PLACE OF.
A statement made and filed in the trial court in aid of a motion for a new trial, containing a statement of what purports to be all the exceptions taken and allowed, and all the evidence relating to the same, if regularly settled and allowed by the trial judge, is sufficient to serve as a bill of exceptions on writ of error.

5. EVIDENCE—BEST AND SECONDARY — ACCOUNTS OF DEFAULTING POSTMASTER.
In an action on a defaulting postmaster's bond, a question to the defaulter's successor in office whether he had received orders to make demands on the defaulter is not objectionable on the ground that the written orders are the best evidence of their contents, since the question does not concern the contents.

6. SAME—ITEMS OF ACCOUNTS—IDAHO STATUTE.
An action by the United States upon a defaulting postmaster's bond, brought in a district court of the territory of Idaho, is not within the meaning of Rev. Laws Idaho, § 4209, (St. 1887,) requiring plaintiffs to furnish the items of accounts sued upon; and the United States may refuse such items, and thereafter introduce in evidence copies of the account current and the money-order account of the defaulter.

7. SAME—CREDITS CLAIMED AGAINST UNITED STATES — REV. ST. § 951—ACTION ON POSTMASTER'S BOND.
Rev. St. § 951, providing that, in suits by the United States against individuals, no credit shall be admitted on trial unless presented to the treasury and disallowed, applies to payments by sureties of a defaulting postmaster on account of his liability, made in cash, as well as to credits, when evidence of such payments is sought to be introduced by the sureties in an action against them on the bond.

8. POST OFFICE — LIABILITY OF SURETIES ON POSTMASTER'S BOND — TRIAL — DIRECTING VERDICT.

Sums recovered from a defaulting postmaster by his sureties, and paid over to the United States, should be credited upon the general account of the defaulter, and not upon the liability of the sureties; and where the defalcation, after making such credits, is largely in excess of the liability of the sureties, and, in an action against them, no evidence is offered in defense except the payment of such sums, an instruction to find a verdict for the United States is not erroneous.

In Error to the District Court of the United States for the District of Idaho.

At Law. Action in the district court of the first judicial district of the territory of Idaho against Joseph Alexander and others, as sureties upon the bond of one Hibbs, a defaulting postmaster. Judgment was given for plaintiff, and, pending a motion for a new trial, the cause was transferred, on the admission of the territory into the Union as a state, to the district court of the United States for the district of Idaho, by which the motion was denied. Defendants bring error. Affirmed.

Rothchild & Ach, for plaintiffs in error.

Fremont Wood, for the United States.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. An action was brought in 1886 in the district court of the first judicial district of the territory of Idaho to recover from the sureties on the bond of one Hibbs, a postmaster, $10,000, the penalty of the bond. On November 28, 1888, judgment was rendered for that amount upon the verdict of the jury in the case. On December 1, 1888, notice was given of the intention of defendants to move for a new trial, and subsequently, in accordance with the practice of that court, a statement of the case was settled, with exhibits to be used on the motion for new trial. On April 15, 1889, the motion was submitted to Judge L. L. Logan, of that court, and was by him taken under advisement until November 27th following, when he denied the motion. This decision on the motion was considered void, for the reason that, at the time it was rendered, a successor to Judge Logan had been appointed and qualified, and had assumed the duties of the office. On July 3, 1890, Idaho was admitted into the Union as a state, and by the act of admission this cause was transferred to the district court of the United States for the district of Idaho. On May 19, 1891, application was made to that court for an order setting aside the decision of Judge Logan denying the motion for new trial. On May 25th the application was granted, and on December 14, 1891, the motion for new trial was overruled. On April 2, 1892, the writ of error and citation were issued by which the record was brought into this court.

It is contended on behalf of the defendant in error that the writ must be dismissed, for the reason that a writ of error will not

lie to review the decision of a district court of the United States granting or overruling a motion for a new trial, and for the further reason that the judgment of the territorial court sought to be reviewed was rendered more than six months prior to the time of suing out the writ.

Upon the first point the law is well settled. The decisions of the circuit and district courts upon motion for a new trial are not reviewable. It is held that the motion for a new trial is designed only to invoke the judgment of the trial court upon the alleged errors set out in the motion, and that its office and function are limited to that court. Doswell v. De La Lanza, 20 How. 29; Railway Co. v. Struble, 109 U. S. 381, 3 Sup. Ct. Rep. 270; Missouri Pac. Ry. Co. v. Chicago & A. R. Co., 132 U. S. 191, 10 Sup. Ct. Rep. 65; Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. Rep. 201; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. Rep. 8. And the rule is applicable to the circuit court of appeals. Railway Co. v. Howard, 1 C. C. A. 229, 49 Fed. Rep. 206; McClellan v. Pyeatt, 1 C. C. A. 613, 50 Fed. Rep. 688.

But it is contended that, inasmuch as, by the laws of Idaho in force at the time the judgment was rendered therein, and at the time the motion for a new trial was filed, an appeal would lie to the supreme court of the territory, the right of appeal from the decision on that motion is still conserved to the plaintiffs in error; and they point to the case of Bates v. Payson, 4 Dill. 265, as sustaining that view. We do not so understand the doctrine of that decision. That was a case arising under the act admitting Colorado into the Union, and declaring the federal court to be the successor of the supreme court of the territory as to certain cases, with power to proceed therein "in due course of law." The question arose whether an action at law which had been taken by appeal to the territorial supreme court, and thence transferred by the act to the circuit court of the United States, could be properly regarded as pending in the latter court, since, by the practice of that court, no action at law could be taken thereto by appeal, but must needs be taken by a writ of error. The court decided, in effect, that, inasmuch as the cause was pending in the territorial supreme court, the circuit court would not consider the method of procedure by which it was taken there, but would proceed as that court would have proceeded if it had retained the case. That decision does not affect the question of the method of procedure in the circuit court. There can be no doubt that a cause removed or transferred to a circuit or district court of the United States on the admission of a territory into the Union must, from the time of transfer, be subject to the rules of practice and procedure of the court to which it is so removed, and the provision of the statute that the latter court shall proceed "in due course of law" means no more than this. It is clear, therefore, that no appeal or writ of error would lie to this court from the decision of the district court of Idaho overruling the motion for a new trial.

But, upon inspecting the writ of error in this case, it will be

seen that it does not purport to be brought to review the decision on the motion for a new trial. By its terms it is equally applicable to the judgment upon the verdict of the jury, and the question arises whether the six months within which to sue out the writ, as limited by section 11 of the act creating the circuit court of appeals, had expired on April 2, 1892. We are of the opinion that it had not, and that the judgment of the territorial court was suspended by virtue of the motion for a new trial, which had been filed in due time, and which had been entertained by the court, and that it was so suspended until the final disposition of that motion. In Brockett v. Brockett, 2 How. 238, it was held that a petition for a rehearing filed during the term, and actually entertained by the court, suspended the operation of a decree in equity until the petition was disposed of. In Cambuston v. U. S., 95 U. S. 287, by implication, the same doctrine was held; but it was decided in that case that, if the motion for a new trial is not filed during the term when judgment was rendered, the time for taking an appeal runs from the entry of the judgment. In Railway Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. Rep. 497, a judgment of the supreme court of the state of Texas was sought to be reviewed by writ of error. Some six months after the entry of the judgment in the supreme court of Texas a motion for rehearing was entertained and decided by that court. It was held that the time limited for writ of error to the supreme court of the United States did not begin to run until the petition for rehearing was disposed of. Similar decisions have been rendered in the circuit courts in Rutherford v. Insurance Co., 1 Fed. Rep. 456; Brown v. Evans, 8 Sawy. 502, 18 Fed. Rep. 56. There is nothing contained in the language of the act regulating writs of error and appeal to the circuit court of appeals which would render these decisions inapplicable to this case.

The motion to dismiss the writ is therefore denied.

The objection is made that the record contains no bill of exceptions. We find no difficulty in treating the statement which was made and filed in aid of the motion for a new trial as a bill of exceptions, for the purposes of this writ. It contains a statement of what purport to be all of the exceptions taken and allowed on the trial, together with all the evidence relating to the same. It appears to have been regularly and in apt time settled and allowed by the trial judge. It contains all the essential features of a bill of exceptions.

The first assignment of error is that the court overruled the objection made to the question propounded to the Postmaster Kress, who was successor to Hibbs, when he was asked: "Did you ever receive any orders from the post-office department in regard to making any demands on Mr. Hibbs?" It is contended that, since the orders were in writing, they were themselves the best evidence of their contents. It is a sufficient answer to this objection to point to the fact that the question did not call for the contents of the orders. It called simply for information about the

receipt of the orders from the post-office department. The answer to the question was properly made by parol, and it would have been a sufficient answer if the witness had said either "Yes" or "No." The fact that he proceeded to set forth something of the contents or purport of the orders does not affect the question of the correctness of the ruling upon the objection. If the witness went too far, the remedy was by motion to strike out that portion of his answer.

It is claimed that the court erred in admitting copies of the account current and the money-order account of Hibbs with the post-office department. These copies were transcripts from the books of account of the department, duly authenticated, under the seal of the treasury department, and were competent evidence. Objection was made to their introduction upon the ground that the defendants had made demand for copies thereof by notice served upon counsel for the United States, and that no copies had been furnished; also upon the ground that the action was brought upon forged money orders, and no copies of the forged orders had been set forth in the complaint. The objections were overruled on the trial, upon the grounds, as stated in the bill of exceptions, (1) that the suit was one upon a bond, and not upon account, and that, therefore, the items of the accounts could not be required, under the provisions of section 4209 of the Revised Laws of Idaho, (St. 1887;) (2) that it nowhere appeared in the case that such demand for copies had been duly signed by an attorney of record in the suit or served upon the counsel of the United States; (3) that it does not appear that the suit was brought upon forged money orders. There is nothing contained in the bill of exceptions to contravene these statements of the trial judge, and the reasons so stated for overruling the objections were amply sufficient.

It is assigned as error that the court sustained objections to questions propounded to one of the defendants, by which the defendant sought to adduce testimony tending to prove that certain moneys had been paid by the sureties, or through their instrumentality, to the government, on account of Hibb's liability after his removal from office. This evidence was properly excluded. Section 951 of the Revised Statutes clearly points out the course to be pursued by a surety claiming a credit:

"In suits brought by the United States against individuals, no credit shall be admitted upon trial except such as appear to have been presented to the accounting officers of the treasury for their examination, and to have been by them disallowed in whole or in part."

There had been no attempt to comply with this statute. The contract of the defendants whereby they became sureties for Hibbs as postmaster was made with reference to the provisions of the law concerning the defenses they might make in case of a breach of the bond, and the evidence they might introduce in aid thereof. The statute just quoted entered into, and became part of, their contract. The rule therein provided was a reasonable one. Its binding force has been recognized by the courts. U. S. v. Gil-

more, 7 Wall. 492. It is contended, however, that section 951 does not apply in this case, for the reason that the evidence so excluded would have proven, not credits, but actual payments of money upon account of the postmaster's liability. We are unable to concede that a distinction exists between a claim for payment in cash and a claim for a credit. When we consider the object of the statute, which evidently was designed to prevent the introduction of evidence to reduce the liability of individuals in cases of this kind until the department should have had an opportunity to examine into the nature of the claim, and reject or allow the same, there is equal reason to apply the statute to payments claimed to have been made in cash as to counterclaims or offsets, and, in the plain meaning of the language employed in the statute, a claim for a credit would include any payment of cash which would reduce the liability of the sureties. The payments which the defendants sought to prove in this instance were evidently those pleaded in their amended and supplemental answer, and consisted of moneys which they alleged had been collected by the United States, and were either taken from the person of Hibbs when he was captured, or were collected from certain banks, all of which, the answer alleges, the defendants are entitled to have applied "as a credit" upon the bond. Here we have the defendants' own construction that these alleged payments were properly defined as "credits."

It is claimed that the court erred in directing the jury to return a verdict for the plaintiff. According to the bill of exceptions, the plaintiff introduced sufficient and competent evidence to prove a shortage in the accounts of Hibbs with the government, largely in excess of the penal sum named in the bond, and a demand upon the sureties for payment. The execution and validity of the bond were admitted in the pleadings. The only evidence introduced by the defendants was testimony to prove, that through the instrumentality of one of the defendants, the government had received large sums of money which had been taken from the person of Hibbs, and collected from certain banks. It was not disputed that, after these sums had been credited upon Hibbs' account, he was still indebted to the United States in a sum exceeding the penalty of the bond. The defendants endeavored to have these sums, so realized through their agency, credited upon their liability on the bond, rather than upon the general account of Hibbs. This was a question of law, and was properly disposed of by the court. The result was that there was no evidence whatever to go to the jury in behalf of the defendants, and there was no error in instructing the jury to return a verdict for the plaintiff.

The remaining assignment of errors, that the court erred in overruling the motion for a new trial, cannot, for reasons elsewhere stated in this opinion, be considered by this court.

There being no error in the trial below, the judgment is affirmed.

A. B. DICK CO. v. FUERTH.

(Circuit Court, D. New Jersey. July 11, 1893.)

1. PATENTS FOR INVENTIONS—INVENTION—STENCIL SHEETS.
Letters patent No. 377,706, issued February 7, 1888, to John Broderick, for a "prepared sheet for stencils," consisting of a thin, highly porous sheet of material, such as Japanese dental paper, or yoshino, coated or impregnated with a soft waxy substance, such as paraffine, which, when the sheet is pressed upon by a writing or printing instrument, will be displaced on the lines of impression so as to leave them open to the passage of ink through the pores of the sheet, involve patentable invention over the devices of the prior art in which sheets of material were coated with hard wax, as in patent No. 332,890, issued December 22, 1885, to David Gestetner, and then rendered pervious to ink on the lines of the letters by cutting away the body of the sheet, or by puncturing it with a proper instrument.

2. SAME—SUFFICIENCY OF SPECIFICATIONS.
There is no defect or insufficiency in the specifications of the Broderick patent such as would prevent those skilled in the art from making and using the same, and the patent is not objectionable on this ground.

3. SAME—INFRINGEMENT—ESTOPPEL—FALSE MARKING.
An applicant for a patent caused to be stamped upon some of the articles sold the words: "Pat. July 6, 1886. Pats. applied for." The patent of July 6, 1886, had been granted to the applicant for a different article, but the words were used by advice of counsel, under a misapprehension of the law, and without any intention to deceive the public. *Held*, that these words might be rejected as mere surplusage, and the applicant was not estopped from suing a subsequent infringer, although the stamping of an unpatented article as patented is forbidden by Rev. St. § 4901.

4. SAME—SUIT FOR INFRINGEMENT—TECHNICAL DEFENSES.
Where the defense to a suit for infringement is purely technical in character, a court of equity should not give effect thereto, unless the proof upon which the technicality is based is ample and satisfactory.

In Equity. Bill for infringement of a patent. Decree for complainant.

D. H. Driscoll, for complainant.
J. A. Beecher, for defendant.

GREEN, District Judge. The complainant, the A. B. Dick Company, filed its bill of complaint in this cause against the defendant, William G. Fuerth, to restrain an alleged infringement of letters patent No. 377,706, granted to one John Broderick, February 7, 1888, for a "prepared sheet for stencils," the title to which, by mesne assignments, is now in the complainant. In the specifications of the letters patent Mr. Broderick declares that he has invented certain new and useful improvements in preparing sheets for stencils or transmitting printing sheets; that in the practice of his invention he employs a thin porous sheet of material, impregnated or coated with a gummy or waxy substance, or other material impervious to ink, and of such porosity, and a gummy or waxy filling of such consistency, that when the impregnated or

coated sheet is placed upon a suitable support or bearing surface, and impressed upon with a writing or printing instrument, the gummy or waxy filling will, under the pressure thereof, be displaced at the point or lines of impression so as in all cases to leave them open to the passage of ink through the pores of the sheet; and he claims that such sheets so prepared dispensed with the necessity of employing in the preparation of stencil sheets an abrading or puncturing instrument, bearing surface, or plate. He further declared that he prepared his improved stencil sheet by preference from a sheet of thin, highly porous paper, by immersing the same in a bath of melted gummy or waxy substance, such as paraffine, of about 120° Fahrenheit fusion point. In a paper so prepared he asserted that the stylus passes over the surface with the ease and fluency of a lead pencil, so as to produce an almost perfect representation of the writer's autograph with a pen. The stencil, thus prepared, is then used in duplicating impressions, in the manner already familiar, by placing it on a sheet of paper, and passing an inked roller over it, or any other manner in which such a stencil may be used. He further says that the described stencil plate for the production and multiplication of impressions of printing is made by impressing the type letters, or other desired characters, designs, pictures, maps, or illustrations upon the prepared sheet with type (as by a typewriting machine) or plates on which the letters, etc., are made of raised lines and surfaces, such as, on being so impressed, will express from the prepared sheet the gummy or waxy substance, leaving the fibers exposed and open to the transmission of ink.

There are three claims in the letters patent, which are as follows:

"(1) A transmitting printing sheet, consisting of a thin, porous sheet, through which ink is readily transmitted, such as Japanese dental paper, or yoshino, filled or coated with a substance impervious to ink, as paraffine, substantially as described. (2) A transmitting printing sheet, consisting of a thin, porous sheet, through which ink is readily transmitted, such as Japanese dental paper, or yoshino, filled or coated with a substance impervious to ink, as paraffine, and having this filling or coating removed at the points or lines of printing, substantially as described, for the purposes specified. (3) A prepared sheet for stencils, consisting of a sheet of Japanese dental paper, or yoshino, coated with a substance impervious to ink, substantially as described."

Of these claims only the second and third are involved in this controversy. Looking at the invention, then, broadly considered, it seems to consist of a novel stencil, or rather, perhaps, a new transmitting printing sheet, extremely thin in substance, which is coated or filled with some soft waxy substance impervious to ink, and yet is so porous that in the removing of the filling or coating of wax at any point by pressure, the sheet itself, without disturbance of fiber, becomes open to the transmission of ink through it. So that the result arrived at by Mr. Broderick in his invention, if it be, indeed, an invention, is this: That the stencil is

made by the removing of the soft waxy or gummy filling or coating, rather than by the heretofore usual and more common way by perforation or cutting away of the sheet itself upon which the coating or filling has been placed. A stencil may be defined to be a thin plate or sheet of any substance in which a figure, letter, or pattern is formed by cutting completely through the plate. Mr. Broderick's achievement consists in the formation of a stencil without the cutting of the letters, figures, or patterns through or from the body of the porous substance upon which the soft waxy or gummy material has been placed. Stencils were very commonly in use long before Mr. Broderick's invention. They were made not only of metals, but as well of other material, such as paper, which had been previously coated with some substance which would render it impervious to the passage of ink. So that it must be admitted there was nothing new in making a stencil itself, as a stencil, nor in the coating of the thin paper with wax or other gummy substance as a component part thereof. Whether what Mr. Broderick did in this case evidences patentable novelty and shows invention depends not only upon the state of the art, but as well upon the exact means by which the end sought by Mr. Broderick was attained. The defendant stoutly contends that this alleged invention is no invention at all; that it does not embrace any substantial variation or change from what then belonged to the art, and does not, therefore, involve the exercise of inventive faculty; that the subject-matter of the letters patent was wholly within the domain of common knowledge among persons skilled in the art; that each element in the claim was well known, and that it only required the exercise of mechanical skill to attain the result which Mr. Broderick claims to have been the first to invent. So far as the state of the art is concerned, it is undeniably true that stencils were well known and in common use prior to the date of the letters patent granted to Broderick. Stencils made from waxed or gummed paper were quite as common as those made from metals or other materials. The defendant introduced in testimony as a substantial part of his defense a large number of patents, including as well those which related to the process of coating paper with wax and other gummy substances as those which approached more nearly the domain of the Broderick invention, and related directly to stencils and other devices for making multiform copies of writings, designs, and figures. And in this part of the case the defendants' counsel ably summed up his argument as follows:

"The preparation and manufacture of stencils was within the domain of common knowledge among persons skilled in the art, and each element in each claim was well known, and the function which each element would perform, combined with other elements specified in each of the claims, was well known. The alleged invention required only mechanical skill, and no more than ordinary knowledge and judgment in the selection of a more or less porous paper of a class and kind then well known in the market and to the

trade, and in common and public use for the same purposes, and prepared in the same way, and of varying porosities, according to the style and character of the work required."

Of course, if the argument of counsel, sound in itself, had been fortified by facts in evidence, it would have ended this litigation, in this court at least; but, after a most careful consideration of the matters involved in this controversy, I am unable to assent to the conclusions insisted upon by the defendant as being well founded.

I do not think it necessary to examine minutely each one of the alleged anticipating patents, nor to point out all the particulars which differentiate them from the invention of Broderick. Nor can it be necessary to consume time in explaining just what the state of the art displayed. It is true beyond question that the elements which, combined, appear in and characterize the stencils in common use, as well as the inventions covered by the letters patent, are, in cases where paper forms the basic material, without exception, porous paper upon the one hand, and a filling or impregnation or covering of wax upon the other. But I do not find any stencil known to the art which would fail to come within the definition of a stencil as already given; that is to say, in each case the figure or letter or pattern which is to be copied by the use of a stencil is primarily formed by cutting or perforating in some wise through the substance, plate, or material, or whatever it may be, which bears the coating of wax or gummy substance. Thus, in some of the patents, the thin paper covered with wax is laid upon a roughened under-surface, and the figure to be copied is then traced over it; pressure being had, the sharp roughness of the under-surface penetrates through the thin, porous paper, causing openings, minute to be sure, but very close together, making an almost continuous cutting, through which the ink is transmitted to the sheet upon which the printing is to be done. In others, peculiar kinds of acid ink are to be used, which eat through the fibers or a material of the surface supporting the wax, and so practically make the stencil by cutting through the surface of the stencil itself. In yet other instances the writing or printing is done by a notched or roughened wheel of small diameter, which forces its way through the fibers or surface of the material. The result in each case is the same. The basic material is cut through or perforated. All these devices differ, I think, from the improved stencil now under consideration. Does this latter stencil show invention? It is very difficult to define what invention is. It certainly is not reasoning. It does not arise from any logical deduction. A necessary conclusion from certain admitted premises will not support it. Inferences such as a man of ordinary intellect would naturally draw when he is possessed of the ordinary skill and knowledge of the art in respect to which the inference may be drawn, falls very far short of being invention. But if one creates, not only by the operation of mind, but as well actually, physically, new means by which is necessarily obtained a certain specific end, means which are novel to the creator as well

as novel to the world, which had never existed before, at least in the combination or conjunction in which the creator causes them to exist for the first time,—he who does this must, I think, be regarded as an inventor.

Now, as we have seen, before Mr. Broderick's alleged invention, stencils were made for copying purposes by cutting through or perforating the basic plate or material. The letters to be copied, or the figures or the words or the designs, were bodily cut out of the material which formed the basis of the stencil. The result was that in all the stencils which had been made previous to the invention of Mr. Broderick serious difficulty had been encountered, especially with certain letters called "loop letters;" such, for instance, as B, D, O, P, and Q. It was impossible to make these letters perfectly, simply from the impossibility of supporting the center part of the letter, in any other way than by attaching it to the body of the stencil, thereby making the letter itself imperfect; or, if not so attached, the letters would, so far as the loops were concerned, become a mere open space, without exhibiting the peculiar inner lines of the letters themselves, which gave them their distinct form and shape, and when used as stencils would cast upon the paper simply a blot. It was to overcome this defect in all stencils, and to make a perfect letter or design or figure, that Mr. Broderick made his invention. He discovered, after a long search and many experiments, that the paper known as "Japanese dental paper," or "yoshino," was so very porous that its fibers need not at all be cut or destroyed or abraded in the manufacture of stencils; and that, if he covered yoshino paper with a waxy or gummy substance, very soft in consistency, and then removed by pressure only the wax in conformity with the shape of the letters, figures, and designs which he desired to print, the ink would be easily transmitted in the printing process through the paper where the wax had been removed, without requiring any severance or disturbance of the fibers of the paper itself. In making loop letters, therefore, by this method and means, the inner part of the loop would still be firmly a part of the stencil itself, the fibers running from the loops to the body of the paper not being disturbed or cut or weakened in any degree. Hence a perfect letter or design or figure was produced. It is apparent, therefore, that there is a very great difference between the stencils which were described in the Broderick patent and the stencils which were generally in use, including the stencils which were covered by the letters patent relied upon by the defendant. As has been said before, in all the stencils which were known before they were improved by Broderick, it was absolutely necessary that the substance or material or fiber of the stencil itself should be cut or perforated in the formation of proposed letters, and in this respect they are all radically different from Broderick's invention; for by his invention the stencil is made by removing the waxy coating, and by leaving intact the basic substance of the stencil plate. And just here it is well to notice that not only did Broderick's invention

introduce the porosity of the paper as an element in his "improvement of stencils," but as well for the first time made use of a soft wax for the necessary coating, and this was quite as important as it was novel. Hard wax has a tendency to make the underlying base of paper in stencils harsh and rigid and brittle. Pressure exerted upon such waxy surfaces inevitably ruptured or broke or seriously abraded the fibers of the paper, and so affected not only the solidity of the stencil, but as well destroyed the sharpness of outline so necessary in letters and designs. A soft wax is so called simply because its particles flow upon each other, move readily and easily, while it produces no deleterious effect upon the natural pliability of fiber. Now, as the particles of soft wax move easily, they readily yield to slight pressure upon their surface; and so, without great force of impression, the proposed letter or design or figure of the stencil may be easily and perfectly formed. Thus, safely and simply, was avoided the danger of destroying the supporting fiber inherent in other stencil sheets. Now, nowhere in the prior art is there so much as a hint that a soft wax would, as a coating for stencil sheets, be valuable. In fact, not only was there no such suggestion, but there was a total disregard of the consistency of the coating substance in the making of stencils. It was considered as absolutely of no account; and its value, as a matter of careful judgment, was wholly ignored.

It may be argued that, after all that can be said about the advantages arising from the peculiar consistency of the wax used by Broderick, the difference between it and the harder wax of other stencil sheets is only a matter of degree; but this is hardly so. The primary object of using wax on stencil sheets is simply to render the sheet impervious to ink, save where the sheet is cut away in the delineation of the object to be copied. If the use by Broderick of a softer wax than had ever been purposely used before was for this purpose alone, the question of degree might well be raised; but such was not the only, nor the chief, use to which the wax selected by Broderick was purposed. He chose the softer wax for his stencil coating chiefly because it was to become practically the stencil. In impressing upon the softer wax the letters and figures to be copied, he easily displaced the wax itself because of its very softness, at the very points or lines of impression, and so made a perfect opening or place, through which the ink passing traced a perfect copy through the network of fibers left bare by such displacement. Even the defendant admits that for such purpose a hard wax is not only unsuitable, but unusable; hence there can be no question of degree raised, for the harder wax cannot be a factor in the problem solved.

In the course of the argument, counsel for defendant very strenuously insisted that one of the patents which has already been generally referred to as an anticipating patent was in reality a foundation patent for the use of Japanese paper in the construction of stencils. He referred to No. 332,890, which was granted

on December 22, 1885, to David Gestetner, of London, England, for a new and improved transfer or reproducing paper. In those letters patent it was stated that the object of the invention was to produce a new and improved paper, to be used for reproducing letters, drawings, documents, etc., which paper is perforated by means of a well-known perforating device, such as a tooth wheel of the nature of a stylus, or any other perforating instrument. The invention was said to consist of a sheet of bamboo fiber paper, on one surface of which a layer of wax or paraffine is fixed. The paper used was a Japanese paper made from a bamboo fiber. The letters patent contain two claims, the first of which was for an improved article of manufacture, being a sheet of transfer paper, consisting of a sheet of bamboo fiber paper, on one side of which a layer of wax or paraffine is fixed, substantially as shown and described. The second claim is not in any wise different. It may readily be admitted that this was the first time that bamboo fiber paper is mentioned in any of the letters patent relating to stencils, but I think the evidence is clear in this case that the paper which Gestetner used in his stencil sheet was a very different paper indeed from the paper known as the "yoshino." A great mass of testimony was taken touching the different kinds of paper manufactured in Japan, and the materials used in the manufacture. It is not at all necessary to follow the witnesses through the somewhat contradictory statements which they made touching Japanese paper. I think the weight of the testimony shows very clearly that the paper used by Gestetner was technically known as "gampi," and that the peculiarity of the gampi paper was that, while it was very thin, its fibers were exceedingly close together. Photographic copies of the papers, which were produced and shown, clearly exhibited this peculiarity, so that, if the invention of Broderick was based alone upon the use of yoshino paper, I still think that the Gestetner patent could not be looked upon as an anticipation. The letters patent granted to Gestetner especially referred to the manufacture of the stencil by means of a perforating or puncturing instrument; that is, an instrument which would perforate or puncture the paper. This is not the way in which Broderick made his stencil. He absolutely refrained from perforating or puncturing the paper which he used. The gampi paper, without perforation, could not be made into a stencil; its fibers being too close to permit the passage of ink, except through perforations or punctures. The yoshino paper requires no separation or piercing or puncturing of the fibers; for they lie so far apart that ample space is afforded for the passage of the ink after the letters or figures have been once impressed upon the surface of the wax. Much stress is laid upon this patent in the argument, but I am unable to see that it has any special bearing upon the merits of the case. It must be borne in mind that Broderick does not claim as his main element yoshino paper, but yoshino paper covered, coated with a soft wax, easily displaceable.

Besides these defenses, there were a number of other defenses interposed by the defendant, which were purely technical in character. It may be open to question how far a court of equity should regard defenses which are purely technical when interposed by one who is an infringer of the letters patent which he is seeking to destroy. If it be obligatory upon a court to consider them, and give them weight in the final determination of the question at issue, it is equally clear it is its duty to insist that the proof upon which the technicality is based should be ample and satisfactory. One of these defenses thus interposed by the defendant is that certain of the stencils made under this patent by Broderick were stamped as being made under another patent previously granted to Broderick. Undoubtedly some of the stencil sheets which Broderick made did have upon them these words: "Write on this side. Pat. July 6, 1886. Pats. applied for." This patent of July 6, 1886, is known as the "autographic patent," and it was improper, undoubtedly, to mark the sheets of the typewriter stencil paper as patented July 6, 1886. But it will be noticed that the words "Pats. applied for" were also stamped on the sheets; that is, that application had been made to the patent office for letters patent for the very sheet which was then presented to the public. I think it would be fair to reject the first part of the inscription as mere surplusage. If not, the most that can be said is that a section of the Revised Statutes (section 4901) had been violated, and, if the defendant had been injured in any way thereby, he might enforce the collection of the penalty which this section provides for its violation. When that penalty has been enforced, no other or further punishment can be inflicted upon the wrongdoer. But I think it is a complete answer to this contention of the defendant—that Broderick is estopped from claiming the protection of the letters patent in this case—that there is not a particle of evidence to show that the defendant impressed the inscription upon his stencil sheet with an intent to deceive the public. The worst that can be said of it is that it was a mere result of a misunderstanding of the law; an act, as the proofs show, committed under the advice of counsel. I do not think, therefore, that this defense can avail the defendant.

Another technical defense is that the letters patent in this case were granted after examination by the officials connected with one department of the patent office without knowledge of the patent previously granted to Gestetner for his paper, or to Broderick for his file plate patent. In fact the allegation is that some one in Broderick's interest surreptitiously removed the Gestetner patent and the Broderick file plate patent from that division of the patent office where the patent in suit was being examined, for the purpose of keeping from the knowledge of the examiner in that department the existence of those patents. A large amount of testimony taken in the cause relates to this alleged fraud. I shall not rehearse it here. It is enough to say that, in my judgment,

not only does the testimony fail to establish the contention of the defendant, but it does not raise a scintilla of doubt as to the perfect fairness of the officers in the patent office in dealing with this matter. It would take much stronger proof than that produced by the defendant to satisfy me that officials connected with the patent office, or reputable patent solicitors, would purposely do the things which are rather hinted at than deliberately charged by the defendant for the alleged purpose of benefiting one inventor at the cost of another, who was equally meritorious.

Nor do I think the objection raised by the defendant to the validity of the letters patent under consideration for want of sufficient specification of the said "prepared sheets for stencils so as to enable those skilled in the art to make, produce, and use the same" is well taken. Taking the whole patent together, I think there can be no question that the invention and the mode of use is clearly described and set forth by Broderick, so that he who runs may read and understand. There seems to be neither ambiguity nor uncertainty in the language of the specifications and claims. They are concise, terse, and well expressed. As is quite usual in cases of this sort, the evidence touching infringement is contradictory. I think the weight of the testimony preponderates in favor of the complainant, and upon a careful consideration of all the testimony upon this part of the case I am of the opinion that it has been satisfactorily proved that the defendant did infringe these letters patent, as he has been charged. I think it only fair to say that while, in my opinion, Broderick's invention displays novelty and patentability, and that he has certainly accomplished a desired end by the creation and use of novel means, and that as such he is entitled to that protection which the law grants to a successful inventor, yet such conclusion has been reached only after much hesitation. If such judgment be based upon insufficient facts, or unsound reasoning, I am glad to know that the defendant can find his remedy in a court of review. There must be a decree for the complainant, as prayed for.

AMERICAN BELL TEL. CO. v. CUSHMAN et al.

SAME v. HUBBARD et al.

(Circuit Court, N. D. Illinois. September 6, 1893.)

1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION—ADDITIONAL EVIDENCE.
   The production of additional ex parte evidence attacking the validity of a patent is not a sufficient reason for denying an injunction when the patent has been sustained by the supreme court and by various circuit courts after exhaustive litigation, as in the case of the Bell telephone patent, No. 186,787.

2. SAME—INFRINGEMENT.
   The Bell telephone patent, No. 186,787, is infringed by both the Corwin and the Cushman telephones.

3. SAME—COURTS—FOLLOWING PRIOR DECISIONS.
On a motion for preliminary injunction the circuit courts will follow decisions in other circuits adjudging certain devices to be infringements of a patent, especially when the parties are substantially the same.

4. SAME—LIMITATION BY FOREIGN PATENT.
The word "patented," as used in Rev. St. § 4887, providing that every patent for an invention which has been previously patented in a foreign country shall be limited to expire with the foreign patent, refers to the date of the actual issuance of the foreign patent, although the same is antedated, as in the English practice, to the day the application was filed.

In Equity. Suits for the infringement of letters patent No. 186,787, issued January 30, 1877, to Alexander Graham Bell, for a telephone. Motion for preliminary injunction. Granted.

Bond, Adams, Pickard & Jackson, F. P. Fish, and J. J. Storrow, for complainant.

Merritt Starr, Ephraim Banning, and L. C. Brooks, for defendants.

JENKINS, Circuit Judge. The patent involved in these suits has passed under the review of the supreme court of the United States, (Telephone Cases, 43 O. G. 377, 126 U. S. 1, 8 Sup. Ct. Rep. 778,) and its validity sustained. The history of the Bell telephone patents is the history of an enormous litigation, involving the truth of alleged anticipations sought to be sustained by a marvelous mass of evidence. The invention was attacked as perhaps no other invention was ever before attacked. It was sustained, and its integrity established by the decision of the highest and the ultimate judicial tribunal of the land. That decision must be held conclusive. If there was omission of evidence in that case, sought to be here supplied by ex parte testimony, I do not feel at liberty, in view of the many decisions of the federal courts sustaining this patent, to now give ear to such testimony upon the hearing of a motion for a preliminary injunction.

I entertain no doubt that the defendants infringe this patent. Mr. Chief Justice Waite declared:

"The patent itself is for the mechanical structure of an electric telephone, to be used to produce the electrical action on which the first patent rests. The third claim is for the use in such instruments of a diaphragm, made of a plate of iron or steel or other material capable of inductive action; the fifth, of a permanent magnet, constructed as described with a coil upon the ends nearest the plate; the sixth, of a sounding box as described; the seventh, of a speaking or hearing tube, as described, for conveying the sound; and the eighth, of a permanent magnet and plate combined. The claim is not for these several things in and of themselves, but for an electric telephone in the construction of which these things or any of them are used."

It would serve no useful purpose at this time and upon this motion to consider the claimed differences in the construction of the various devices. Whatever the variations in parts, the function performed is the same, the result attained is the same. That re-

sult is the invention of Mr. Bell. The claim is, as stated by the supreme court, not for the several things declared in the patent, but for an electric telephone in the construction of which, among other things, a permanent magnet, constructed as described, with a coil upon the end or ends nearest the plate, is used. The patent is not for the magnet, but for the telephone of which it forms a part. And the particular devices respectively claimed by defendants have been declared to infringe. In the Hubbard Case the Corwin telephone is the infringing device, and that was enjoined by Judge Acheson, and afterwards by Judge Lacombe. In the other case the Cushman telephone is used. That was also adjudged an infringing device by Judge Blodgett in Telephone Co. v. Cushman, 45 O. G. 1193, 36 Fed. Rep. 488. I ought not, if I were so disposed,—and I am not,—to disregard these adjudications. In the one case the very device is adjudicated to infringe. In the other, not only so, but substantially as between these same parties, for I cannot but regard as a subterfuge the putting forward of Cushman's wife as the responsible infringer with Cushman as a mere looker-on in the conduct of the business. A man cannot thus hide himself under his wife's petticoats. Cushman cannot thus avoid the consequences of the decree of the court. That decree remains unimpeached, and conclusive upon the rights of the parties.

The remaining question arises upon section 4887 of the Revised Statutes, which provides as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The patent in suit was granted January 30, 1877. The inventor, through Morgan-Brown, an agent in London, applied for an English patent by filing a provisional specification on the 9th day of December, 1876. In May, 1877, the English patent was issued, sealed on the 15th of May, but antedated to December 9, 1876, and conditioned that on or before June 9, 1877, a complete specification should be filed. The English statute permits this antedating of patents, but provides by St. 1852, (15 & 16 Vict. c. 83,) as follows:

"Sec. 24. Any letters patent issued under this act, sealed and bearing date as of any day prior to the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date, providing always that (save where such letters patent are granted for any invention in respect whereof a complete specification has been deposited upon the application for the same under this act) no proceeding in law or in equity shall be had upon such letters patent in respect of any infringement committed before the same were actually granted."

It is clear that no right exists in the patentee (when further and complete specification is required) before the actual granting of the patent. It is equally clear, I think, that under our statute this invention was not patented abroad at the time of the granting of the patent here. An application had been made, but not until after the granting of the patent here was the patent abroad issued. The invention is not patented abroad before the actual sealing and issuance of the patent. It seems to me clear that the meaning of our own statute is to limit the term of the monopoly so that it shall not exist longer than a previously granted monopoly abroad. But it is not to be so limited unless the invention has been previously patented abroad. The term "patented," as used in our statutes, does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly. Gold & Stock Telegraph Co. v. Commercial Telegram Co., 31 O. G. 1559, 23 Fed. Rep. 340; Emerson v. Lippert, 42 O. G. 964, 31 Fed. Rep. 911; Seibert Cylinder Oil Co. v. William Powell Co., 47 O. G. 1072, 35 Fed. Rep. 591; Smith v. Goodyear Dental Vulcanite Co., 11 O. G. 246, 93 U. S. 486–498.

An injunction will issue.

THE LOUIS OLSEN.

OLSEN v. HARITWEN.

(Circuit Court of Appeals, Ninth Circuit. July 24, 1893.)

No. 98.

1. STATUTES—CONSTRUCTION—AMENDMENT.
   The constitution of California provides that no law shall be amended by reference to its title, but all amended laws shall be re-enacted and published at length as amended. Code Civil Proc. Cal. § 813, was amended and re-enacted by an act in which the whole Code was revised, and which repealed all laws inconsistent with itself. *Held*, that a subdivision of section 813 which was set forth unchanged in the amendatory act was not so re-enacted as to make it a later statute than one on the same subject existing before such re-enactment, and thereby impliedly repeal such other statute.

2. SAME—CODIFICATION—EXISTING LAW.
   In Civil Code Cal. § 5, declaring that the provisions of the Code, "so far as they are substantially the same as existing statutes or the common law, must be construed as a continuation thereof, and not as new enactments," the common law referred to is the existing common law, not the law formerly prevailing, which had been abrogated by statute.

3. SAME—CONFLICTING PROVISIONS—MARITIME LIENS—MASTERS' WAGES.
   Act Cal. April 13, 1850, adopted for all courts of the state the common law of England, by which the master of a vessel had no lien on the ship for wages. Civil Prac. Act Cal. 1851, § 317, made all vessels liable to liens "for services rendered on board," thereby giving the master a lien for his wages, and this provision is re-enacted in Code Civil Proc. Cal. § 813; but Civil Code Cal. § 3055, provides that the master shall have a general lien for advances, etc., but no lien for his wages; and Pol. Code Cal. § 4480, provides that the Codes must be construed as though

all had been passed at the same moment and were part of the same statute. *Held*, that Civil Code, § 3055, could not be regarded as a mere declaration of the common-law rule, but was a positive enactment; that the common-law rule adopted in 1850, and the provision of the act of 1851 creating the lien, were not in pari materia, in such sense that, on their subsequent incorporation and re-enactment in the Codes, Code Civil Proc. § 813, could prevail, as a re-enactment of the latest expression of the legislative will; but that Civil Code, § 3055, contained the first positive expression of the will of the legislature concerning the master's lien, and, in denying him a lien for wages, constituted an exception to the general rule expressed in Code Civil Proc. § 813, effect being thus given to both provisions. 52 Fed. Rep. 652, reversed.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel by Charles Haritwen against the steam schooner Louis Olsen (William Olsen, claimant) to recover wages due libelant as master of the vessel. A decree was rendered for libelant. 52 Fed. Rep. 652. Claimant appeals. Reversed.

D. T. Sullivan, for appellant.

Page & Eells, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The libelant brought suit against the steam schooner Louis Olsen to recover his wages for services rendered in the capacity of master of the vessel on a sailing voyage from San Francisco to the North Pacific ocean. Exceptions were interposed to the libel, on the ground that the master has no lien for his wages. The exceptions were overruled, and a decree was rendered in favor of the libelant. From that decree this appeal is taken.

There is no allegation in the libel as to the nationality of the vessel referred to, but it is conceded that she is an American vessel, and that the contract under which the master rendered the services to the owners was made in the state of California. It is also conceded that no lien upon the vessel exists for the master's wages, either by the maritime law or the common law, and that, if there be such lien, it obtains its existence by virtue of the statute law of the state of California.

In the civil practice act of 1851 (section 317) it was enacted that all steamers, vessels, and boats shall be liable "for services rendered on board at the request of or on contract with their respective owners, masters, agents, or consignees," and that "the said several causes of action shall constitute liens upon all steamers, vessels, and boats." This statute clearly changed the rule of the common law, and by its terms gave the master a lien for his wages. Such was the construction given it in the district court of the United States for California, and affirmed on appeal to the circuit court. The Mary Gratwick, 2 Sawy. 342.

There was no further change in the law until 1873, when the four

Codes of California were simultaneously adopted,—the Civil Code, the Code of Civil Procedure, the Political Code, and the Penal Code. In the Code of Civil Procedure (section 813) the provisions of the law contained in the civil practice act are re-enacted in almost the identical language quoted above. In the Civil Code (section 3055) it is provided as follows:

"The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages."

Here, then, are two provisions of the law apparently in conflict. By the one it is declared that all persons shall have a lien upon the vessel for their wages; by the other it is declared that the master of the ship has no lien for his wages. It is expressly declared in the act whereby the four Codes are adopted that they shall all take effect concurrently. Pol. Code, § 4480, provides as follows:

"With relation to each other, the provisions of the four Codes must be construed * * * as though all such Codes had been passed at the same moment and were parts of the same statute."

Reference, therefore, cannot be had to the date or hour of passage of the two sections, nor to their relative position in the statute books, to ascertain which is the later expression of the will of the legislature.

It is contended that the last clause of section 3055 is but a declaration of the common-law rule, and that it was not intended as a legislative enactment. This argument does not commend itself to our consideration. It is hardly to be conceived that the legislature would have made an empty or purposeless declaration of a rule of common law more than 20 years after that rule had been abrogated by statute. The section must be regarded as a positive enactment. To hold otherwise is not only to deprive the statute of all force and meaning, but to give to it the effect of a false statement; for it was not true that at and prior to that enactment the master had no lien for wages. He had such lien secured to him by statute under the previous practice act.

It is urged that the last clause of section 3055 of the Civil Code is repealed by virtue of the act of the legislature of 1874, amending section 813 of the Code of Civil Procedure. The amendment was embodied in a general act whereby the whole of the Code was revised. The amendments to section 813 consisted in inserting in subdivisions 2, 3, 4, and 5 thereof the words "in this state" or "within this state." Subdivision 1, which contains the provision conferring a lien for services rendered on board of vessels, was not affected by the amendment, and was left unchanged. That subdivision is repeated, however, in the amendatory act, and there follows thereafter a general repeal of "all provisions of the law inconsistent with this act." It is argued that the legislature thereby intended to re-enact subdivision 1 of section 813, and to repeal the last clause of section 3055 of the Civil Code as incon-

sistent therewith. If subdivision 1 had been itself amended by the act of 1874, that fact would furnish strong ground in support of this contention. That subdivision is set forth in the amendatory act, in evident compliance with the constitution of the state, which requires that, in case of amendment or revision of the law, "the act revised or section amended shall be re-enacted and published at length as revised or amended." The effect of such re-enactment has been settled by repeated adjudications, and the rule controlling the same is expressed as follows:

"The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the section is changed, it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal re-enactment should have the effect of disturbing the whole body of statutes in pari materia which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness before an implied repeal can be recognized." Suth. St. Const. § 133.

In this instance there is not only nothing to show an intention to re-enact subdivision 1, or to give it new force or effect, but we find evidence of a contrary purpose in the fact that, at the time the Code of Civil Procedure was amended, the other Codes were simultaneously revised and amended, and section 3055 of the Civil Code was left unrepealed and unaffected by amendment.

Section 5 of the Civil Code is relied upon to dispose of the conflict between the two sections of the law. That section provides as follows:

"The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as a continuation thereof, and not as new enactments."

The common law referred to in section 5 is clearly the existing common law,—that which was enforced at the time the Codes were adopted,—and not the common law which had prevailed at some prior period, but which had been abrogated by statute. The language employed is capable of no other construction. The section refers to the re-enactment of the existing law, whether statutory or common law. The word "existing" refers to and limits the "common law," as well as the "statutes." The section declares that such laws re-enacted in the Code shall be deemed a continuation of the existing law. A law enacted in the Code could not be the continuation of a statute law or of the common law unless the law so enacted had been in force at and prior to the adoption of the Code. To hold otherwise would be to disregard the plain meaning of the words employed.

It is further contended that, if we concede to the last clause of section 3055 the force and effect of a positive enactment, it is still rendered nugatory through a rule of construction which is expressed thus:

"Where two statutes in pari materia, originally enacted at different periods of time, are subsequently incorporated in a revision and re-enacted in

substantially the same language, with the design to accomplish the purpose they were originally intended to produce, the time when they first took effect will be ascertained by the courts, and effect will be given to that which was the latest declaration of the will of the legislature, if they are not harmonious." Suth. St. Const. § 161.

The argument is that by the act of April 13, 1850, the common law of England was adopted as the rule of decision in all the courts of the state. A year later the practice act was adopted, and therein the law was enacted giving a lien upon vessels for services rendered on shipboard, which law, in 1873, was continued in force in section 813 of the Code of Civil Procedure. Having been so continued in force in 1873, and the common-law rule having been also re-enacted in section 3055, it follows that section 813 is the later expression of the will of the legislature, and, by the law of construction just quoted, must prevail over section 3055, which is but a re-enactment upon this particular subject of the general act of April 13, 1850. The difficulty with this argument is that it leaves out of sight some of the plain facts of the previous legislation. The act of April 13, 1850, was a general adoption of the common law of England as the rule of decision in the courts of the state. Under the common law, the master's lien had no existence. In 1851 the practice act was adopted, expressly conferring a lien upon vessels for wages. The statute so enacted was not, strictly speaking, a repeal of the common law; it was the creation of a right which at common law had never existed. The common law so adopted in 1850, and the provision of the practice act abrogating the same, and creating the lien, cannot be regarded as "two statutes in pari materia;" and when the Civil Code was adopted, it cannot be said that the two statutes were "subsequently incorporated in a revision," or that they were "re-enacted in substantially the same language, with the design to accomplish the purpose they were originally intended to produce." On the contrary, section 3055 contains the first positive expression of the will of the legislature concerning the specific subject of a master's lien. The object of the rule just quoted, as of all rules of statutory construction, is to arrive at the legislative intent. The rule is a reasonable one. Where a statute upon a specific subject has been repealed, not expressly, but by implication, by the enactment of a later statute upon the same subject, inconsistent with the first, and both laws are subsequently re-enacted in a revision or codification, they still have the same relative force and effect as before the codification; that is to say, the earlier remains repealed by the later statute. In such a case the presumption arises that the repeal of the earlier statute has been overlooked by the codifiers, and therein lies the reason of the rule. Bank v. Patty, 16 Fed. Rep. 751. Neither the letter nor the reason of that rule applies to this case. When the Codes were adopted, there was no statute upon the subject of liens upon vessels, save and except the law now embodied in section 813. The common-law rule denying the master's lien had never been

formulated in any statutory enactment, and was not found upon any statute book. It cannot be said that there was inadvertence in inserting in the Codes this provision of the common law, and that its abrogation was overlooked. That section must have been intentionally framed and inserted in the laws at the time of the adoption of the Codes as the expression of the intention of the law-makers upon that particular subject. It will be noted that the first clause of that section, declaring that the master shall have a lien upon vessels for his advances, is a departure from the common law; while the last clause, following directly thereafter, and completing the enactment, and denying the master's lien for wages, is a return to the common law. The fact that the last clause so adopted coincides with the unwritten law in force by the act of 1850 cannot create the presumption that the abrogation of that unwritten law by the adoption of the civil practice act, in 1851, was overlooked in the codification. On the other hand, the adoption of this section of the Code is proof that the general subject of the lien of the master upon the vessel was therein considered in all its bearings. It is not disputed that the first clause of the section is in full force and effect, and that the lien thereby created is recognized and enforced. To say that the second clause is empty, void, and of no effect, from the bare fact that it coincides with the common law, is to deprive the legislature of the power to restore the common-law rule in the Codes after it had once been abrogated, unless at the same time they expressly repeal every law upon the statute book inconsistent with such restoration. It must be held that the legislature meant by this positive enactment to restore the common-law rule upon the subject of the master's lien for wages, and the court has not the right to refine away the actual expression of the legislative intent by a rule of construction in a case where the reason of that rule does not apply. It is the duty of the court to give force and effect, if possible, both to section 813 and section 3055. We find no difficulty in doing this. Section 813 contains the expression of the general rule upon the subject of liens for services on shipboard. Section 3055 contains the law upon the subject of the master's lien for advances and wages, and, so far as his lien for wages is concerned, it contains the only exception to the general rule declared in section 813. The decree of the district court is reversed, and the cause is remanded, with instructions to dismiss the libel at the cost of the libelant, and that the appellant recover his costs on this appeal.

THE SIRIUS.

THE SIRIUS v. CEDROS ISLAND MINING & MILLING CO., (LOWE et al., Interveners.)

(Circuit Court of Appeals, Ninth Circuit. July 17, 1893.)

No. 103.

1. SALVAGE—CONTRACT FOR TOWAGE—DURESS—AMOUNT OF COMPENSATION.
On a libel on contract for salvage services rendered by the steam schooner Tillamook to the steamer Sirius, the evidence showed that the Sirius, having lost her propeller and part of her shaft, was placed under such sail as she had, and, after drifting for three days, was anchored in a bay of an island off the coast of Lower California; that she was in a dangerous position, as she could not get an offing with her small sail power, and in case of a southerly gale might go ashore; that the master of the Tillamook, which came to her assistance, proposed either to tow her to San Diego for $20,000, or to furnish stores, and gratuitously take an officer to San Diego to procure assistance; that the original purpose of the master of the Sirius was to send to San Diego for assistance; that he was positive his position was safe, and that he could get to sea before a southerly storm became dangerous; that he decided not to send an officer to San Diego, as he wished to avoid lengthening his voyage; that he claimed that $20,000 for the towage services was unreasonable and exorbitant, and proposed either a reduction in the charge or arbitration, or to leave the question to the owners to settle; and that his propositions were rejected by the master of the Tillamook. The master and purser of the Sirius testified that the master of the Tillamook demanded "$20,000 or nothing, and I want you to talk quick, or I will leave you." The master of the Tillamook testified in an unsatisfactory and contradictory manner that in the conversation he expressed a doubt of the ability of his vessel to tow the Sirius, and offered to leave the question of compensation to the court. The negotiations occupied an hour and a half. The contract for the towage service was drawn by the purser of the Sirius, and subsequently signed by her master. The Tillamook was valued at $32,000, and the salvage property at $143,539. *Held*, that the service rendered was a salvage service, and not a towage service; that, under the circumstances, the bargain was inequitable, the price agreed on exorbitant, and that $8,000, with interest from the date of the service, was fair compensation. The Wellington, 52 Fed. Rep. 605, distinguished. The Sirius, 53 Fed. Rep. 611, reversed.

2. SAME—APPORTIONMENT.
The award should be distributed as follows: $5,300 to the charterers of the Tillamook, $1,000 to her master, and $1,700 to the other officers and crew of the vessel, according to their relations to the service performed, their extra work, and their regular wages. The Sirius, 53 Fed. Rep. 611, modified.

Appeal from the District Court of the United States for the Northern District of California.

Libel by the Cedros Island Mining & Milling Company against the British Steamer Sirius, her cargo, J. Lowe and others, interveners. From a decree for libelant, (53 Fed. Rep. 611,) John Meek and H. M. Gregory, claimants, appeal. Reversed.

Andros & Frank, Page & Eells, and E. W. McGraw, for appellants.

George Fuller, Walter G. Holmes, and H. W. Hutton, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On the 20th day of February, 1892, the steamship Sirius, while on her voyage from Central American ports to San Francisco, was disabled by the loss of her propeller at a point 55 miles north of Cedros island. By the use of such sails as she had, and with the aid of currents, she arrived in the course of three days at Cedros island, and made anchorage in a bay on the southerly side of the island, called "South Bay." Upon the easterly side of the island, and about 30 miles from South bay, the steam schooner Tillamook, an American vessel of 208 tons burden, was lying at anchor, near a mining camp, prepared to take on board a cargo of freight which she was to carry by way of the port of Ensenada, 217 miles distant, to the port of San Diego, Cal. The time required for her usual voyage to Ensenada was 30 hours, and from that port to San Diego, 8 hours. On the morning after his arrival at South bay the master of the Sirius sent the purser in a small boat up to the mining camp, where the Tillamook lay, in the hope of finding a steamer by which he could send information to San Diego of the condition of the Sirius. The purser reached the Tillamook the same day, and on the following morning the captain of the Tillamook hoisted the purser's boat upon his vessel, and steamed down to South bay. On arriving there the master of the Tillamook went on board the Sirius, and had a conference with the master of the latter vessel, concerning the towage of the Sirius to San Diego. The master of the Tillamook offered to perform that service for $20,000. The master of the Sirius considered that sum exorbitant, and asked the master of the schooner if he would not consider a less sum. He also offered to leave the matter of compensation to arbitration, or to the owners of the respective vessels. The master of the schooner insisted upon the sum first named, and, after considering the matter for more than an hour, the master of the Sirius accepted the terms, and the masters of the two vessels signed a written contract as follows:

"It is hereby agreed between Captain H. S. Hamm, captain and master of S. S. Tillamook, and Captain H. M. Gregory, captain and master of Br. S. S. Sirius, that the said master of the steamship Tillamook will tow the steamship Sirius to a safe anchorage in the harbor of San Diego for the sum of twenty thousand dollars U. S. gold coin, to be paid in San Francisco by said master of S. S. Sirius on account of owners, all coal and necessary help to be furnished by the Sirius."

The Tillamook then took the Sirius in tow, and towed her up to the mining camp, where the vessels remained over night. The next morning, February 26th, the Tillamook again took the Sirius in tow, and in a little less than four days brought her safely to anchor at San Diego, having towed her about 320 miles. During all of this time the weather was fair. No danger or difficulty was experienced, and no damage was done to either vessel. On the

morning following the arrival of the vessels at San Diego, a southeasterly storm arose, which lasted through the ensuing night. The value of the Sirius with her cargo and freight money was $143,539. The value of the Tillamook was $32,000. The libel was brought to compel payment of the agreed stipulation. The district court sustained the libel, holding the contract valid, and a decree was entered against the Sirius for the sum of $20,000 and interest and costs.

On the appeal the following assignments of error are made: That the court erred (1) in holding that the written contract was valid; (2) in finding that the same was not executed under duress; (3) in finding that the compensation therein stipulated for was not exorbitant; (4) in awarding $20,000 salvage, when the evidence disclosed that less than half the sum would have been a large award for the services rendered; (5) in allowing interest from the date of the decree.

The consideration of these assignments of error involves an examination of the testimony concerning the situation of the Sirius at the time the contract was made, the negotiations out of which the contract arose, and the nature and value of the service rendered. There can be no doubt that the Sirius was in peril. That fact is conceded by the counsel for both the appellants and the appellees. She had some sails upon her foremast, but none upon her mainmast. Her shaft was broken and her propeller was lost. She lay at anchor near the center of the bay. The testimony of disinterested and experienced seamen would indicate that in case of a southerly wind, such as subsequently occurred on the morning of March 2d, she could not have gotten out to sea, but would have been driven upon the beach, and wrecked. The bottom of the bay was sandy, and afforded insecure anchorage. The presence of a large quantity of kelp increased the difficulty of reaching the open sea. Although the wind at that time was from the northwest, the prevailing winds at that season were southerly. The nearest telegraph station was at Ensenada, about 250 miles away. The only apparent means of relief, other than the towage offered by the libelant, were either to send a messenger to Ensenada to telegraph thence to San Diego for a tug boat, or to intercept one of the south-bound steamers running from San Francisco to Panama. Of these there were known to be two,—the Newbern, which would not leave San Francisco until the 1st of March, and the Panama, which in her regular course would pass so far to the westward of the Cedros islands that to intercept her by means of an open boat was considered impracticable.

Concerning the conversations between the masters of the two vessels at the time of and prior to making the contract there are but three witnesses, the masters themselves and the purser of the Sirius. The master of the Sirius testifies that the conversation was as follows:

"I then asked him what he would tow me up to San Diego for. 'Twenty thousand dollars;' that was his answer. I then told him that was exor-

bitant, and I would not pay it. He reiterated again: 'Twenty thousand dollars or nothing, and I want you to talk quick, or I shall leave you, and go back to the mining camps.' I asked him if he would submit the matter to arbitration. He positively declined. Twenty thousand dollars or nothing were his terms. There was no use in offering him anything less. I understood that thoroughly. It was twenty thousand dollars or nothing. I then asked him if he would take an officer to San Diego for me, to communicate with my owners. He said he would do it, but I must hurry up. He left my cabin. I then turned to the purser, and consulted with him about the matter. We concluded that under the circumstances there was nothing to do but to accept his terms."

The purser's account of the interview is substantially the same:

"Captain Hamm says, 'Well, you want a tow?' Captain Gregory says, 'Yes.' He said, 'I will tow you for twenty thousand dollars.' Captain Gregory says: 'That is an outrageous price. Can't you tow me any cheaper than that?' He says, 'No, not a cent cheaper.' He says, 'Will you leave it to arbitration in San Francisco?' He says, 'No.' He says, 'Will you submit it to our own owners, to the owners of both ships, and allow them to settle it?' He says, 'No, I won't.' He says: 'I haven't got much time, and,' he says, 'you must hurry. I am going to get out. I will take the purser to San Diego if he wants to go, but I have to get out, and I want you to hurry up, too.'"

The testimony of the tug master as to the language of the interview differs from that of the captain and the purser of the Sirius in two important particulars: First. He testifies that at the beginning of the conversation he expressed a doubt of the ability of his vessel to tow the Sirius. "I said my vessel is too small to tow you up. I don't know if I could do it." Second. He adds the statement that after offering to tow the Sirius to San Diego for $20,000 he made an alternative proposition, to wit, that he would leave it to the court to decide what the compensation should be.

There is no finding of the fact in the decree appealed from that this offer to leave the compensation to the determination of the court was actually made by the master of the tug. A careful consideration of the evidence convinces us that no such proposition was made. In the first place, the testimony of the tug master upon this subject is distinctly denied by both the master and the purser of the Sirius. The former testifies:

"There was no talk made at any time about referring the matter to the court. Of that I am thoroughly positive. There was but one question that I was allowed to discuss, and it was twenty thousand dollars or nothing."

In the second place, the testimony of the master of the Tillamook upon this point is unsatisfactory and contradictory. He first testifies that on boarding the Sirius he went into the captain's room, accompanied by the purser of the Sirius, and there met the master of the Sirius, and that the conversation was as follows:

"I said: 'My vessel is too small to tow you up. I don't know if I could do it. If I have to charge, I have to charge that price, which is twenty thousand dollars; but,' I says, 'if you don't want to do that we will leave that over to the court, and let the court decide what price I shall have.'"

Upon his cross-examination, being repeatedly asked to repeat the conversation in detail, he did so, but in each instance omitted

all reference to the proposition to leave the compensation to the court. Subsequently, on cross-examination, he testified as follows:

"Question. And before the agreement was drawn up you made him this offer? Answer. He made me the offer first to leave it to arbitration, which I did not accept. I told him to leave it to the court, which would do for me. Q. Then he sat down and wrote the agreement? A. Yes, sir. Q. Right there in your presence? A. Right there in my presence. Mr. Brewster [the purser] wrote it in the presence of me and the captain."

It will be observed that up to this point in his testimony the witness locates all the negotiations in the captain's room, and in the presence of the purser. Upon a later cross-examination, when asked to state who was present when he made this particular proposition, he changes the place of conversation and answers:

"I think the captain came out of his room, and spoke to me on deck. Question. Who was present, and whereabouts was it? Answer. On the port side of the house, out on deck. Q. Who was present? A. Me and the captain. Q. Anybody else? A. No, sir."

The purser, who testifies "they had no conversation at which I was not present," says that he heard nothing concerning the proposition to leave the question of remuneration to a court, and that he paid particular attention to all that was said, and would have heard it if anything of the kind had occurred. There is, moreover, an inherent improbability in this portion of the narrative of the tug master. It is difficult to believe that the master of the Sirius, who confessedly protested against the price demanded for the towage service as exorbitant, and urged that the same be left to arbitration, or to the determination of the owners of the two vessels, would have declined a proposition which was substantially the equivalent of his own, and which would have relieved him from the responsibility of agreeing to pay the price which he denounced as exorbitant, and would have left the whole matter to the adjudication of a court of admiralty. It is scarcely to be conceived that rather than do this he would deliberately have chosen the alternative of binding his owners and consignees to the payment of so extraordinary a sum. It is likewise improbable that the master of the tug, who persistently refused to entertain the propositions of the master of the Sirius, and answered all protests and inquiries with his proposition to tow them to San Diego for $20,000, that or nothing, and who, as the purser says, caused the contract to be drawn in triplicate, and with great care, so that no loophole should exist for the escape of liability to pay the sum agreed upon, would have been willing to accept the award of a court of admiralty for the service for which he was contriving to obtain so excessive a price.

Viewing the whole transaction in the light of the evidence and the circumstances, it would appear that the master of the Tillamook was from the first intent upon securing a profitable bargain out of the necessity and danger of the Sirius. Before arriving at South bay he had evidently decided upon his price. When his terms were demanded he required no time to consider his answer. It was

$20,000, that or nothing; and he was in a hurry, too. True, he was willing, when asked, to take with him an officer to Ensenada or San Diego free of cost, also to wait for the captain's letters, but we fail to perceive in this fact any indication of his reluctance to undertake the towage, or any indifference concerning the acceptance or rejection of his offer. There may have been an apparent indifference assumed for a purpose. His own testimony that he was reluctant to undertake the towage, and that he expressed distrust of the capacity of his steamer to accomplish the same, is not corroborated by any witness or by any circumstance. The conduct of the master of the Sirius in signing the contract whereby he agreed to pay $20,000 for a service the actual value of which was not more than one-tenth of that sum, can be explained only upon the theory that his vessel was in peril, and that he was influenced by a consciousness of that fact. In his testimony, it is true, he does not say this; on the contrary, he expresses his belief that his vessel was not in serious danger, and that he would have been able to extricate her in case of a change in the wind. He went so far as to say that the real reason why he did not choose the other alternative offered him, and send to San Diego for assistance, was the loss of time that would have resulted; but it is to be noted that on being asked if there were any other reason, he answered: "No, sir, except to get my ship out of that position. In case southerly weather had come up, I would have been compelled to go to sea." Elsewhere in his testimony, in answer to the question whether he considered himself in a safe position where he was, he answered: "That is a question that is rather difficult to answer. I can say 'Yes' or 'No.' I think, so far as my own judgment as a seaman goes, * * * I should certainly have thought that I could get my ship out, and I think I could have before any southeaster came up to endanger my ship." When we consider the condition in which the vessel would have been if he had got her out to sea, rigged as she was, and crippled by the loss of her propeller, it is apparent that her peril would still have been very considerable; otherwise no reason is perceived why the master of the Sirius should in the first instance have taken his vessel from the open sea, where she was drifting, and brought her to anchor in South bay, where the anchorage was bad, and where, as he admits, he was in a dangerous position, but for the fact that he anticipated sufficient warning of a change in the wind before a southerly wind would fairly be upon him, and prevent his escape.

The towage service was rendered by the tug without difficulty or danger to the latter. The weather was fair, and nothing occurred to interfere with the steady and regular progress of the two vessels towards the port of San Diego. There is an attempt made to show that there was risk to the Tillamook from the fact that an unusual and severe strain was put upon her machinery, and it is also claimed that if stormy weather had arisen she would have been in danger of having the hawser get foul of her pro-

peller. So far as these arguments are concerned, we deem it a sufficient answer to say that it is not apparent to us from the evidence that there was any peril to the towing steamer. It does not appear that any injury was actually received by her, or that there was necessarily any danger to her machinery. The weather remained fair during the whole of the service, and if a change of weather had occurred there was nothing in the situation to compel the Tillamook to continue the service at her own peril.

Should the contract, made, as it was, under these circumstances, be enforced? The law applicable to the subject is well expressed in the decision of the supreme court in Post v. Jones, 19 How. 158:

"Courts of admiralty will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others, to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic or profit. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services."

The doctrine thus declared early in the history of the court has been affirmed in more recent decisions. In the case of The Tornado, 109 U. S. 117, 3 Sup. Ct. Rep. 78, the court said:

"Every agreement for salvage compensation is subject, as to amount, to the judgment of the court as to its being equitable, and conformable to the merits of the case."

There can be no question that the service rendered by the Tillamook was a salvage service, and not one of mere towage. This is distinctly alleged in the libel. The averments are that the Sirius was in an entirely helpless and disabled condition in consequence of the breaking of her shaft and the loss of her propeller, and that her sails were not sufficient to keep her head to the sea, or to prevent her from drifting with the currents, and that, had it not been for the assistance so rendered her, she and her cargo and the lives of all on board would have been in danger of being lost. The evidence sustains these averments. It is equally clear that the price charged by the Tillamook was an exorbitant one. She was put to little inconvenience or expense. She deviated but little from the course of her regular voyage, and it is not shown that she thereby suffered loss of other business. The Sirius was subsequently towed from San Diego to San Francisco, by a tug which left the latter port for that purpose, at an expense of $1,200. There is some intimation in the testimony that, owing to competition in towage, this price was unusually low, but, after making due allowance for this fact, and for every contingency that might have arisen in the performance of the contract undertaken by the Tillamook, we are unable to find that the actual value of the service rendered by her was more than one-tenth the amount stipulated in the contract.

The case of The Wellington, 52 Fed. Rep. 605, is cited as affording a precedent to sustain the decree of the court below. The Wellington, while bound to San Francisco with a cargo of 2,350 tons of coal, lost her propeller blades, and drifted near the mouth of the Columbia river. While in communication with the steamer Sussex, which offered to tow her to safe anchorage near the Columbia river, she hailed the steamer Monserrat, which was bound for San Francisco. The Monserrat was not fitted for towage services, and was also laden with coal. Her master offered to tow the Wellington to San Francisco, and to leave the compensation to the decision of the owner of the latter vessel. That offer was rejected, and $15,000 was finally agreed upon. Neither vessel possessed a suitable towline, and five small lines were used. This, in case of bad weather, would have been a source of danger. The weather, as it turned out, was fair, and the vessels arrived in five days. The court held that, while the compensation was excessive, yet in view of the fact that there were other means of relief offered there was no compulsion, and that it was not so exorbitant as to justify the court in setting it aside. That case differs from the case at bar in two important features. In the first place, the disparity between the price agreed to be paid for the service rendered the disabled vessel and its actual value was very materially less in that case than in this; and, in the second place, in the case of the Sirius there was no choice of means of relief. The proposition to take a messenger to Ensenada, and thus procure assistance from San Diego, was not the presentation of a means of present relief, and did not offer a deliverance from the danger of the situation.

In our view of the facts, therefore, the master of the Tillamook took an unfair advantage of his power, and made an inequitable bargain, not conformable to the merits of the case, and the towage contract should not be enforced. The facts of the case at bar are not unlike those in the case of The Costa Rica, 3 Sawy. 610. The Costa Rica was disabled by the breaking of her propeller shaft at a point 130 miles south of San Diego. She was bound from Panama to San Francisco. She was towed into San Diego by the steamer Newbern. The latter vessel was engaged 44½ hours in the service, and consumed at her own expense coal of the value of $800. At the time the Newbern took hold of the Costa Rica the latter was in no immediate danger. She was imperfectly rigged for sailing, but with favorable winds she could probably have reached Cape Colnette, where there was safe anchorage, in 18 or 20 hours, or she could have made the port of San Diego in 4 or 5 days. The total value of the salved ship, cargo and freight, was $244,756. The value of the Newbern and her cargo was $242,000. The court allowed salvage in the sum of $10,000. The time occupied in rendering the salvage service in the case of the Costa Rica was only one-half that occupied in the case before the court, but the value of the property salved in that case

was considerably greater than in this, while the value of the vessel and cargo rendering the salvage in that case was eight times greater than in this.

In our opinion, a liberal recompense to the Tillamook for the salvage service rendered in this case would be the sum of $8,000. The case is therefore reversed and remanded, with instruction to enter a decree for the libelant for that sum, with interest from the date of the service rendered, and the costs in the district court, the same to be apportioned among the libelants and interveners in the ratio adopted in the decree appealed from; and that the appellants recover their costs on this appeal.

THE GYPSUM PRINCE.

HIGGINS et al. v. THE GYPSUM PRINCE.[1]

(District Court, S. D. New York. July 15, 1893.)

COLLISION—SAIL VESSELS MEETING—CHANGE OF COURSE—FAILURE TO WATCH EFFECT OF MANEUVER.

Two schooners, the Tarbell and the Gypsum Prince, came in collision at night in Vineyard sound, the collision resulting in the sinking of the Tarbell. On conflicting evidence, the court found that the vessels approached on nearly opposite courses, the Tarbell heading W., the Gypsum Prince about E. ½ N.; that the Gypsum Prince had the wind aft of the beam, and it was her duty to avoid the Tarbell, and the duty of the latter to hold her course; that the Gypsum Prince altered her course from half a point to a point to N., to avoid the Tarbell, but, as the wind freshened, the latter also gradually changed from W. to W. by N., thus thwarting the effect of the change made by the Gypsum Prince to avoid her; that the Gypsum Prince, after her change of course, might have observed that the green light of the Tarbell did not broaden off as it should have done, and so might have known that she was not sailing away from the Tarbell. *Held*, that both vessels were in fault,—the Tarbell for not holding her course, as she was bound to do, the Gypsum Prince for failing to watch the effect of her own change of helm, and continuing that change on seeing that she was not avoiding the Tarbell.

In Admiralty. Libel by Lewis H. Higgins and others against the Gypsum Prince for collision. Decree for half damages.

Carver & Blodgett and Convers & Kirlin, for libelants.
Wing, Shoudy & Putnam, for claimant.

BROWN, District Judge. The above libel was filed to recover the damages arising from the loss of the libelants' three-masted schooner George S. Tarbell, through collision with the four-masted schooner Gypsum Prince, between 10 and half past 10 on the evening of November 12, 1892, about five miles westerly of Vineyard Haven light. The wind was from N. W. to N. N. W. The Tarbell, deeply loaded with plaster, and drawing about 16 feet of water, was bound from Windsor, N. S., via Gloucester, to New York. She

[1] Reported by E. G. Benedict, Esq., of the New York bar.

had been sailing by the wind, close hauled, on her starboard tack; and from 8 to 10 P. M. she was heading from W. ½ N. to W. The Gypsum Prince was bound from New York to Windsor. She was light, having only about 15 tons of ballast, and was drawing only 8 feet of water. She was 163 feet long by 36 feet beam. The Tarbell was 150 feet long by 32⅓ feet beam. The Gypsum Prince was upon her port tack, with the wind aft of her beam, and was heading E. ½ N. It was her duty to keep out of the way of the Tarbell. The night was clear, but overcast, and excellent for seeing lights. The weather was good.

According to the testimony of the witnesses on board each vessel, each first made the green light of the other; and each soon afterwards saw also the red light of the other for a brief period, after which the red light of each was shut in, leaving the green light clearly visible. The mate was in charge of the navigation of the Gypsum Prince. At first, seeing green light to green light, no change of course was thought by him to be needful; but when the red light was seen for a few moments, and then shut in, he starboarded his wheel and hauled either half a point or a point more to the northward, thereby changing his course from E. ½ N. to E. by N., or to E. by N. ½ N., supposing that to be sufficient to pass safely to windward of the Tarbell. When a few lengths distant, the Tarbell again showed her red light, still on the starboard bow of the Gypsum Prince; whereupon the mate of the latter ordered his wheel hard a-starboard. Her master then hurried on deck from below, and seeing the Tarbell's red light one or two lengths away on his starboard bow, ordered his helm hard a-port; but the stem of the Gypsum Prince struck the port side of the Tarbell near the fore rigging, at an angle of from four to seven points, and the Tarbell sank soon after.

The witnesses for the Tarbell say that they had the green light of the Gypsum Prince on their port bow, and hence showed her always their own red light; that she made no change of course until within two or three lengths of the Gypsum Prince, when, collision being unavoidable, she luffed in order to ease the blow, not changing her heading over one point. Each estimated the distance of the other, when first seen, to be from 1 to 1½ miles; and the time between that and the collision, to be from 10 to 15 minutes. The Gypsum Prince was sailing at the rate of about seven knots; the Tarbell, about five. A mile would, therefore, be traversed by them in 5 minutes; and a mile and a half, in 7½ minutes.

The contention of the claimants is that the maneuver of the Gypsum Prince was sufficient to avoid the Tarbell; and that that maneuver was thwarted solely by the fault of the Tarbell in porting her wheel, not when in extremis, but when at a considerable distance, whereby she changed her course about four points to starboard, when the Gypsum Prince was already on her starboard hand, thus running up across the bows of the Gypsum

Prince, and rendering collision unavoidable. The Tarbell, on the other hand, insists that the Gypsum Prince was approaching her always on the Tarbell's port side, and that it was for that reason only that the Tarbell ported her helm to ease the blow.

I have found extreme difficulty in this case; not so much in the endeavor to ascertain the truth whether it was probably the Tarbell's green light, or her red light, that was chiefly exhibited to the Gypsum Prince, as to find any satisfactory and certain explanation of how and why the collision occurred. For careful consideration of the testimony satisfies me that the master of the Tarbell is mistaken in supposing that the green light of the Gypsum Prince was a point or a point and a half on his port bow, as he constantly asserts. Patterson, who was walking on the deck forward, says that the green light when first reported was "ahead, or a little on the port bow." He also testifies that the lookout reported it "right ahead." And the master in his first answer says that he reported it "ahead, or on his port bow." The master also watched it from his position aft, standing within a foot of the port rail; and after considerable hesitation in his testimony, he finally states that he saw the green light of the Cypsum Prince from that position ranging between the fore rigging and the fore staysail, which was well hauled in; and that in order to see the green light ranging outside of the fore rigging, he would have been obliged to lean over the port rail. The distance from the port rail to the foremast was at least 15 feet, and the rigging sloped inward; and the master probably stood from 80 to 100 feet aft of the fore rigging; hence if the green light ranged inside the port rigging, and only one-third of the distance to the foremast, that would make the Gypsum Prince bear nearly a quarter of a point on the Tarbell's starboard bow, sufficient to shut in the Tarbell's red light, and at the distance of a mile, to locate the Gypsum Prince nearly 300 feet to the northward of the line of the Tarbell's heading. A very slight change of the Tarbell's heading to northward by yawing, or by unsteadiness in steering, would be sufficient to show her red light. This agrees precisely with what the lookout and mate of the Gypsum Prince testify that they saw; and this concurrence in the testimony is conclusive to my mind that the green light of the Gypsum Prince did not in fact bear on the Tarbell's port bow, but was on her starboard bow; and that it was the Tarbell's green light that the lookout and mate of the Gypsum Prince mostly saw, as they testify. The master of the Tarbell did not go to the starboard side of his vessel to see how the light ranged from that side; and there is no evidence that any one on that vessel took the range from the starboard side.

The positive testimony of the lookout and mate of the Gypsum Prince, that it was the Tarbell's green light and not her red light that they saw continuously, would be entitled, even under contradiction, to great weight; because the circumstances detailed by them show that they were observant and alert in watching the

Tarbell's lights, and in noting the changes; and that they acted upon these observations. Having seen and noted both lights, it is not reasonably possible that the green light could have been mistaken for the red, or that they did make any such mistake. Their testimony as to what they saw and did is, therefore, either true, or a pure fabrication. I must accept it as true, both because no reason to discredit those witnesses appears, and because the testimony of the master of the Tarbell in fact confirms them. He testifies in effect to his supposition only of the bearing. His fatal error was that he did not go to the starboard side of the Tarbell to verify his supposition. Had he done so, I have no doubt he would have seen the Gypsum Prince plainly to starboard. The Pomona, 35 Fed. Rep. 921.

In accepting as true, however, the claimant's contention that the Gypsum Prince was upon the starboard bow of the Tarbell, and with the exceptions stated, saw only the Tarbell's green light, and in thus rejecting the libelants' theory as to how the collision occurred, the difficulty of explaining it is not diminished. For if the Tarbell was heading W. by N., as her wheelsman says she was, when the lights were first seen, and if she kept that course substantially till the vessels were only a few lengths apart, and the Gypsum Prince being at say five minutes before collision, and when a mile away, at least 200 feet to windward of the Tarbell's course, i. e. enough to shut out the Tarbell's red light, then, even if the Gypsum Prince had not luffed at all, but had kept her course N. ½ E., there would have been a difference in their courses of a point and a half from opposite; and supposing the leeway made by the two vessels to have been the same, the Gypsum Prince would have been sailing away from the Tarbell at the rate of 1,800 feet to the mile, i. e. in seven-twelfths of a mile, 1,050 feet; and their distance apart when they passed each other should have been at least 1,250 feet. Approaching in that manner, it is not credible that when within six or eight lengths, the master of the Tarbell could have made the mistake of supposing the Gypsum Prince to be on his port bow, instead of on his starboard bow; or that there should have appeared to be need of any change of course by the Tarbell; or any possible danger of collision; or that she would have luffed to avoid collision when so far from danger. And if the Gypsum Prince, soon after first seeing the red light, say at the distance of two-thirds of a mile, changed her course a point or a half point more to port, the vessels would have passed each other at a distance of from 1,500 to 1,750 feet.

It is plain, therefore, not only that the collision did not come about in that way, but also that when the vessels came near each other, no mere luffing by the Tarbell of even four points could explain this collision. For a luff of four points, the most contended for by the defendant, would not produce a northerly offing of over 350 feet from her former course; and the Tarbell, by such a luff merely, could not have come within 800 or 1,000 feet of the Gypsum

Prince. Some different explanation must, therefore, be looked for.

To account for the collision at all, I am, therefore, forced to find, first, that the course of the Tarbell when her green light was first seen was about W. and not W. by N. There is sufficient warrant in the testimony for this conclusion. For the master says that at 10 P. M., the last time he looked at the compass and within half an hour of the collision, the Tarbell's course was W. by compass. Patterson, who had the wheel for the two hours previous, says that the vessel was all the time sailing by the wind, making "about W. ½ N., but sometimes fell off some, though not so much as to W. ½ S." Peterson took the wheel at 10 P. M.; and he says the course was W. by N. This contradicts the master; and no dependence can be placed on his testimony, since he makes the course of the Tarbell the same after his admitted luff of one point, as before the luff. When he took the wheel at 10 P. M. the vessel's course was west, as the master testifies; and he received from the master an order, in its nature somewhat discretionary, viz.: "If the wind started up, to keep her west by north." This was the order as finally stated by the master, and shows clearly that the course was then W. The wheelsman says nothing about this qualification in the order; but he doubtless acted upon it; and when at some time afterwards the wind freshened, as the master says it did, the wheelsman no doubt hauled from west to west by north. It is entirely consistent with the evidence that this change occurred soon after the green light of the Gypsum Prince was seen; and that makes the solution of the collision easy. For this change of the Tarbell's course completely neutralized the maneuver of the Gypsum Prince to avoid her. It is also probable that the Gypsum Prince, being very light, and having the wind nearly abeam, made a quarter or a half point more leeway than the deeply-laden Tarbell; and that she was thus drifting down constantly upon the course of the Tarbell.

My view of the collision, therefore, is, that the two vessels, when the lights were first seen, were on nearly opposite courses, the Tarbell heading W.; the Gypsum Prince, about E. ½ N.; that the latter bore about a quarter of a point on the Tarbell's starboard bow, while the Tarbell's light bore about half or three quarters of a point on the Gypsum Prince's starboard bow; that each first saw the green light of the other; that soon afterwards the Tarbell, by a little yawing to the northward, or unsteadiness of steering, showed her red light for a few moments only, when it was shut in again; and that the Gypsum Prince in like manner by a little yawing to the southward, or by unsteadiness in steering, also showed her red light for a few moments and then shut it out, on returning to her former course; that the Gypsum Prince thereupon, by starboarding her helm, changed her course from half a point to a point more to the northward, until she had the Tarbell's green light from a point to a point and a half on her starboard bow; that the Tarbell soon after, on the freshening of the wind,

gradually changed her course to the northward, until she headed W. by N., thus thwarting the effect of the change made by the Gypsum Prince to avoid her; and that she continued on this course till very shortly before the collision, when she had hauled up enough to bring her red light into view, when only a few lengths from the Gypsum Prince, and then hard a-ported her wheel; that the Gypsum Prince, moreover, probably made leeway to the amount of a quarter or half a point in excess of the leeway made by the Tarbell; and that the collision was brought about through this excess of leeway and by the Tarbell's change of course soon after the red lights were first seen, and through the failure of the Gypsum Prince to starboard sufficiently to counteract both of these causes.

While this view of the facts of the collision charges the Tarbell with fault in changing her course, without reference to her final luff, which may be disregarded, it does not exempt the Gypsum Prince from blame. For the Tarbell's light, when first seen, could not have been over three-fourths of a point off the starboard bow of the Gypsum Prince; and after the latter had changed her course a point, or half a point more to port, it is certain that the Tarbell's green light did not broaden off on the starboard bow of the Gypsum Prince beyond 1½ points, as it would have broadened had no change of course been made by the Tarbell. The testimony of the lookout and mate of the Gypsum Prince shows that the bearing kept about the same till the red light again appeared, when the Tarbell was very near; and the breadth of the green light off the bow must in fact have diminished before the red light last appeared. This ought to have made it evident to the Gypsum Prince, some minutes before the collision, that she was not sailing away from the Tarbell, or keeping out of her way, as she ought to have done, either through her own excess of leeway, or through some change in the Tarbell's course. It was not enough for the Gypsum Prince to go off a point, and then give no further heed to the Tarbell. She was bound to continue watchful of the effect of her maneuvers; and when her first change was seen, as it ought to have been seen, to be not effectual to make the Tarbell's light broaden off more and more as the two approached nearer to each other, the Gypsum Prince was bound to make a timely further change, instead of waiting until the red light appeared nearly ahead, as it evidently did, when only a few hundred feet distant. Both vessels, are, therefore, in fault, and the libelants are entitled to a decree for one-half their damages and costs.

MOLLIE GIBSON CONSOLIDATED MIN. & MILL. CO. v. THATCHER et al.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 266.

1. MINES AND MINING—CONVEYANCES—CONTRACTS FOR ROYALTIES.
After 1.67 acres of the territory within the exterior lines of location of the Silver King lode mining claim had been awarded to the Sauquoit claim by a judgment of the state court, the owners of the Sauquoit claim purchased the Silver King claim, and in the contract to purchase, the deed, and an agreement to pay royalty for ores extracted, the parties described the Silver King claim as survey No. 4,746, and referred to the exterior lines of the location, and to such lines extended vertically downward, as being the subject-matter of the contract. *Held*, that the deed and contracts included the 1.67 acres as part of the Silver King lode mining claim.

2. WRITTEN INSTRUMENTS—PAROL EVIDENCE TO VARY—CONFLICTING TESTIMONY.
Where parol testimony, if competent to vary the legal effect or construction of a deed and written contracts, is conflicting, an evenly-balanced cause must be determined from inspection and construction of the instruments.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Suit by M. E. Thatcher and others against the Mollie Gibson Consolidated Mining & Milling Company for an accounting for ores mined pursuant to certain contracts. Decree for plaintiffs. Defendant appeals. Affirmed.

Statement by CALDWELL, Circuit Judge:

This was a bill filed by M. E. Thatcher, G. W. Thatcher, George L. Brown, and A. V. Hunter, plaintiffs, against the Mollie Gibson Consolidated Mining & Milling Company, defendant, to compel the defendant to account for the royalty alleged to be due the plaintiffs for ores extracted from the Silver King lode mining claim under the contracts and deed set forth below, and to permit plaintiffs to inspect the workings and ore in said mine.

Agreement of the 25th of March, 1891: "This agreement, made this 25th day of March, A. D. 1891, between the Mollie Gibson Consolidated Mining and Milling Company, a corporation existing under the laws of the state of Iowa, of the first part, and M. E. Thatcher, G. W. Thatcher, and G. L. Brown, of the city of Aspen, county of Pitkin, state of Colorado, and A. V. Hunter, of Leadville, Lake county, said state, parties of the second part, witnesseth, that the said parties of the second part have bargained and sold to the said party of the first part, in consideration of the following payments and covenants hereinafter mentioned, all that certain mining claim situated in Roaring Fork mining district, Pitkin county, Colorado, known as the 'Silver King,' (and lying near and to the west of the Mollie Gibson lode,) free and clear of all incumbrances and liabilities whatsoever; and said second parties hereto agree, upon fulfillment of the covenants herein to be kept and performed by said first parties, to convey by good and sufficient mining deeds, or cause to be conveyed, the said Silver King lode, as above. And the party of the first part hereby promises and agrees to pay to said parties of the second part for said Silver King lode the sum of one hundred and fifty thousand dollars, ($150,000,) to be paid as follows, to wit: Twenty-five thousand dollars on the placing of a good and sufficient mining deed for said above-described lode in escrow in the Denver National Bank, conveying said lode to said party of the first part, to be delivered to said party of the first part on the further payments of ($25,000) twenty-five thousand dollars on each thirty days thereafter till all is paid. And the said parties of the first part hereby further agree to pay to said second parties, their heirs and assigns, a royalty of 15 per cent. on the net smelter returns received from all ore marketed in and under the said Silver King lode, and its side and end

lines vertically extended downward; and it is hereby agreed that said royalty shall be reserved to said parties of the second part in their deed of conveyance above described."

Deed executed in pursuance of foregoing agreement: "This indenture, made the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-one, between M. E. Thatcher, G. W. Thatcher, and George L. Brown, of the county of Pitkin and state of Colorado, and A. V. Hunter, of the county of Lake and state of Colorado, parties of the first part, and the Mollie Gibson Consolidated Mining and Milling Company, a corporation created and existing under the laws of the state of Iowa, and doing business in the county of Pitkin and state of Colorado, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of one hundred and fifty thousand dollars, ($150,000,) lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, convey, remise, release and forever quitclaim, unto the said party of the second part, and to its successors and assigns, the Silver King lode mining claim, lying near and to the west of the Mollie Gibson lode mining claim, and being United States survey No. 4,746, the original location certificate of which is duly recorded in Book Z, page 160, and the amended location certificate of which is recorded in Book 21, page 75, of the official records of Pitkin County, Colorado, situate in the Roaring Fork mining district, in the county of Pitkin and state of Colorado, subject to the payment of the royalty or rent as hereinafter stipulated, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, attendant, and appurtenant, or therewith usually had and enjoyed, and also, all and singular, the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances; to have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever, subject, however, to the payment by the said party of the second part to the said parties of the first, their heirs and assigns, of fifteen per cent. (15 per cent.) of the net smelter returns, after deducting transportation, sampling, and smelting charges, extracted and marketed from said lode mining claim,—that is, from within the boundaries of vertical planes extended downward through the side and end lines of said lode mining claim; and the said party of the second part, for itself, its successors and assigns, hereby covenants, promises, and agrees to and with the said parties of the first part, their heirs and assigns, to pay to the said parties of the first part, their heirs and assigns, fifteen per cent. (15 per cent.) of the net smelter returns, after deducting transportation, sampling, and smelting charges, of all ores that may be hereafter extracted and marketed from said lode mining claim, said royalty or rent to be left with the purchaser of the ore, subject to the order of the parties of the first part, their heirs and assigns. And the said parties of the first part respectively covenant and agree with said party of the second part that they have good title and right to convey their respective interests in said Silver King lode mining claim, and respectively covenant and agree, each for him or herself, that the respective interest by him or her sold and hereby conveyed is free, and discharged of all liens, taxes, and incumbrances whatsoever."

Contract of even date with deed: "Memorandum of agreement, made this 27th day of March, A. D. 1891, between the Mollie Gibson Consolidated Mining and Milling Company, a corporation, party of the first part, and M. E. Thatcher, G. W. Thatcher, George L. Brown, and A. V. Hunter, parties of the second part, witnesseth that whereas, on the 25th day of March, A. D. 1891, the parties of the second part executed a certain agreement for the sale of the Silver King lode mining claim, situated in the Roaring Fork min-

ing district, in the county of Pitkin and state of Colorado, to the party of the first part; and whereas, by said agreement, it is stipulated that the said parties of the second part are to receive fifteen per cent. of the net smelter returns of all ores that may thereafter be marketed from said premises, as a part consideration of said sale; and whereas, the deed to said premises, in accordance with said agreement of sale, is to be executed with this agreement, but it is considered inexpedient to include all the agreements concerning said royalty in said deed, but in lieu thereof this agreement is to be considered in connection with said deed, and as a part thereof: Now, therefore, for the purpose of making the agreements concerning said royalty and the manner of working and managing said premises more definite, it is mutually agreed between the parties hereto: First. That the parties of the second part shall, from the date hereof, henceforth receive 15 per cent. of the net smelter returns (after deducting transportation, sampling, and smelting charges) of all ores that may be marketed from said Silver King lode mining claim, which said sum shall be received by said second parties free and clear of all claims, liens, taxes, or incumbrances of any kind and every kind and nature whatsoever. Second. That the said parties of the second part shall have the right of access to all parts of the Silver King mine, at all reasonable times, for the purpose of inspection; and the said parties of the second part shall have the right to appoint an agent to inspect the mining of ore in said mine, oversee shipments of ore, and inspect or be present at the sampling of the same. Third. The said party of the first part agrees that it will not cause to be instituted any legal proceedings, of any nature or description whatsoever, affecting the title of the parties of the second part, or their grantees, to any of the mineral that may be contained within the exterior boundary lines of said claim, extended downwards indefinitely, and that the royalty to be paid to said parties of the second part shall be free and clear of expense of all suits or proceedings brought against the Silver King claim or the ores contained therein, which shall be finally determined in favor of the parties hereto, or either of them. Fourth. The said party of the first part further agrees that it will proceed forthwith, and diligently continue, to develop the ore in said Silver King lode mining claim, by pushing the existing incline or other workings on its property towards and into the said Silver King lode mining claim, or by sinking the present or a new shaft on said claim. Fifth. That said parties of the second part shall have the right, at any reasonable time, at their own expense, to cause a survey of the underground workings of said Silver King lode mining claim to be made by a reputable surveyor, to be named by them. Sixth. And the said parties mutually agree that this agreement, and the deed herein referred to, shall only apply to and affect the said Silver King lode mining claim and the ores contained therein and belonging thereto."

The defendant answered, setting up, among other things, that 1.67 acres claimed by the plaintiffs to constitute a part of the Silver King lode mining claim was in fact no part thereof, and was not included in the contracts and the deed above set out. There was a decree below for the plaintiffs, and the defendant brought the case here by appeal.

The following is the opinion of Judge HALLETT, who tried the case in the circuit court:

"HALLETT, J. March 26, 1891, M. E. Thatcher, G. W. Thatcher, George L. Brown, and A. V. Hunter conveyed to the Mollie Gibson Consolidated Mining and Milling Company 'the Silver King lode mining claim, lying near and to the west of the Mollie Gibson lode mining claim, and being United States survey number 4,746, the original location certificate of which is duly recorded in book Z, page 160, and the amended location certificate of which is recorded in book 21, at page 75, of the official record of Pitkin county, Colorado.' The deed contained a provision in the habendum clause for payment by the grantee to the grantors, their heirs and assigns, 'of fifteen per cent. (15 per cent.) of the net smelter returns, after deducting transportation, sampling, and smelting charges, extracted and marketed from said lode mining claim,—that is, from within the boundaries of vertical planes extended downwards through the side and end lines of said lode mining claim; and the said party of the second part, for itself, its successors and assigns,

hereby covenants, promises, and agrees to and with the said parties of the first part, their heirs and assigns, to pay to said parties of the first part, their heirs and assigns, fifteen per cent. (15 per cent.) of the net smelter returns, after deducting transportation, sampling, and smelting charges, of all ores that may be hereafter extracted and marketed from said lode mining claim, said royalty or rent to be left with the purchaser of the ore, subject to the order of the parties of the first part, their heirs and assigns.'

"Contemporaneously with this deed an agreement was made in which the parties recite the making of the deed, and state that they make the agreement because 'it is considered inexpedient to include all the agreements concerning said royalty in said deed; but in lieu thereof this agreement is to be considered in connection with said deed, and as a part thereof.' They then declare that fifteen per cent. of the net smelter returns of all ores that may be marketed from said Silver King lode mining claim shall be paid by the grantees to the grantors, and 'that said parties of the second part,' who are the grantors in the deed, 'shall have the right of access to all parts of the Silver King mine at all reasonable times for the purpose of inspection, and said parties of the second part shall have the right to appoint an agent to inspect the mining of ore in said mine, oversee shipments of ore, and inspect or be present at the sampling of the same.'

"The bill alleges that complainants have been excluded from part of the ground within the Silver King location, an area of 1.67 acres; that they have not been allowed to inspect that territory according to the terms of the agreement; that ore has been taken from it for which the defendant refuses to account; and complainants demand an accounting as to the ore taken from the premises, and also that they 'have access to all parts of said Silver King lode mining claim, including said 1.67 acres, by means of the usual openings, shafts, drifts, levels, and inclines through which the workings therein are reached, without hindrance from the defendant, whenever request for that purpose is made by your orators, according to the terms of the contract aforesaid,' and that defendant be 'enjoined from in any manner interfering with your orators or their agents in the exercise or enjoyment of any of their rights aforesaid, or from disputing the title of your orators to the whole of the said Silver King lode mining claim, including the 1.67 acres aforesaid.'

"When the deed was made, there was a dispute between the parties concerning the ownership of the 1.67 acres mentioned in the bill which arose in the year 1885. The Silver King lode was located in 1880 or 1881. Two dates are given, but both of them are earlier than the Sauquoit location, under which respondent claims, and it is not material to consider whether the one or the other be correct. The Sauquoit claim is the one under which respondent claims title to the 1.67 acres, and it was located in 1885. Soon after the location of that claim, application was made in the land office for patent. Adverse was made by the Silver King owners to this application, and suit was brought in the district court of Pitkin county in support of the adverse.

"In July, 1886, something like a year after the suit was instituted, judgment was entered in that action upon stipulation of counsel, by which the territory in conflict between the two locations was divided, and the Silver King was awarded 2.46 acres, and the Sauquoit 1.67 acres. Nothing was done upon this judgment towards obtaining a patent for the Sauquoit claim for the 1.67 acres that were awarded to it; but in the following year (1887) the Silver King made application, independently of the other, for its own location, and an entry was allowed upon that of the entire claim, including the 1.67 acres which had been awarded to the Sauquoit by the judgment of the district court of Pitkin county in July, 1886.

"Following this entry there were extended proceedings in the land department,—an application to the commissioner of the land office to set aside the entry, which was done by the commissioner on the 21st of February, 1891. An appeal was taken from his decision, and this was affirmed by the secretary of the interior in March of the same year,—the 29th of March, I think; so that the situation of the property in respect to the 1.67 acres of land on the 26th or 27th day of March, 1891, when the deed and agreement to which refer-

ence has been made were executed, was that there was an entry of the entire claim by the Silver King which had been set aside by the commissioner in so far as it affected the 1.67 acres in dispute between that location and the Sauquoit, and the case was pending on appeal to the secretary of the interior. His decision was made four or five days later.

"It may also be well to say that complainants in the bill, the grantors in the deed, were then in possession of the ground in dispute. There is some conflict of testimony upon this point; but, taking it altogether, it seems to establish that complainants had a shafthouse upon the premises, and some machinery there at that time. Of this controversy and its merits it is not necessary to say anything in determining this case, except that the controversy existed between the parties; that it was a pending controversy, and apparently one in which there was some degree of acrimony between the parties. On the 25th day of March, when negotiations began which resulted in making the deed dated March 26th, which was not, in fact, signed until the 27th day of that month, the witnesses for complainants (and they are very largely the complainants themselves) state that when the negotiations began for the purchase of the property by the Mollie Gibson Company, and during the progress of the negotiations, they had distinctly in mind the controversy which existed in respect to the 1.67 acres, and that it was mentioned. It was understood by them, in the progress of the negotiations, or, in any event, before they were closed, that this territory was within the terms of the deed and the agreement executed between the parties. The witnesses for respondent say that no mention whatever was made of the controversy. They go further than that, and say that they had the matter distinctly in mind, as the complainants had it in mind, and intended to exclude it from the agreement, if any mention should be made of it. * * * [Here the learned judge copies from the testimony in the record.]

"In the view I take of the case, it is not necessary to go further than to say that this dispute existed between the parties, and that both parties had it in mind; that is, the subject whether this ground was embraced in the deed and in the agreement was in their minds. It may be well to say further that, before the deed and agreement were executed in Colorado Springs, the terms of the instruments were under discussion between counsel—Mr. Cavendar, I think, for the complainants, and Mr. Edsall for respondents—for the better part of the day, and that the language of both instruments was carefully considered. On the day preceding the execution of these instruments, negotiations occurred between the parties here in Denver, and upon that occasion an agreement was drawn by Mr. Bolles, who bore some relation to the company, but who, I believe, was not an attorney, which was not materially different from that which was executed on the 27th of March; so that, with this as a basis,—the agreement which had been made between the parties on the 25th day of March, 1891, in Denver,—counsel proceeded to the discussion of the whole matter at Colorado Springs the following day, and the result of their discussion was embodied in the deed and the agreement made on the 27th of March. This makes it clear that the only office of the court in the premises is to interpret the language of the parties in the deed and the agreement of the 26th and 27th of March, 1891; and, looking to them only, it seems to me that there is no room for discussion. The controversy here is whether the complainants have the right to fifteen per cent. royalty on any ore they have taken from the 1.67 acres, and the right to inspect that territory, under the terms of the deed, and the agreement executed between the parties. Now, the deed declares that the payment of royalty shall be from all ore taken 'from within the boundaries of vertical planes extended downward through the side and end lines of said lode mining claim.'

"When we refer to the agreement in the first paragraph, the Silver King lode mining claim is given as the territory from which the royalty shall be paid; but in the third clause there is this language: 'Said party of the first part [that is, the respondent company] agrees that it will not cause to be instituted any legal proceedings of any nature or description whatsoever, affecting the title of the parties of the second part or their grantees, to any of the mineral that may be contained within the exterior boundary lines of said claim, extended downwards indefinitely.' The agreement, which was made

in Denver, and drawn by Mr. Bolles, of the 25th day of March, 1891, contains this language on the same subject: 'And the parties of the first part hereby further agree to pay the said second parties, their heirs and assigns, a royalty of fifteen per cent. on the net smelter returns received from all ore marketed in and under the said Silver King lode, and its side and end lines vertically extended downward.'

"That language is quite as clear as that of the deed and of the agreement. The position of the respondent is that inasmuch as there was a judgment in the district court of Pitkin county, awarding to the Sauquoit claim 1.67 acres of the territory which was within the exterior lines of the Silver King claim, it cannot be said that that territory so awarded to the Sauquoit claim thereafter remained as a part of the Silver King location, and that it should be understood by all parties and by the court, as matter of law, that by the judgment of the district court of Pitkin county the 1.67 acres was excluded from the Silver King territory. But we cannot accept that view of it. The territory which may be granted from a location, or that which may be obtained by a judgment of court, is not in any sense actually excluded from the lines of the location. It may be properly described, still, as within such lines. Parties referred to the Silver King location in all these locations, and in all the papers which they executed in respect to it, as survey No. 4,746, and referred to the exterior lines of the locations constantly, and to those lines extended downward vertically, as being the subject-matter of their contract and agreement. I do not see how we can say that any part of the territory included within those lines shall be regarded as without them. It seems to be plain enough that it was the duty of the parties, if they intended to exclude from those lines the territory included within them, or any part of it, that they should have stated so in their agreement. I am of the opinion that the complainants are entitled to the relief for which they ask."

A. E. Pattison, Thomas H. Edsall, and Henry W. Hobson, (William W. Cooley and Albert E. Pattison, of counsel,) for appellant.

Charles I. Thomson, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) The only question in this case is whether the 1.67 acres of land in controversy was excluded in the conveyance and contracts made by the appellees to and with the appellant. There is a good deal of parol testimony in the record touching this question, but, if such evidence is competent, it is too conflicting, and too nearly balanced, to vary the legal effect and construction of the written contracts and deed. The case must therefore be determined upon an inspection and construction of those instruments. Upon this question we fully concur in the reasoning and conclusion reached by Judge HALLETT in his opinion set out in the statement of the case. The decree of the circuit court is therefore affirmed.

WASHINGTON NAT. BANK OF TACOMA v. ECKELS, Comptroller of the Currency, et al.

(Circuit Court, D. Washington, W. D. August 29, 1893.)

1. NATIONAL BANKS — APPOINTMENT OF RECEIVER BY COMPTROLLER OF THE CURRENCY.

The power vested in the comptroller of the currency by Act June 30, 1876, (19 Stat. 63,) authorizing him, whenever he becomes satisfied of the

insolvency of a national bank, to appoint a receiver, is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court.

2. SAME—VOLUNTARY LIQUIDATION.
The right to put a national bank in voluntary liquidation, given to stockholders by Rev. St. § 5220, does not affect the right of the comptroller to appoint a receiver under the act of June 30, 1876.

3. SAME.
Nor does the provision of the act of 1876, providing that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, limit the power of the comptroller to take action before the bank ceases to do a banking business.

4. SAME—CLOSING UP BUSINESS.
Section 1 of the act of 1876, authorizing the appointment of a receiver by the comptroller to "close up" a national banking association, contemplates the liquidation and final winding up of the business of the bank, not the mere closing of the bank, and does not limit the power of the comptroller to take action before the bank has closed its doors.

In Equity. Bill by the Washington National Bank of Tacoma for an injunction to restrain James H. Eckels, the comptroller of the currency, and a bank examiner appointed by him as agent, from proceeding after the bank had, pursuant to a vote of more than two-thirds of its stockholders, gone into voluntary liquidation, to take possession of the assets of the bank for the purpose of putting the same in charge of a receiver. The defendant Charles Clary, bank examiner, interposed a plea in bar, alleging that the comptroller of the currency, after due examination, being satisfied that the bank was insolvent, had ordered him to take charge of the bank, for the purpose of turning the same over to a receiver, to be appointed pursuant to the act of June 30, 1876, (Supp. Rev. St., 2d Ed., 107.) Hearing on exceptions to the plea for insufficiency. Plea sustained.

Crowley & Sullivan, for complainant.
Wm. H. Brinker, U. S. Atty., and F. C. Robertson, Asst. U. S. Atty., for defendants.

HANFORD, District Judge, (orally.) In the case of the Washington National Bank against the comptroller of the currency, pending at Tacoma, I regard it as a great hardship that the comptroller of the currency should deem it necessary to interfere in the settlement of the business of the bank by the officers and means which have been chosen by the bank's stockholders, directors and creditors, and which are satisfactory to them, especially in view of the uncontradicted averment in the bill that the bank is able to meet all of its obligations, and willing to do so, and intending to do so, and that it is proceeding as well as it can to liquidate,—that is, to pay,—and close up its business. Now, regarding it as a hardship, I have endeavored, in reflecting on the case, to bring my mind to the conclusion that the court may lawfully interfere by issuing an injunction to restrain the appointment of a receiver, but the result has not been satisfactory.

In 1876 congress passed a law which, in terms, gives the comptroller of the currency the right to appoint a receiver whenever he becomes satisfied, after an examination, that a national bank is insolvent. The power thus vested in the comptroller of the currency is discretionary, and I think the rule holds good in this case, as in others, that where the head of a bureau in one of the departments of the government is clothed with discretionary powers, and authority to investigate facts and act upon his conclusions, his conclusions as to the facts are final, and not reviewable by the courts; so that the decision of the comptroller of the currency in this case, that the bank is insolvent, is to be taken as a finality. It is equivalent to the fact, whether the bank is really insolvent or not, so far as to authorize the exercise of the comptroller's power to put the bank in the hands of a receiver. Section 5220, Rev. St., gives the stockholders the right, by a two-thirds vote, to put the bank in voluntary liquidation. But there the law, so far as it gives the stockholders or officers of the bank any rights, ceases. It simply declares that they may, by vote, go into voluntary liquidation, and then the duty devolves upon them to give certain notices,—give notice to the comptroller, and give notice to everybody by publication. But I am unable to find in that provision anything to control this later act of congress, vesting the comptroller with power to appoint a receiver to take charge of a national bank when he becomes satisfied that it is insolvent. The same statute of 1876 provides when the stockholders may choose an agent to take charge of the business of a bank in liquidation; that is, after the receiver has had charge of it long enough to pay all its debts, and after its debts have all been paid, then the stockholders can select an agent to take charge of what remains of the assets. Now, all that seems to indicate that the comptroller, as the head of the bureau having charge of the national banks of the United States, and representing the government, so far as it has any interest, and representing the creditors and stockholders, is vested with power to take charge of a bank, and appoint a receiver, whenever certain conditions exist, and I do not think that this power is limited to cases in which his action may be taken before the bank has ceased to do a banking business. The words "close up," used in the statute, mean the liquidation and closing up of the business of the bank, not the closing of the bank. It is evident from the manner in which these words are used that it relates to the final winding up of the business. All that the receiver is required to do, the only service he can render, is in transacting the business that has to be done after the bank is closed, and it certainly never was intended by the use of these words to indicate an intention to limit the power of the comptroller to taking action before the bank has closed its doors. These are my conclusions in the matter, and I shall therefore sustain the plea.

MILLS et al. v. MILLS, (RIDER, Intervener.)

(Circuit Court, D. Oregon. September 8, 1893.)

No. 1,910.

1. EXECUTORS AND ADMINISTRATORS—PURCHASE OF ESTATE BY ADMINISTRATOR —RATIFICATION OF HEIR.
The consent of the heir and sole devisee of an estate that the administrator should purchase the property, and the acceptance and retention by the heir of a promissory note made by the administrator in payment of the purchase price, is a complete authorization and ratification of the transaction, the validity of which cannot be questioned, where neither the purchase price was inadequate, nor the sale procured by unfair means.

2. DEED—DELIVERY—PRESUMPTION.
The possession of a duly-executed deed by the grantee, and the finding among the papers of the deceased grantor of a promissory note made by the grantee for the purchase price, together with an unexecuted mortgage to the grantor for the purchase price, create a presumption that the deed was duly delivered to the grantee; and the words, "Don't record your deed till you see me. I will bring up the mortgage with me,"—in a letter from the grantor to the grantee, contain an implied admission that the grantee had a right to record the deed.

3. EQUITY—MORTGAGE FOR PURCHASE PRICE.
In such case equity will direct the execution of a mortgage by the grantee to secure the note given for the purchase price.

In Equity. Bill by Ceceil J. Mills and Warrena Mills, by her next friend, against Fred H. Mills, for a reconveyance of realty and for an accounting. William M. Rider, as administrator of the estates of Warren H. Mills and Warren F. Mills, intervenes. Decree for complainants.

Frank V. Drake and Reddy, Campbell & Metson, for complainants and intervener.

N. B. Knight and C. A. Dolph, for defendant.

GILBERT, Circuit Judge. The complainants brought suit against the defendant, alleging that on January 22, 1890, Warren H. Mills died in San Francisco, Cal., leaving all his property, by will, to his only son and heir, Warren F. Mills; that a portion of said estate consisted in an undivided one-half interest in certain personal property and lands situated in Klamath county, Or.; that, with the consent of said Warren F. Mills, the defendant was upon the 21st day of July, 1890, appointed administrator of the said property in Oregon by the county court of Klamath county, and upon August 12th, following, filed his inventory and appraisement of said property; that on the 17th day of November, 1890, the said Warren F. Mills died, leaving surviving him the said Ceceil J. Mills, his widow, and Warrena Mills, an infant, his only child, and devising and bequeathing to his said widow all of his estate; that the defendant took possession of said property in Oregon as such administrator, but that he is wrongfully dealing with the same as his own, and claims to own all of said personal property, and has appropriated the rents and profits of said real

estate to his own use, and has suffered waste of the said estate; that he has wrongfully disposed of portions of said personal property, and appropriated the proceeds thereof to his own use; that in July, 1890, the said Warren F. Mills, by deeds, partitioned said lands with the owner of the other moiety, and thereafter, in September, 1890, the said Warren F. entered into negotiations with the defendant concerning the sale and conveyance to defendant of a one-fourth interest in said lands so set apart to the Mills estate; that defendant executed a promissory note to said Warren F. for $8,000, payable five years from date, for the purchase price of said interest, and that said Warren F. and wife executed a deed therefor, and placed the same in the hands of defendant, but said deed was not to be considered delivered until the defendant should execute a mortgage on said interest to secure payment of said note; that said negotiations were never completed, and said mortgage was never executed, and the defendant wrongfully placed his deed on record, and wrongfully claims title thereunder. The prayer of the bill is that the defendant be decreed to hold said title to said interest in the lands in trust for complainants, and that he make conveyance thereof to the complainants; that he account for and pay over all profits derived by him from the use of the real estate of said estate; and that he account for all personal property of said estate.

The defendant's answer alleges that the one-half interest in the personal property did not belong to the estate of Warren H., but was the property of Warren F., by gift from his father, and that Warren F., having procured the other half interest from his father's former partner, sold the whole thereof to defendant in July, 1890, for a consideration of $3,800. The answer denies that the conveyance of the one-fourth interest in the lands was not completed before the death of Warren F., and denies that the defendant agreed to execute a mortgage therefor, and alleges that the defendant paid Warren F., on account of the purchase of the land, $2,000 in cash, and, on account of the lease transferred to him, $800, and the remainder was paid by notes. Some amendments were made to the bill, and supplemental averments were filed, showing that the defendant was upon July 6, 1892, removed from office as administrator; and W. M. Rider, who succeeded him as administrator of the estate of Warren H. Mills, and became also the administrator of the estate of Warren F., intervened, in his official capacity, on behalf of both estates.

The evidence in this case shows that Warren F. Mills and the defendant were cousins, and the relations existing between them were of an unusually confidential and friendly character. Warren F. was possessed of a considerable estate, while the defendant was poor. They had been students of the law together at Michigan University. When the death of Warren H. occurred, the defendant, at the request of Warren F., came to Oregon to look after the estate in Klamath county. He was appointed administrator on the 21st day of July, 1890. At about that date, Warren F.

also came to Oregon, and negotiations were begun between him and the defendant, looking towards a sale to the latter of all the personal property together with an interest in the land. Warren F. had by this time purchased from J. B. Rider the other one-half interest in the personal property. The negotiations were under consideration some two months. In the latter part of September, 1890, Warren F. went from Linkville to San Francisco, and did not return to Oregon. His death occurred on November 17, 1890. There is some discrepancy in the parol testimony as to the condition of the negotiations regarding the sale of the personal property and the land at the time of the death of Warren F. It is undisputed that he had executed a bill of sale of all of the personalty, and that he and his wife had made a deed of a one-fourth interest in the land, and had placed the same in the defendant's possession. Two promissory notes from the defendant were found among the effects of Warren F. in San Francisco,—one for $3,850, and one for $8,000; also, an unexecuted mortgage drawn to secure the $8,000 note; also, an option to purchase said one-fourth interest in said lands from the defendant in case the same should be offered for sale by him; also, an indenture of lease executed by said Warren F. and the defendant, leasing to the defendant for five years the three-fourths interest in said lands belonging to said Warren F. The defendant had in his possession, and produced in evidence, the bill of sale, duly executed; the deed to the one-fourth interest in the lands; a lease signed by Warren F. and himself, by which the other three-fourths interest in said lands is leased to defendant for a term of five years; an assignment of the unexpired term of a previous lease upon the property of Warren H., made by Warren H. and J. B. Rider to one McCollum.

It is the contention of the complainants that the negotiations were not completed at the time of the death of Warren H.; that the deed referred to was placed in the hands of the defendant for a special purpose only, and was not delivered; and that the defendant procured possession of the other papers wrongfully, after the death of Warren F. A large amount of testimony is presented upon this issue. I am inclined to the belief that the contention of the complainants is not supported by the evidence. It is not disputed that all the papers in question, except the mortgage, were duly executed by the parties before Warren F. left Oregon. The fact that the papers were found in the possession of the parties, in the manner above indicated, creates a strong presumption that all the terms of the transaction were agreed upon, and that all the papers so signed were delivered. The parol testimony is not sufficient to overcome this presumption. A letter which was written by Warren F. to the defendant on the 27th day of October, 1890, affords some light upon the situation. He wrote, (concerning the lease:)

"Are you discouraged? Do you want to give it up? If so, let me know by telegraph at once, for I have a man who wants the place, if he can have it

right off. I want to stick to my bargain with you, but I also want you to stick by yours with me. * * * Don't record your deed until you see me. I will bring up the mortgage when I come."

It is claimed by the complainants that the expression, "Don't record your deed until you see me," is corroborative of their contention that the deed had not been delivered to the defendant. To my mind, it is evidence to the contrary. The words so written contain an implied admission on the part of Warren F. that the defendant had the right to place his deed on record, and that there was a possibility of his doing so, unless requested to withhold the same. When Warren F. left Oregon, it is evident that the mortgage had not been prepared. There was probably an understanding that the deed and mortgage were to go upon the record simultaneously.

The deed from Warren F. and wife to the defendant recites a consideration of $10,000, and the defendant testifies that that sum was the actual consideration, and that he paid to Warren F. in cash, at the time of the delivery of the papers, the sum of $2,000 on account thereof, and $800 on account of the transfer of the McCollum lease. The complainants offered testimony to prove that the defendant had no money, and that he could not have made these payments of cash. His own testimony is that during the year prior to his departure from Michigan, and while he was a student of the law at Ann Arbor, his father paid over to him some $2,100 in satisfaction of a debt which had had its inception many years prior thereto, when the defendant was a child, and which, from $700, had, with interest, increased to $2,100 in 1889; that this money had by defendant been intrusted to the safe-keeping of Warren F. at Ann Arbor, and had been carried upon the person of defendant when he came to Oregon. In the light of the evidence, it is impossible to credit this story. The proof is that, about the time the payment is said to have been made to the defendant from his father, the latter was in great financial embarrassment. On November 1, 1888, he wrote to his brother Warren H., saying, "Fred [the defendant] was happy when he got the news that you sent him the money to go to school." On May 11, 1889, he again wrote to his brother: "I was out to Ann Arbor ten days ago, and I gave Fred seventy-five dollars. He wanted money very bad. He thinks he will get through this year. I hope he will, for the fact is I have all I can do to keep along." In 1889, after his graduation from the law school, the defendant was sued at Ann Arbor, Mich., for seduction, and in February, 1890, the suit was compromised by the payment of $500. The money was borrowed from Warren F. upon the joint note of defendant's father and the defendant. The defendant was at this time 23 years of age, and he asks us to believe that, at the time his father assumed the burden of this $500 note, he, for whose benefit the money was borrowed, had in his possession $2,100, paid to him by his father, and that both his father and Warren F. were acquainted with that fact. It is clear that the defendant had little or no money after his arrival in Oregon. On

June 18, 1890, he wrote Warren F., "I bought a horse to-day from a man who was broke and had to sell, so I do not think I will have the means to go to the city unless I go with you." At the time the defendant claims to have made the cash payment to Warren F., he left unpaid the $500 note above referred to, as well as a $200 note given by him to Warren F. for borrowed money. Those notes were still unpaid at the time of Warren's death. In view of these facts, it cannot be believed that the defendant paid cash to Warren F. on account of any part of the purchase price of the property. The true consideration for the land, although recited at $10,000 in the deed, evidently, was but $8,000, and all payments were made by the notes of the defendant.

A careful consideration of the testimony convinces me that the personal property referred to in the pleadings belonged to the estate of Warren H. Mills at the time of his death, and that it was placed in the official inventory of his estate, which was filed in the county court by the defendant on August 12, 1890. I am convinced that sheets containing that portion of the inventory and appraisement have been detached and removed from the files. The defendant and some of his witnesses, it is true, testified that at the time of the appraisement of the real estate the personal property was also appraised; that the appraisement was made at an attorney's office in Linkville, and without inspection of the property, but that the appraisement of the realty was for the purpose of filing the inventory required by law, while the appraisement of the personal property was made merely to satisfy Warren F. that the price which the defendant had agreed to pay him therefor was not inadequate. This latter statement is in itself exceedingly improbable. Warren F. was present at the time of the appraisement. He had seen the personal property. He was doubtless as well acquainted with its value as was the defendant, and, if he were not, it is not reasonable to suppose that his judgment thereon would be in any way enlightened by the guess of three residents of Linkville, who were not then in the presence of the property, and never saw it. One of the appraisers testifies that the appraisement and inventory were made, both of the personal property and the lands, as the property of the estate of Warren H. Mills, deceased. There is evidence which to my mind amounts to absolute proof that this was the case. The inventory, as now found on record, contains mention only of the real estate. The real estate is specified and described in detail upon written sheets attached to the ordinary printed form of inventory. The value of each parcel, as found by the appraisers, is set opposite its description. There is found among the effects of Warren F. Mills an account book in which appears, in his handwriting, what is described as, and purports to be, a copy of the inventory and appraisement of the estate. It was evidently made at the time the appraisement was made. The inventory in the book contains the personal property, the whole of which is appraised at $3,799.64, and the undivided one-half belonging to the estate at $1,899.82. In the sum total, at the end of the inventory, the per-

sonal property is by mistake added in at $3,799.64, instead of $1,899.82, making a total of lands and personalty at $11,885.14. The same error appears in the inventory which was filed in the county court. The sum total is there stated at $11,885.14. When the defendant's title to the personal property was called in question, after the death of Warren F., on the ground that he (defendant) could not purchase property of which he was the administrator, he must have conceived the scheme of withdrawing that property from the inventory of the estate. When he detached the sheet containing the same, he saw the necessity of making the values of the remaining real property that much greater, so as to correspond with the total valuation, which was written out in the inventory, and which could not well be changed. A comparison with the copy of the inventory kept by Warren F. shows the manner in which this was done. The values of certain parcels of the real estate were raised. The value of the second parcel was changed from $400 to $1,400; of the third, from $400 to $409; of the fourth, from $655 to $855; of the sixth, from $100 to $700; of the eighth, from $100 to $190; and 82 cents was added to the value of the last parcel. These alterations were all easily made. The sum total of the increase in the valuations so made is exactly $1,899.82, which is the valuation of the one-half interest in the personal property. But the fact that the value of that property was carried into the inventory at $3,799.74, instead of $1,899.82, was overlooked by the defendant, and the values in the altered inventory now on file are still less, by $1,899.82, than the sum total therein stated. No demonstration of fraud and forgery could be more complete than that presented by this record. The conclusion is irresistible that the one-half interest in the personal property, when the same was purchased from Warren F. by the defendant, belonged to the estate of Warren H. Mills, deceased, of which estate the defendant was then the administrator, and was inventoried as such by the defendant. The question arises whether that fact renders void the sale of personal property to the defendant. The law concerning the right of a personal representative to purchase the property of his estate has in recent times been largely modified. The preponderance of modern decisions tends to the conclusion that such a sale may often be advantageous to the estate, and that such advantage is the main thing to be considered. The purchase is held to be not void, but voidable, at the option of persons interested in the estate. Harrington v. Brown, 5 Pick. 519; Mead v. Byington, 10 Vt. 116; Ives v. Ashley, 97 Mass. 198; Staples v. Staples, 24 Grat. 225; Harshman v. Slonaker, 53 Iowa, 467, 5 N. W. Rep. 685.

It is claimed, however, that the sale to the defendant is made void by statute. Section 1166, Hill's Ann. Laws, provides:

"The order of confirmation of sale in this title mentioned is conclusive as to the regularity of the sale and no further. All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited and if made are void."

The prohibition contained in the statute would seem to refer to purchases made at administrators' sales,—purchases made by an

administrator from himself, either directly or indirectly. It is doubtful if it is intended to prohibit a purchase by the administrator from an heir. At the same time, such a purchase would undoubtedly be subject to the general rules which control dealings where a fiduciary relation exists. The sale would be void if any unfair advantage were taken of the heir by the executor or administrator. But it is immaterial whether or not the purchase from Warren F. Mills by the defendant is within the inhibition of the statute. The consent of the heir and sole devisee of the Warren H. Mills estate that the defendant should purchase this property, and the acceptance and retention by him of the promissory note made in payment of the purchase price, amount to such complete authorization and ratification of the transaction that its validity cannot now be questioned. Grim's Appeal, 105 Pa. St. 383; Dunlap v. Mitchell, 10 Ohio, 117. It is not contended that the purchase price was inadequate, or that the sale was procured by unfair means. Warren F. was upon the ground. He had seen the personal property, and knew its value. The one-half interest in it had been bequeathed him by his father's will. The other half he had purchased from his father's former partner. He treated it all as his own property. He sold the whole to the defendant. The sale was made in good faith. Its validity is not called in question by any creditor, and it is not shown that any right has been prejudiced thereby. Warren F. Mills was content to accept the defendant's note in payment without security. He could not, if now living, repudiate his own deliberate act in so doing, and none of the parties to this suit is in position to do more than he could have done.

I am convinced, from the evidence, that it was the intention of Warren F. Mills and the defendant that a mortgage should be executed to secure the payment of the note given for the purchase price of the land, and it is not proven that that agreement was abrogated, as testified by the defendant. It will be the decree of the court that the defendant execute a mortgage upon the land so conveyed to him, in the terms of the mortgage prepared by Warren F. Mills, and that, in case no such mortgage is executed, there be decreed to be a lien upon said property so conveyed from the date of the conveyance thereof, in lieu of such mortgage, and that the defendant pay the costs of this suit.

SOUTHERN PAC. R. CO. v. GOODRICH et al., (two cases.) SAME v. MALCOLM. SAME v. NORTON. SAME v. GREEN.

(Circuit Court, N. D. California. May 22, 1893.)

QUIETING TITLE—PLEADING.

In federal courts, sitting in states where the local statutes have dispensed with possession by complainant as a prerequisite to maintaining the suit, a bill in equity to quiet title to land is demurrable, which fails to

allege affirmatively either that plaintiff is in possession, or that both complainant and defendant are out of possession.

In Equity. Bills by the Southern Pacific Railroad Company against Goodrich and others to quiet title to land. Respondents demur. Demurrer sustained.

Joseph D. Redding, for complainant.
S. F. Leib, for respondents.

McKENNA, Circuit Judge, (orally.) This is a bill in equity to quiet title to certain real estate. The bill alleges the incorporation of the company, and contains the usual allegations of the grant of the land to complainant by the act of July 27, 1866, and that it is within 20 miles of said road, and not reserved, and that the United States had full title thereto, and that it was free from pre-emption or other rights; that the company had filed its map of definite location, and built its road, which was accepted, and that it had performed all other conditions required to earn the land, and entitle it to a patent; that respondent, unknown to complainant, but subsequent to the filing of the map of definite location, made a location upon said land as lieu land, in lieu of a 36 section of school land; that said land was afterwards awarded to respondents by the state of California, and a patent issued to them, by virtue of which they claim the land, which is alleged to be worth $5,000, and over; that complainant had repeatedly applied to the commissioner of the general land office and to the president for a patent, but they refused, and complainant has repeatedly and in a friendly manner applied to respondents to convey said land to complainant; and that the patent from the state constitutes a cloud on the title. Respondents demur to the bill, on the ground, among others, that complainant's remedy, if it have any, is at law, and not in equity.

Section 723 of the Revised Statutes, repeating the sixteenth section of the judiciary act of 1789, provides "that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The supreme court, commenting on this section, said substantially in Hipp v. Babin, 19 How. 278, that whenever a plaintiff can proceed at law he must, because the defendant had a constitutional right to a trial by jury. Can the plaintiff in this case proceed at law? In Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158, it was decided that a grant of the kind described in the bill was one in praesenti and of the legal title. See, also, Railroad Co. v. Amacker, 1 C. C. A. 345, 49 Fed. Rep. 529, and Railroad Co. v. Wright, (in circuit court of appeals in this circuit, Jan. 16, 1893,) 4 C. C. A. 193, 54 Fed. Rep. 67. The plaintiff, therefore, has the legal title, and, if the defendants are in possession of the land, it can sue at law. Under a precisely similar grant, ejectment was maintained in Salt Co. v. Tarpey, supra. It is said in Whitehead v. Shattuck, 138 U. S. 150, 11 Sup. Ct. Rep. 276, if plaintiff is the owner in fee of the premises, it can establish that fact in an action at law, and, if the evidences of defendant's title are void, that fact plaintiff can also

show. There is no occasion for resort to a court of equity, either to establish its right to the land, or put it in possession thereof.

But the bill does not show that defendants are or are not in possession, and therefore does not show that an action at law can or cannot be maintained. Does it therefore show that an action in equity can be? Prior to the enactment of local statutes dispensing with possession in the plaintiff in actions to quiet title, the conditions of a suit in the federal courts were the legal title and possession. Since the enactment of such statutes, the legal title is still necessary. The local statutes have been interpreted by the supreme court in Frost v. Spitley, 121 U. S. 557, 7 Sup. Ct. Rep. 1129; Holland v. Challen, 110 U. S. 15, 20, 3 Sup. Ct. Rep. 495; and Whitehead v. Shattuck, 138 U. S. 150, 11 Sup. Ct. Rep. 276, supra. In Frost v. Spitley, commenting on the Nebraska statute, the court say:

"By reason of that statute, a bill in equity to quiet title may be maintained in the circuit court of the United States for the district of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for."

"The requisite of the plaintiff's possession," the court says, "is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills."

The rule which was insisted on in this case was the legal title in plaintiff.

Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495, was also a suit to quiet title for what the bill described as wild and unoccupied land. Neither party, therefore, was in possession. The court, following the local statute of Nebraska, which enables a plaintiff to sue, though not in possession, sustained the bill. To the objection that, by entertaining the suit, controversies properly cognizable in a court of law will be drawn into a court of equity, it was replied:

"There can be no controversy at law respecting the title or right of possession of real property when neither party is in possession. An action at law, whether in the ancient form of ejectment, or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

In Whitehead v. Shattuck such a case did arise. It was also an action to quiet title, and the plaintiff alleged he was the owner of the premises, and that the defendant claimed them under a patent of the United States, and was in possession. It was decided that he had a plain, speedy, and adequate remedy at law. The action was brought in Iowa, and the Code of the state authorized an action to be brought to determine and quiet the title to real property by any one having an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession; but the court refused to follow the statute. It held that, while this statute enlarged the powers of the courts of equity of the state, it could not enlarge the powers of the federal courts, or annul the force of the law of congress declaring

that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law," or the constitutional right of parties in actions at law to a trial by jury. It is hardly necessary to say that the California Code has no greater powers than the Iowa Code to give jurisdiction to federal courts in equity. These cases, therefore, must be held to establish that to sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out of possession; in other words, the land must be unoccupied land.

In this case we have seen the bill has no allegations of possession in either the plaintiff or the defendants, and this, it is claimed, distinguishes the case from Holland v. Challen, in which it appeared that the defendant was not in possession, and from Whitehead v. Shattuck, in which it appeared that he was. But the essentials of jurisdiction are defined in those cases, and, being essential, must be alleged. The remedy in equity is the alternative to the want of a remedy at law; hence it is not enough to show that the plaintiff may not have, but it should appear that he actually has not, a plain, adequate, and complete remedy at law. Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336, cited by counsel for the complainant, is not necessarily antagonistic to these cases. If it is so, it must be deemed to be overruled by them. The plaintiff in that case derived title through an act of congress to a railroad company granting it certain land. The defendant claimed under a patent of the United States. It was held that the latter was a cloud upon plaintiff's title, but neither counsel nor the court gave any attention to the question of possession, or its effect on the jurisdiction of the court. The later cases are explicit in this regard, and show that the remedy at law is complete.

The case of Railroad Co. v. Stanley, 49 Fed. Rep. 263, decided by Judge Ross, in the circuit court of the southern district, does not militate with the views which I have expressed. The bill in that case alleged a grant to the Texas Pacific Railroad Company of the land in controversy, and that the defendant asserted title under a patent from the state. The defendant demurred, on the grounds that complainant did not have legal title, and did not show that it was in possession. These grounds were held, and correctly held, to be insufficient. From aught that appears, however, the defendant may have been also out of possession, and the condition of federal jurisdiction complete.

The demurrer will be sustained, and on the ground alone that I have stated. The other grounds are not passed upon.

This will apply to the cases of Southern Pacific Railroad Company v. Goodrich; Southern Pacific Railroad Company v. Malcolm; Southern Pacific Railroad Company v. Norton; and Southern Pacific Railroad Company v. J. E. Green.

Mr. Redding: I should like 30 days, if your honor please, to amend, so as to make that allegation sufficient. The Court: Is

there any objection to that? Mr. Lieb: No, sir. Mr. Redding: As I understand the ruling of the court, it is that we fail to allege that the defendant was not in possession, and that is the reason of the sustaining of the demurrer. The Court: The ruling of the court is that as the complaint does not show complainant is in possession, nor show that both it and respondent are out of possession, it does not show jurisdiction in equity. Mr. Redding: That was exactly the method that the bill was framed upon,—that neither plaintiff nor defendant is in possession. It is not alleged that the plaintiff or defendant is in possession. The Court: You may amend to allege that the complainant and defendant are both out of possession. Mr. Redding: I understand that the bill does allege that now. That was the intention of the bill,—that neither the plaintiff nor defendant was in possession. It is not alleged that either the plaintiff or defendant was in possession. The Court: There is an absence of allegation. The court holds there must be a presence of allegation showing the conditions of jurisdiction. Mr. Redding: I will take 30 days to amend to put the allegation in the affirmative that neither the plaintiff nor defendant is in possession. The Court: Then the other points of the demurrer will be passed upon.

Ex parte DAVIDSON.

(Circuit Court, D. Washington, N. D. August 23, 1893.)

1. COURTS—JURISDICTION—WAIVER OF FORM OF PROCEEDING.
   On an application by the receiver of a railroad for a rule to show cause why possession of certain real property should not be surrendered to him, where the parties and the subject-matter are within the jurisdiction, and respondent voluntarily answers asserting a right to the premises, and submitting his claim for adjudication, he thereby waives his objection to the form of the proceeding.
2. PUBLIC LANDS—WHAT INCLUDED IN GRANT.
   Where ledges or spits or tongues of land project out beyond the meander line of a bay, they are included as part of the fractions of sections shown on the government survey, and conveyed by government patent.
3. SAME—ACQUISITION OF RIGHT TO POSSESSION.
   In a controversy for the possession of such a ledge between the receiver of a railroad and one claiming ownership it appeared that the railroad company had acquired title from the patentee to the fractional section from which the ledge extended; that the person to whose rights the claimant succeeded, at the time of the railroad survey, claimed nothing but the privilege of burning a coalpit, and was afterwards employed by the railroad company for the express purpose of holding possession of the land for it, and acting as watchman of the company's property thereon, being compensated by money and supplies and free house rent; and that claimant derived his interest by purchase from such agent. *Held*, that the railroad company had title to the property, and that the receiver was entitled to possession.
4. SAME.
   If the land in question did not pass by the government patent, the title remained in the United States, and the right to possession was acquired by the railroad company when it located its line, selected the land, filed articles of incorporation and maps, and secured the approval of the secretary of the interior, pursuant to the act of March 3, 1875, granting right of way, etc., to railroads.

5. SAME—FAILURE TO PERFECT TITLE—RIGHT OF OTHERS TO POSSESSION.
The fact that the land is yet unsurveyed, and that the railroad company cannot perfect its title by filing a map within 12 months after government survey, as provided by section 4 of the act, does not entitle others to take it under other claims, as the appropriation of the land for railroad purposes takes it out of the body of the public domain.

6. SAME—PRE-EMPTION—HOMESTEAD.
The court will take judicial notice that the lands surrounding Seattle harbor, including the land in question, have for years been selected and known as the site of a city; and as the land is unfitted for, and could not be taken as, agricultural land, under the pre-emption law, and is excluded from the operation of the homestead law, an individual could not acquire title to it simply by living upon and improving it.

In Equity. Application by Thomas R. Brown, receiver of the Seattle, Lake Shore & Eastern Railway Company, for a rule on Jacob Davidson, to show cause why he should not surrender to the receiver possession of certain real property alleged to belong to said company. The respondent filed an answer containing exceptions to the proceeding for want of jurisdiction in the court, and also setting forth an adverse claim to the property, on the ground that the same is unsurveyed public land of the United States; that he purchased improvements thereon from one Lewis S. Rice; and that he claims the right to occupy said land and acquire the title under the United States homestead law. An issue was joined by a replication, and the case was heard upon the pleadings and evidence. Exceptions overruled, and findings and decree for the receiver.

E. M. Carr, for receiver.
P. P. Carroll, for respondent.

HANFORD, District Judge, (orally.) The parties to this proceeding and the subject-matter are within the jurisdiction of the court, and the respondent having voluntarily set forth in his answer his claim to the premises, and thereby submitted the same for adjudication in this summary proceeding, I hold that the objections to such form of proceeding have been waived.

In reaching a determination of the question at issue as to the right of possession, it is proper to take into account the character and description of the land itself, as well as the grounds upon which the parties respectively base their claims to right of possession. This land appears by the undisputed testimony in the case to be a low ledge or sand spit, extending out from the mainland into the harbor of Seattle. In making the government surveys the surveyor took no account of it. It is either land that has been made by accretion since the survey was made, or else the surveyor intentionally or negligently made no note of it as land, and ran the lines so as to leave it outside of the government survey. It is "land," as distinguished from "tide flats," over which the tide ebbs and flows. It lies above the line of ordinary high tide, and is not land to which the state of Washington has any right or claims any right. The declaration in the constitution of this state (article 17) that the people of this state assert proprietorship in the shores and beds of rivers and navigable waters up to the line of ordinary high water

is sufficient to exclude this from any claim of the state, because, by the undisputed testimony in the case, it is above ordinary high tide. No claim therefore can be predicated upon the rights of the state of Washington.

It is land to which the United States government had the title, and the government is the primary source of title. Whatever rights can be claimed by any one must rest upon the laws of the United States or a patent or grant from the government of the United States. Now, the receiver representing this railroad corporation is the plaintiff in the case, and should, if he prevails at all, prevail by virtue of having shown by the evidence a prima facie right to have possession; and after a prima facie showing is made, if there appears to be opposed to it a colorable claim, then his right should appear by the evidence to be superior or paramount to that of the defendant. The government being the source of title, the question is whether this railroad company has acquired any right to claim this land under the laws of the United States or any patent or grant from the government. It appears by the maps that, in making the surveys, sections were cut into fractions, and were made fractional by the shore of this bay, and all the grants or conveyances that the United States has made of those fractions are grants of land bounded upon tide water. The meander line is not controlling as fixing the boundary; it is simply a series of tangents run at different angles for the purpose of ascertaining approximately the quantity of land in each legal subdivision to be paid for. But the navigable water of the bay is the boundary. It is true that the decisions establish the rule that conveyances of land upon tide water convey no riparian rights; that is, no legal title to anything beyond the boundary. But a patent does convey title to all the lands within the established boundaries shown by official maps of the government surveys. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; Forsyth v. Smale, 7 Biss. 201; Mann v. Land Co., 44 Fed. Rep. 27. Now, the surveys have fixed the boundaries of those fractions fronting upon the tide water of this bay, and I think that, according to the rules established by the decisions, whatever ledges or spits or tongues or points of land project out beyond the meander line are included as part of the fractions conveyed by the patents. If that is the correct view of this matter, by the chain of title including conveyances from the patentee of the United States the railroad company has acquired the title to this sand spit and owns it.

In addition to the conveyances, there is undisputed evidence that the railroad company had prior possession, and, as against this defendant, Davidson, has now the right of possession. It appears from the testimony that Mr. Rice was engaged in burning a coalpit at the time the projectors of the railroad went there to make surveys, and he was living in a cabin close to the bank, and claiming nothing except the privilege of burning a coalpit there. He was afterwards employed by the railroad company for the express purpose of holding possession of this piece of ground for the railroad company. He received from persons interested in the com-

pany money and supplies. Groceries and provisions were furnished him as compensation for holding possession of that piece of ground for the company, and he continued to receive moneys and supplies until the time of his death, for that purpose and with that understanding. In addition to that, the house he lived in was built by the railroad company, and he was allowed to live in it rent free as a further compensation, or as part of his compensation for services rendered by him to the company by living upon and holding that piece of ground, and acting as watchman to protect the tools and other property that was left upon it belonging to the company. Now, Mr. Rice could no more, by a pretended sale of his improvements to Mr. Davidson, give the right to possess and occupy that ground than a farmer's hired man could, in the absence of the farmer, sell the farm, so as to put him to the inconvenience of having to prove his title in order to regain possession. The law will not tolerate any such thing as a tenant or employe dispossessing his landlord or employer, either by setting up and claiming adverse possession himself, or by letting another into possession. Such an attempt as that is deceitful and fraudulent, and something that no right can be predicated upon under any conditions whatever. Mr. Rice was put in possession of that property, and a house was built for him there, as an employe of the company, and he could not dispose of the right of possession to another, even one who might deal with him in good faith, and without any knowledge of a fraudulent intent on his part.

But Mr. Davidson does not occupy even that position. He never saw this ground, according to his own showing, until November, 1889. The inception of his claim of right was by becoming a creditor of Rice, and loaning him money and doing work for him with a team, in payment for which he claims that in 1890 Rice attempted to deliver it over to him. He had known before that time that the railroad company claimed the ground. He had known that Mr. Rice was there as an employe of the company, and, instead of going to the company to find out about it, he inquired of Rice, and took Rice's say so. Now, any man buying property in good faith, with knowledge that another person had a claim before attempting to buy it, would go and see that person, and find out about it, unless he intended to take his chances of success in a controversy. So it is plain that Mr. Davidson, in buying the property from Rice, knowingly bought merely the chances of being able to hold it against the railroad company by litigation or otherwise. He is in the position of a man who has bought a lawsuit on speculation.

I am led to the conclusion that the railroad company has the title to the property. It had prior possession. The receiver has made a prima facie case, and, as against it, there is only a wrongful claim of possession at the utmost.

In regard to the title, this can be said further: that, if this piece of ground did not pass by the patents which the United States government issued, the title remained in the United States

up to the time when the railroad company located its line of road, and selected this piece of ground for a station, filed its articles of incorporation and maps with the department of the interior, and secured the action of the secretary of the interior in approving it, and thereby, under the provisions of the act of March 3, 1875, (Supp. Rev. St. [2d Ed.] 91,) acquired it by grant from the United States to the company direct. The act does not limit the right of railroad corporations to acquire ground for right of way and station purposes to surveyed lands. It plainly contemplates that railroads may be extended across unsurveyed lands, and it simply requires that, after the surveys are made, a profile or map shall be filed and approved by the secretary. This land was surveyed by an employe of the railroad company, and notes of the survey accompanied the map, and there is room to argue at least that the secretary of the interior approved this survey. But, whether that is so or not, the railroad company have acquired the right under said act to have possession. If the title has not been perfected by filing a map after survey, the land being yet unsurveyed, the land is not for that reason exposed to be taken under another claim. The appropriation of it for railroad purposes takes it out of the body of the public domain, and prevents any settler from going upon it and claiming it under any of the other land laws of the United States.

The land is not subject to be taken under the homestead or pre-emption laws. It is not land that can be settled upon and taken under either of those laws, or any law that I know of that gives an individual the right to acquire title to land by living upon and improving it. The land laws of the United States are very liberal in giving the people the right to settle upon agricultural land, and acquire title to it, and in providing for the sale of mineral and timber lands. But this piece of ground comes within the provisions of neither of those laws. It is not mineral land nor timber land. It is not land that can be taken as agricultural land under the homestead law. The terms of the homestead law authorize a settler to acquire a homestead upon unappropriated public lands upon which he may have filed a pre-emption claim, and which may be subject to entry under the pre-emption laws. Section 2258 of the Revised Statutes of the United States excepts and reserves certain classes of land from entry under the pre-emption law. Among the descriptions of land so reserved are lands included within the limits of any incorporated town, or selected as a site for a city or town, or used in any way for trade or business.

Now, it is a matter of such general knowledge that the court will take judicial notice of it, that the lands surrounding this harbor have been for many years selected for and known as the site of a city. It is true that it has not all of it been covered and occupied by brick buildings or city improvements, but it is—all of it—the site of a city, and occupied for purposes of trade and business. The land in controversy lies on the water front next to tide water. It is not land that can be taken as agricultural

land under the pre-emption law; and, if not under the pre-emption law, then it is excluded under the homestead law. Any pretense of a man that he has taken up such a piece of ground right in the harbor of the city of Seattle, as a farm, or to maintain a poultry yard upon it, is a transparent sham. The land is valuable for other purposes, and no one would contemplate using it for purposes other than those for which it is most valuable; that is, as a location for trade and business. As early as 1885 this railroad company went there, and surveyed this land, and entered into possession of it for the purpose of business; and, long before Mr. Davidson saw it, it was occupied and actually used for business and trade, and was therefore reserved from entry by the terms of the pre-emption law.

On this question as to the right of possession, I have no doubt, and shall hold, that the receiver is entitled, as against Mr. Davidson, to have immediate possession of the ground. I direct that an order be prepared requiring the respondent within 10 days to vacate the premises, and surrender possession to the receiver, and the order will be enforced by proper proceedings, if necessary.

ADAMS v. SPOKANE DRUG CO.

(Circuit Court, D. Washington, E. D. October 7, 1893.)

NATIONAL BANKS—RECEIVER—ACTION ON NOTE—EQUITABLE DEFENSES.

In an action at law by the receiver of a national bank on a note, the maker may plead as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the liens of the United States and general creditors attached. Yardley v. Clothier, 49 Fed. Rep. 337, followed.

At Law. Action by J. H. Adams, receiver of the Citizens' National Bank of Spokane Falls, against the Spokane Drug Company, upon a promissory note. Demurrer to an answer, pleading a set-off. Overruled.

Jay H. Adams, in pro. per.
Cy Wellington, for defendant.

HANFORD, District Judge. This is an action by a receiver of a national bank upon a promissory note for $5,000, given to and owned by said bank. The answer alleges that the amount of the loan for which said note was given was not actually paid, but was credited by said bank to the defendant as a deposit subject to check; that thereafter the defendant purchased of said bank three bills of exchange on the Chase National Bank of New York, for sums aggregating $3,500, and paid for the same, by checks against said deposit; that the bills of exchange were presented in due course of business, but acceptance thereof was refused, for the reason that the drawer had failed; that, at the time of the suspension of said bank, part of said deposit still remained to the credit of the defendant; that, before the action was com-

menced, the defendant tendered to the receiver said bills of exchange, and a sum of money equal to the full amount of the principal and interest due on said note, after deducting therefrom the balance of said deposit and the amount of said bills of exchange, with protest fees, and the tender has been made good by bringing said bills of exchange and money into court. The suspension of the bank and appointment of the receiver occurred before the maturity of the note. The case has been argued and submitted upon a demurrer to said answer.

In the case of Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. Rep. 148, the supreme court held that the receiver of a national bank took the assets as a mere trustee, and not as a purchaser for value; that, in the absence of a statute to the contrary, demands and choses in action which belonged to the bank were in his hands, subject to all claims and defenses that might have been interposed as against the bank before the liens of the United States and the general creditors attached; and that there is nothing in the statutes relating to national banks to deprive a customer of an insolvent national bank of the right to set off a debt, or obligation of the bank to him, existing at the time of its failure, against a promissory note which did not become due until after the failure, according to the ordinary rule in equity applicable to cases wherein the reciprocal liabilities of insolvents and others have to be adjusted, and the judgment of the United States circuit court for the southern district of Ohio was reversed for error in sustaining a demurrer to a defense similar to the one pleaded in this case. I should have no difficulty in reaching a satisfactory conclusion, harmonious with the reasoning of that decision, were it not for the fact that in the same opinion the learned chief justice argues that the statute of Ohio, allowing a set-off to be interposed as a defense in an action at law, is not applicable as a rule of practice in the federal courts; and he makes the following emphatic annunciation: "We are of the opinion that the circuit court had no power to grant the set-off in question in the suit at law." The reason given is that "legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted." In England the right to set off a debt due to a defendant from the plaintiff in an action at law is given by St. 2 Geo. II. c. 22, § 13, and made perpetual by 8 Geo. II. c. 24, § 4. Most of the states of the Union, if not all, have long ago enacted similar laws. We have such a statute in the state of Washington. The practice has prevailed in the courts of this country, state and federal, for so long, and has been so often sanctioned by the supreme court of the United States, that the right of a defendant having such a defense to avail himself of it would seem to be firmly established. 2 Pars. Cont. 734; Partridge v. Insurance Co., 15 Wall. 573; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696. In the case last cited, Mr. Justice Gray shows that the Pennsylvania law of set-off has been in force nearly two centuries. In Scott v. Armstrong the supreme court reversed the

judgment of the circuit court for not allowing the set-off pleaded by the defendants in that case, and approved the decision of the circuit court for the eastern district of Pennsylvania in the case of Yardley v. Clothier, 49 Fed. Rep. 337, which was an action like the one at bar, and in which a similar defense was sustained. Considering what was done, notwithstanding what was said by the supreme court, I feel warranted in following Yardley v. Clothier.

The demurrer is therefore overruled, and, the plaintiff having elected to stand upon his demurrer, a judgment in favor of the defendant for costs will be entered.

UNITED STATES v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. September 8, 1893.)

No. 1,982.

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EXTENT OF GRANT.
   Act of July 2, 1864, (13 Stat. 365,) which authorized the construction of the Northern Pacific Railroad from Lake Superior westerly to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, Or., granted lands in aid of the construction on each side of "said railroad line." *Held*, that the grant extended to the road with its branch, and not merely to the main trunk line.
2. SAME—RESERVATION OF "GRANTED" LANDS.
   The grant to the Northern Pacific Railroad was of "every alternate section of public land, not reserved, sold, granted * * * at the time the line of road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that the reservation of "granted" lands was not made in contemplation of a subsequent grant of the same lands to the Oregon & California Railroad.
3. SAME—GRANT IN PRÆSENTI.
   The grant of land to the Northern Pacific Railroad conveyed a present title, subject to the right of the United States to re-enter on failure of the railroad to comply with conditions subsequent, and made the land so conveyed "granted" land, within the operation of the subsequent grant to the Oregon & California Railroad, which also reserved "granted" land.
4. SAME—PRIORITY OF GRANT.
   The grant of lands to the Oregon & California Railroad did not gain a priority over the grant to the Northern Pacific Railroad, either by the fact that the Oregon & California Railroad filed its map of definite location, constructed a portion of its road, and received patents for the land, before the maps of the line of the Northern Pacific Railroad, showing the conflict of grants, were filed, or by the fact that no portion of the Northern Pacific was finally constructed on the line of such maps.

In Equity. Suit by the United States against the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans to cancel patents, and restore land to the public domain. Defendants demur. Demurrer overruled.

Daniel R. Murphy and John M. Gearin, for the United States.
W. D. Fenton and L. E. Payson, for defendants.

GILBERT, Circuit Judge. By act of congress of July 25, 1866, a grant of lands was made to the Oregon & California Railroad Company to aid in the construction of a line of railroad within the state of Oregon, beginning at Portland, and running thence to the

southern boundary of the state; thence to connect with a proposed line of railroad in California running from the state line to a point of connection with the Central Pacific Railroad, in the Sacramento valley. The grant was made in the usual form, and covered every alternate section of public land, not mineral, designated by odd sections, to the amount of 10 sections per mile on either side of the line, reserving therefrom lands granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, for which lands, indemnity was to be allowed as provided in the act. Under the provisions of this act the beneficiary filed its map of definite location for a distance of 60 miles south of Portland on October 29, 1869, and upon January 31, 1870, the lands within the grant for that distance were by the secretary of the interior withdrawn from settlement. A portion of the road was thereupon constructed, and commissioners were appointed to examine and report thereon. On December 31, 1869, the commissioners reported that the road had been duly built for the first 20 miles south from Portland. On September 28, 1870, the commissioners reported the due construction of the next 20 miles. Both these reports were approved by the president, and patents for the lands coterminous with the completed road were issued to the Oregon & California Railroad Company, of dates May 9, 1871, July 12, 1871, June 22, 1876, and June 18, 1877.

The United States brings this suit to cancel said patents, and to restore said lands to the public domain, upon the ground that the lands were not within the grant to said railroad company, and said patents were erroneously issued. There is involved in the suit, approximately, 100,000 acres of patented lands, and 120,000 not patented. The merits of the controversy are presented upon a demurrer to the bill. It is the contention of the United States that the lands were the subject of a grant to the Northern Pacific Railroad Company prior in date to the grant to the Oregon & California Railroad Company, and that, therefore, they were not included in the grant to the latter company, but were, upon the other hand, expressly excluded therefrom by the words of reservation, whereby prior "granted" lands were taken out of the operation of the later grant.

On the 2d day of July, 1864, by act of congress, the Northern Pacific Railroad Company was incorporated. 13 Stat. 365. A portion of section 1 provides as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances namely, beginning at a point on Lake Superior in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus. Sec. 2. And be it further enacted that the right-of-way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands

adjacent to the line of said road, material of earth, stone, timber, etc., for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all the necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and the right-of-way shall be exempt from taxation within the territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill. Sec. 3. And be it further enacted, that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast and to secure a safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the secretary of the interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; provided that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act," etc.

Section 6 provides that the president of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, etc.

The defendants raise a question of construction of this act, which, if well taken, disposes of the controversy at the outset. They urge that the grant is to be strictly construed against the grantees therein named, and that by the terms thereof land is granted only in aid of the construction of the main line of the Northern Pacific, and not in aid of the branch line by way of the Columbia River valley to Portland. I do not so construe the language of the grant. The act authorized the company to build and operate a continuous road, "beginning at Lake Superior and running thence westerly to some point on Puget sound, with a branch line via the Columbia River valley to Portland." It then granted to the company permission to take material for the construction of "said road" from the public lands adjacent thereto, and gave a right of way upon public lands 200 feet "on each side of said railroad." It granted lands in aid of the construction, and the grant extends to lands on each side of "said railroad line," and makes the further provision that as soon as the general route is fixed the president shall cause the granted lands to be surveyed for 40 miles on both sides of "the

entire line." Throughout the act the reference is to the road with its branch, as a single line or road. In the words of the act the grant of land is coextensive with the grant of right of way and the grant of other privileges. There is as much reason for confining the grant of way to the main trunk line as for confining the grant of subsidy to that portion of the road. The road with its branch is referred to as one road in the act, and we have no warrant for saying it is not properly so described.

In view of the subsequent action of the company, however, it becomes immaterial whether or not there was a grant in aid of the branch line. Under the terms of the act the company had the power to locate the main line by the valley of the Columbia river if it so chose, and, as will be seen, that route was subsequently selected, and maps were filed in accordance therewith, and, whatever rights the Northern Pacific Company acquired to the definite sections of land involved in this suit, it obtained by reason of so locating its main line. These lands being included in the general terms of the grant in aid of the construction of the Northern Pacific Railroad, it is obvious that they were excluded from the operation of the grant to the Oregon & California Company, unless (1) they are within the reservation contained in the grant to the Northern Pacific Company; or (2) the failure of that company to construct its road via the Columbia River valley, and to comply with the condition subsequent upon which the grant was made, operated to take the lands out of the reservation contained in the grant to the Oregon & California Company, whereby all "granted" lands were excepted therefrom.

It is urged by the defendants that the reservation contained in the grant to the Northern Pacific Railroad Company expressly excludes from that grant the lands in question in this suit. That grant was of "every alternate section of public land," etc., "not reserved, sold, granted," etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof." The argument is that, inasmuch as prior to the time of fixing the definite line of the Northern Pacific Railroad a grant of the same lands was made to the Oregon & California Company, the lands fall within the description of "granted" lands, which are expressly excepted from the operation of the prior grant. In other words, while the lands in controversy were not "granted" lands at the time of the grant to the Northern Pacific Company, so as to be excluded from the lands conferred upon that company at that time, yet, within the time limited thereafter in which that company could establish its right thereto, they were withdrawn from that grant by the act of congress whereby they were bestowed upon another company, and that the contingency of such withdrawal and subsequent disposal was contemplated and provided for in the prior grant when the exception of granted lands was incorporated therein.

It is urged that there was no law to prohibit a second conditional grant of the same lands in aid of a second railroad before anything should have been done by the first company, and with the understanding that whatever should be taken by the second company should be in subordination to the rights of the first company. It may be conceded that the power of congress in this direction was plenary. But the question here is not what congress had the power to do. It is, what did congress do? What was the intention of congress in inserting the reservation of granted lands from the operation of the first grant? In the light afforded by the policy of the government in relation to the disposition of the public lands in aid of railroad construction, and in view of the settled doctrine of the courts in relation to the nature of the title which passes under such grants, it would seem that the reservation of "granted" lands was not made in contemplation of a subsequent bestowal of the lands in aid of another road. Under such a construction the object of the first grant would be liable to be wholly defeated by a second grant, and the beneficiary of any railroad grant, while complying strictly with the conditions imposed thereupon, might be deprived of the aid upon which the construction of its road depended.

In Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 498, the reservation in the first grant was of lands which were not "sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim had not attached at the time the line was definitely fixed." The court in construing the grant, speaking by Mr. Justice Field, said:

"As the sections mentioned could only be known when the route of the road was established, which might not be for years, the government did not intend to withhold the lands in the mean time from occupation and sale, and thus retard the settlement of the country, nor to exclude the land from appropriation for public uses. And the object of the reservation was to protect the acquisition of rights in this way to lands falling within the limits of the grant, and to exclude from its operation lands specially reserved and lands of a special character, such as mineral lands, other than those of iron or coal, the sale of which was seldom permitted anywhere, and swamp lands. The grant made was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

In the recent case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 17, 11 Sup. Ct. Rep. 389, the court said:

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

But the grant to the Oregon & California Railroad Company contained a like reservation of "granted" lands, and it is next to

be considered whether the lands in controversy were so affected by the grant to the Northern Pacific Company that at the time the grant to the Oregon & California Company took effect they were "granted" lands, and were therefore not within the operation of the latter grant. The nature of the grant itself, and the title that passed thereunder, is well settled by numerous adjudications. In St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 5, 11 Sup. Ct. Rep. 389, Mr. Justice Field said, speaking for the court:

"As seen by the terms of the third section of the act, the grant is one in praesenti; that is, it purports to pass a present title to the lands designated by alternate sections. * * * The language of the statute is that 'there be and hereby is granted' to the company every alternate section of lands designated, which implies that the property itself passed not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification, but when once identified the title attached to them, as of the date of the grant, except as to such sections as were specifically reserved."

The grant therefore conveyed a present title subject to be defeated upon a failure to comply with the conditions subsequent, but the right of re-entry was vested only in the grantor, the United States. The United States alone could declare a forfeiture.

The Northern Pacific road was never constructed via the Columbia River valley, or coterminous with these lands. On March 6, 1865, a map known as the "Perham Map," and intended by the company as a map of general route of the road, was forwarded to the secretary of the interior by the president of the company, together with a letter, in which the president said:

"Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of this railroad from a point on Lake Superior, in the state of Wisconsin, to a point on Puget sound, in Washington Territory, via the Columbia river, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys,"—and requested that "the lands granted to the company be withdrawn from sale in conformity with law."

The map was drawn in the manner indicated in the president's letter. The line intended for the main line followed the north bank of the Columbia river to a point at or near Portland, and thence to Tacoma, on Puget sound, where it was met by the branch line which crossed the Cascade mountains. The map was disapproved by the commissioner of the general land office, and his disapproval was affirmed by the secretary of the interior. The question of the effect of this map was before this court for adjudication on March 1, 1890, in the case of U. S. v. Northern Pac. R. Co., 41 Fed. Rep. 842; and it was held by Judge Sawyer that the company had the right, under the act of July 2, 1864, to locate its main line by way of the Columbia river through Portland, and that the Perham map was a map of general location, and that the failure of the secretary of the interior to give notice thereupon of the withdrawal of the lands from pre-emption, sale, etc., could not affect the rights of the company, for the act itself withdrew the lands upon the filing of the

map, or, as expressed in the act, "after the general route shall have been fixed," which was done by filing the map of the route selected. The court said:

"The company, by filing the map, had indicated its line, and the grant, before uncertain, now became certain and attached to the odd sections of the land within the 40-mile limit. No notice was required to be given by the secretary;" citing Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100.

It is urged that the decision loses its force as a precedent from the fact that the rejection of the Perham map by the commissioner of the land office and by the secretary of the interior was not brought to the attention of the court. It appears that the facts in regard to the Perham map were in that case agreed upon by the stipulation of the parties to the suit. It was stipulated that the map showed "the preliminary location of the company's railroad line from a point on Puget sound," etc., and that "no action was taken by the interior department upon the map, or the request accompanying it." I am unable to perceive how the action of the officers of the department could have affected the question that was then before the court. The matter under consideration was the action of the Northern Pacific Railroad Company, not what was done by the officers of the general land office. Their action could not affect the question that was then before the court, or the question that is now presented in this case.

The inquiry is whether or not the Northern Pacific Company fixed the line of its general route as early as March 6, 1865, by making and filing the Perham map. That the map, when filed, was unsatisfactory to the officers of the government, or was disapproved by them, is a matter foreign to the question. Whether or not it was a map sufficient for the purpose indicated must be determined by recourse to the map itself. The inquiry is not aided by reference to the action of the officers of the interior department. They were not clothed with power to prejudice the rights of the company. But, when their action is further considered, it appears that the extent of their disapproval was their refusal to withdraw the adjacent lands from settlement. This could not prevent the withdrawal, for, as said in the decision just quoted, the law itself made the withdrawal. The commissioner said:

"The evidence required of the route, under the established ruling of the department, is a connected map showing the exact location; the map indicating by flagstaffs the progress of the survey. * * * That proof is required to show the precise portions of each section or smallest legal subdivision cut by the road. * * * Now, in this view, the commissioner reports that no withdrawal should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and general land offices."

It will thus be seen that in the estimation of the officers of the general land office the Perham map was insufficient, because it was not a map of the final and definite location of a surveyed road, and because it had not also been filed by the company in the district land offices in which the lands were situate, neither of which is required by the act.

In construing this act in Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100, Mr. Justice Field said:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side."

It is contended further that the grant to the Northern Pacific Company of July 2, 1864, is wholly superseded and canceled by the joint resolution of congress of May 31, 1870, (16 Stat. 378,) and that whatever rights that company has in the public lands it takes from the latter date, having accepted the grant contained in the joint resolution in lieu of the earlier grant. I do not so understand the joint resolution. It begins with a recognition of the incorporation of the company under the prior act. It proceeds to confer upon the company power to mortgage its property. It expressly authorizes the company to make the change in its line by constructing the main line down the valley of the Columbia river, with power to build a branch line across the Cascade mountains, as indicated in the Perham map. It recognizes the existence and perpetuation of the prior land grant by providing for the substitution of other lands "in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands granted by congress to said company within the limits prescribed by its charts." There is in the joint resolution other recognition of the "grants and duties" provided for in the act of incorporation, and nothing can be found indicative of a purpose to abrogate the prior act, or to substitute a new and independent grant therefor.

On the 13th day of August, 1870, the company filed a second map, designating the main line by way of the north bank of the Columbia river, as in the Perham map. It was a map of definite location, and thereupon the secretary of the interior formally withdrew the lands, and issued his notice. Whatever objection may be urged to the Perham map, it must be conceded that the map of August 13, 1870, in all respects, complied with the act, and that then, if not before, the line of the Northern Pacific road became definite and fixed. In the view I take of the law, it would make no difference with the rights of the parties to this suit if the Perham map had not been filed. The grant to the Northern Pacific being prior in date to the grant to the Oregon & California, and the reservation of granted lands from the first grant being held not to refer to lands subsequently granted in aid of another road, the first grant remained prior and superior to the second, and there could be no reversal of the order of their priority, resulting either from the fact that the grantee, under the junior grant, filed its map of definite location, and constructed a portion of its road, before any map was filed of the line of road under the older grant, or from the further fact that in the final construction of the Northern Pacific road no portion thereof was established upon the line either of the Perham map or the map of 1870. Congress did not offer these lands to the

competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River valley, the forfeiture of its grant therefor declared by congress in 1890, and the construction by the Oregon & California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon & California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States. Under these circumstances it cannot be justly said, as urged by counsel for the defendants, that the United States is now placed in the attitude of breaking faith with the Oregon & California Company. That patents were issued to the defendant company for these lands does not affect the decision of this case upon the demurrer. The public lands of the United States are held in trust for the people, and cannot be disposed of by the unauthorized acts of the agents or officers of the government. The demurrer to the bill must be overruled.

CONSOLIDATED ICE-MACH. CO. v. TRENTON HYGEIAN ICE CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

1. NEW TRIAL—MISCONDUCT OF JURY—"QUOTIENT" VERDICT.
   A verdict obtained by taking one-twelfth of the aggregate amount of the several estimates of the jurors is not objectionable when there was no antecedent agreement to be bound by the result, and when each juror deliberately assented to and accepted the amount thus ascertained.

2. SAME—EVIDENCE—AFFIDAVIT OF JUROR.
   It is against public policy to receive the affidavit of a juror for the purpose of impeaching a verdict by showing that it was a "quotient" verdict.

3. SAME—MISCONDUCT OF JURY—WHAT CONSTITUTES.
   In an action to recover the price of an ice plant sold, where the defense was rested largely upon the alleged poor quality of ice produced, it was highly improper for jurors, on encountering one of defendant's ice wagons during the trial, to examine the ice, and test its quality for themselves.

4. SAME—WAIVER BY PARTY.
   Where, however, such misconduct had come to the knowledge of the defeated party before he had closed his testimony, and he nevertheless went on with the trial, and did not call the matter to the court's attention until after the return of the verdict, he waived his right to object thereto, and could not have a new trial on that ground.

At Law. Action by the Consolidated Ice-Machine Company against the Trenton Hygeian Ice Company to recover the price of an ice-machine plant. There was a verdict for plaintiff, and defendant now moves for a new trial. Motion denied.

John H. Kitchen and Gilbert Collins, for plaintiff.
C. H. Beasley and Allan L. McDermott, for defendant.

GREEN, District Judge. This was an action brought by the plaintiff against the defendant to recover the consideration price of an ice plant made, constructed, and set up by the plaintiff for the defendant in the city of Trenton. The defendant insisted that the ice plant was in various respects defective, and not in accordance with the written contract which had been made by the parties; that it was impossible to produce good, merchantable ice by it when in operation; and that in consequence of the impure character of the ice which had been made by the machine great loss had accrued to the defendant. Upon the trial the jury rendered a verdict in favor of the plaintiff for $78,363.42. A motion was immediately made for a new trial, and two causes were assigned therefor: (1) That the verdict which had been rendered was technically a "quotient" verdict; (2) that the verdict was invalid because of the misconduct of the jury during the trial.

While it may be accepted as settled that a verdict rendered in pursuance of an agreement by the jurors to accept one-twelfth of the aggregate amount of their several estimates, without the assent of their judgment to such a sum as their verdict, is invalid, yet it is equally well settled that, although jurors divide the aggregate of their several estimates by 12, and return the quotient as their verdict, it will not be held to be legally objectionable if, after the amount has been ascertained, the respective jurors deliberately assent to and accept the amount so obtained as, in their opinion, a just verdict, and so return it. The essential ingredient of a "quotient" verdict which renders it objectionable in the eye of the law is that there should be an antecedent agreement between the jurors to accept the result of the division without hesitation as the proper and true verdict to be rendered. The testimony taken on the rule to show cause in this case shows that upon the suggestion of one of the jurors, after the jury had retired to their room for the consideration of the issues to be decided by them, it was agreed that each juror should write upon a slip of paper that amount which should be allowed to the defendant for the damages which the defendant claimed to have sustained by the imperfect condition and operation of the ice plant after it had been delivered to it, and that the total amount of these sums should be divided by 12, and the result, if satisfactory, should be the verdict on that branch of the case. It will be noticed that this proposed course of action related to but one of the various defenses which had been interposed by the defendant to the plaintiff's claim. The affidavit before the court shows that this agreement was attempted to be carried out but in fact was carried out only partially; for the result turned out to be so unsatisfactory, when the division was made, that a number of jurors declined to accede to it, and insisted that another ballot should be taken. Even that produced an unsatisfactory result. And still another attempt was made—in fact, five or six

in all—before the sum was produced which seemed to be satisfactory to all the members of the jury. When that sum was obtained by the division as described, each juror, without exception, assented to it, and adopted it as the fair and just allowance which should be made to the defendant for the damages which it claimed, and rendered it in open court as their true verdict.

Such a verdict, so obtained and so assented to, without the antecedent agreement to be bound by it, which seems to have been wanting in this case, is not objectionable as a "quotient" verdict. But, even if it were so objectionable, the only evidence that the verdict was arrived at in this manner is the affidavit of one of the jurors who was himself guilty of the alleged misconduct, if it was misconduct. Such an affidavit from a juror cannot be received to impeach his verdict, or to show what transpired in the jury room among his fellow jurors while engaged in the consideration of the case in question. Public policy, sound reason, are wholly against it. To admit such evidence would tend to defeat the solemn act of the jury, done under the solemn obligation of an oath publicly taken in a court room, and would open the door widely to iniquitous influences, resulting always in injustice. It must be rejected. There is absolutely therefore no legal evidence before the court that the verdict in this case was arrived at in any other manner than fairly and justly; hence this reason falls to the ground.

The main issue in this case chiefly concerns the insufficiency of the ice plant erected by the plaintiff for the defendant under a written contract, especially with reference to the character of the ice produced by it when in operation. The plaintiff claimed that the ice plant was in good condition, and would produce, if properly operated, good, pure, merchantable ice. The defendant denied this, and it was the chief contention in the cause. During the trial it appears, by the affidavits presented to the court on this motion, that a wagon filled with the ice made by the plant in question happened to be at the door of the courthouse as the jurors were passing out at recess, and that some of them, seeing it, closely examined the ice, tasted it, smelled it, and criticised it; and this conduct on the part of the jury is assigned as a second reason for a new trial. It is hardly necessary to say that a cause should be decided by a jury solely upon the evidence produced before it legally during the trial, in the presence of the court, and that it is highly improper for a jury, or any member of it, to acquire information or knowledge touching any issues pending in the cause in any other way. It was an important question whether the ice made by this ice plant in every respect accorded with the guaranty of its character which the plaintiff had made as a consideration for the execution of the contract in question. A large amount of evidence had been taken pro and con upon this issue. Beyond question, those jurors who saw fit to investigate, for the purpose of informing themselves as to the character of the ice made by the plant, that load of ice which was standing before the courthouse, did a highly improper act.

Such evidence was wholly illegal, and should have received no attention by any jury, nor should it have been permitted to have any effect upon the action of the jury. Had the matter been brought to the attention of the court immediately upon its becoming known, as it should have been, in all probability the trial would have been then and there terminated. But the evidence is that the incident occurred while the testimony was in the course of being taken. It was known to the defendant almost immediately and before it had closed its testimony; and yet, after it was so known, witnesses were sworn on both sides, testimony taken, the cause summed up by the counsel, the jury charged by the court, and the verdict rendered, without any reference being made to it in any manner.

The failure to act promptly in matters of this sort is often fatal, and it must be held to be so in this case. A party cannot be permitted to lay by, after knowledge of a matter of this character, and speculate upon the result, complaining only when the verdict is unsatisfactory. As was stated by Judge Shipman in Berry v. De Witt, 27 Fed. Rep. 723:

"A party cannot know during the trial a fatal objection arising from the misconduct of a juror upon the trial, and yet keep silent, and then seek to take advantage of it in the event of an adverse verdict. The effect of the misconduct by the juror is lost if it is not complained of by the injured party as soon as he knows of it."

As stated in this case, complaint was not made until the result of the trial was known. Such laches destroys the defendant's right.

The rule to show cause is discharged.

WHITENACK v. PHILADELPHIA & R. R. CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

1. PLEADING—GENERAL DEMURRER TO SEVERAL PLEAS.
   A general demurrer which is filed to several pleas must be overruled if any one of the pleas is good.
2. NUISANCE—PLEADING—LIMITATION OF ACTIONS.
   In an action at law in a federal court in New Jersey for the maintenance of a nuisance, a plea of the state statute limiting actions for nuisance to a period of six years is good, it being necessary to plead the statute in order to limit the recovery to that time.
3. SAME—WHEN ACTION LIES.
   An action at law for a private nuisance may be maintained against a person who actively maintains a nuisance originally erected by another, even though defendant has never been notified to abate the same.

At Law. Action by Agnes Whitenack against the Philadelphia & Reading Railroad Company to recover damages for the maintenance of a nuisance. On demurrer to the pleas. Demurrer overruled.

H. M. T. Beekman, for the demurrer.

John R. Emery and S. H. Grey, opposed.

GREEN, District Judge. The declaration in this cause, as amended, charges the defendant with having contributed to the maintenance of a certain embankment, piers, and bridge, which its lessors had wrongly built, constructed, and maintained across the Raritan river, near the lands of the plaintiff, which caused the waters of the Raritan to be backed upon the plaintiff's land, and inflict great damage there. To this declaration the defendant filed three pleas: First, the plea of general issue; second, the plea of the statute of limitation; and, third, that the defendant had had no notice from the plaintiff to abate the nuisance, although it was not the erector of the embankment, but simply the lessee thereof. To the last two pleas the plaintiff filed a general demurrer. It is well settled by the law of pleading that if but a single demurrer is filed to a declaration containing several counts, if any count be deemed good, judgment must be given against the demurrant; and so, if the defendant plead several pleas, all of which are demurred to, judgment must be given for the defendant, if either of the pleas be good. 1 Chit. Pl. p. *665, note 3. This principle is recognized in this state in the case of Hudson v. Inhabitants of Winslow, 35 N. J. Law, 437. In this suit there were 10 special pleas. Some of the pleas were held to be good, and others bad. In delivering the opinion of the court, Justice Beasley says: "As some of the pleas contained in the demurrer are good, the defendants are entitled to judgment." The same rule prevails in the federal courts. In case of U. S. v. Girault, 11 How. 22, Mr. Justice Nelson says: "As the demurrer put in is general to four several pleas, if any one constitutes a good bar to the action the demurrer is bad."

The first plea demurred to is the plea of the statute of limitation. I do not see how this can be held to be other than a good plea in bar. The action is an action on the case for damages alleged to result to the plaintiff from the erection or maintenance of an obstruction to a water course, whereby the plaintiff's lands are seriously affected by the overflow of water. The Revised Statutes of New Jersey expressly declare that all actions of trespass and upon the case shall be commenced and sued within six years next after the cause of such action shall have accrued, and not after. It is well settled that the defendants, to claim any benefit of the statute of limitation, must specially plead it, and, unless it be so specially pleaded, damages that may be recovered by the plaintiff cannot be limited to the six years immediately antecedent to the commencement of the action. It seems, then, that it is a perfectly proper plea for the defendants to interpose to this case, so that the cause of the action may be limited, in accordance to the statute, to the six years prior to the commencement of the suit; and, so far as this plea is concerned, the demurrer is overruled, with leave to the plaintiff to reply to the plea in question within 30 days.

The other plea demurred to is to the effect that no notice had been given to the defendant that the embankment in question was a nuisance, or inflicted the injury complained of, or to re-

move the same. The allegation in the declaration is that the defendant maintained and continued the nuisance in question after it became possessed of the premises on which it was erected. I think the principle governing this case is that an action may be maintained against a party who continues a nuisance erected by another, by actively maintaining it, without notice or request to abate it. Whether there has been such maintenance is a question for the jury, but the allegation of the declaration that it was so maintained by the defendant, I think, is not answered by a plea that it had no notice to remove it. In fact, it may be questionable whether the plea itself, as pleaded, does not amount to the general issue. At any rate, I think the demurrer, so far as this plea is concerned, was well taken, upon the authority of Banking Co. v. Ryerson, 27 N. J. Law, 457, in which case I think Chief Justice Green states the law clearly, succinctly, and in accordance with justice.

The result, however, is, as this demurrer is general, and one plea which has been demurred to has been held to be good, the demurrer must be overruled, with costs to the defendants.

SMITH v. PHILADELPHIA & R. R. CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

DAMAGES—EXCESSIVE VERDICT.

In an action to recover damages for erecting and maintaining an embankment across a living stream, thereby throwing back the waters upon plaintiff's land to its injury, where the embankment has been maintained for 18 years, and the recovery is limited by the statute to the last 6 years, the jury should award nothing for the damage caused by the first 12 years, and a verdict is excessive which apparently includes the entire damage.

At Law. Action by Abraham Smith against the Philadelphia & Reading Railroad Company to recover damages alleged to have been caused to plaintiff's land. There was a verdict for plaintiff, and defendant moves for a new trial. Granted, unless verdict is in part remitted.

R. V. Lindabury, for plaintiff.

John R. Emery and Samuel H. Grey, for defendant.

GREEN, District Judge. This is an action to recover damages alleged to have been caused to the plaintiff's farm by the construction and maintenance of an embankment crossing a living stream, and what was termed a "freshet-water channel," thereby penning back the water upon the land of the plaintiff, causing it to become wet, boggy, and sour, and washed away in places. The jury returned a verdict in favor of the plaintiff for $3,201.84, wherupon a motion was made for a new trial.

A close examination of the evidence satisfies me that a verdict against the defendant ought to be maintained. I think the weight of testimony is clear that the embankment in question not only

absolutely stopped the flow of a living stream of water, causing it to dam back upon the plaintiff's land, rendering it boggy and marshy in places, but as well interfered with the usual flow of the water as it passed across the farm of the plaintiff in times of freshet, changing it in its course almost at right angles, and causing an action of the water which apparently inflicted damage upon the soil. But the verdict in this case, in my opinion, is excessive. The embankment in question was built in 1872. No suit was commenced for damages until 18 years thereafter. By force of the statute of limitation, such suit could only be for such damage as was inflicted between 1884 and 1890, when the suit was commenced; in other words, for the six years antecedent to the date of the writ. It is perfectly clear that the action of the embankment upon the water, both of the living stream and the waters of the river in times of freshet, must practically be constant; hence it is evident that during the 12 years from 1872 to 1884, if, as this jury found, the embankment is the cause of the damage, the land of the plaintiff must have been subject to its deleterious influence, and have been rendered year by year less and less valuable. Yet, for all that damage then inflicted the plaintiff is not entitled to recover. Possibly during the six years covered by this suit the evidences of damage might have become more patent. The soil had become gradually water-soaked and boggy and marshy, and would make less resistance to the movement of the freshet water as it swept across its surface, and more readily give way and be carried off; hence the damage would seem to be greater because it became more visible, when in point of fact its visibility was due to the damage done during all the 12 years previous.

The jury were sent to view the premises on the application of both parties, and saw the land in its present condition. It was undoubtedly an almost insuperable task to guard their minds from the effect of the damages visible on the premises as they saw it. In fact, I may frankly say that I do not see how, from the testimony in the cause, they could fix definitely any sum that would exactly measure the injury inflicted upon the land [subjected to the damaging effect of the water for so many years previously] for and during the term of six years which this suit covers. The amount of their verdict satisfies me that they gave practically the whole amount of the present damage. This, of course, is greatly in excess of the amount which should have been awarded. I have found a very great difficulty in reaching a conclusion as to what would be considered a fair compensation, but, after careful consideration, I have concluded to sustain a verdict for $600, and, if the plaintiff is willing to reduce the verdict to that amount, it may stand; otherwise, there must be a new trial granted, because of the excessive damages awarded.

CITY OF KANSAS CITY v. LEMEN.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 270.

1. MUNICIPAL CORPORATIONS—GOVERNMENTAL ACTS OF AGENTS—LIABILITY.
Where the mayor and police of a city close a circus that is being held on ground claimed to have been dedicated as a public graveyard, they act for the city in its governmental, not its corporate, capacity, and the maxim "respondeat superior" does not apply, so as to make the city liable in damages for their action.

2. SAME—CORPORATE ACTS.
A city is not liable in damages for the wrongful act of its mayor and police in closing without color of law an exhibition, with the intent to injure and oppress the owner thereof.

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

At Law. Action by Frank Lemen against the city of Kansas City, Mo., for wrongfully closing an exhibition held by plaintiff in said city. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

C. O. Tichenor, F. F. Rozzelle, and Frank P. Walsh, for plaintiff in error.

W. C. Scarritt, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. Frank Lemen filed in the United States circuit court for the western district of Missouri a complaint against Kansas City, a municipal corporation of the state of Missouri, wherein he alleged substantially the following facts: That he was a citizen and resident of the state of Kansas, and the proprietor of a show and hippodrome; that, desiring to exhibit said show in Kansas City, Mo., on the 3d and 4th days of May, 1892, he, before that time, lawfully acquired from the owners of a certain tract of land situated within the corporate limits of Kansas City the right to give an exhibition thereon, and that he took peaceable possession of said land with the consent of the owner, and erected his tents thereon, and that he also fully complied with all of the ordinances and regulations of the city with reference to such exhibitions as he proposed to give, and obtained a license for the exhibition from the proper city authorities, entitling him to give two exhibitions, for which he paid to the city $20; but that on the day appointed for the exhibition, and just before it was to begin, "the defendant, Kansas City, acting by and through its mayor, police, and other duly constituted and authorized agents, (the said mayor,) personally consenting and directing all things, did willfully, with knowledge that they were acting wrongfully, and without right, and with the intention to harass and oppress the plaintiff, and to break up and ruin his said business, with force and violence come upon said land, and with threats

and violence did stop plaintiff from prosecuting his said business, and did put a stop to the exhibition of the said show, and did then and there threaten and began to tear down and break and destroy plaintiff's said tents and property, and did with force seize upon the person of the plaintiff and arrest him, falsely pretending that he had violated some city ordinance, * * * and did threaten to arrest and imprison plaintiff's employes unless they desist from carrying on plaintiff's said business, falsely pretending that such employes thereby were violating some ordinance of Kansas City; and did stop, prevent, and warn the people from coming into plaintiff's said show, and from purchasing tickets thereto, * * * and compel and require plaintiff to cancel his appointments to exhibit his show at the place and times aforesaid, and to remove all his property and effects from said tract of land, and did greatly injure and discredit his said business," etc.

The answer which was filed by the city to such complaint (and we only state the substance thereof, after some portions had been eliminated by a motion to strike out) was as follows: The city admitted its corporate capacity, and that the plaintiff intended, and had in fact made preparations, to give an exhibition at the time and place stated in his complaint. It denied, however, that the plaintiff had the consent of the owner of the tract of land described in his complaint to give an exhibition thereon, and averred, to the contrary, that the title to said tract of land was vested in the city, as trustee, to be held for the purposes of a graveyard, and that it had been so vested and held for more than 30 years, and that the remains of many persons had been buried therein, and that many were still entombed in said tract of land. The city further admitted that a license was issued by it to the plaintiff to give an exhibition on said ground, and that he had paid $20 therefor; but it averred that the city had no power to issue a license for a show in a graveyard; and that the police of the city had notified the plaintiff, prior to the intended exhibition, that he could not give an exhibition on the ground selected, because it was a graveyard, and because an exhibition in such place would be a public nuisance, whereupon the plaintiff had withdrawn from said premises, and had removed his tents elsewhere to a place within the city, and had given an exhibition for two days under the license in question.

To the foregoing answer a reply was filed, which denied that the city held the title to the aforesaid tract of land as a graveyard. It was further averred that in a previous suit brought against Kansas City by certain persons who claimed title to said tract of land it was judicially ascertained and adjudged that the lot was not a graveyard, and that in said suit said last-named claimants had recovered the property; and that Lemen acquired his right to give an exhibition on the premises under the said claimants, they being at the time in the quiet and peaceable possession and enjoyment thereof.

The case was tried before a jury on the foregoing issues, and the plaintiff below recovered a verdict against the city in the

sum of $2,200. To reverse the judgment entered upon such verdict, the plaintiff in error has prosecuted a writ of error to this court.

Several exceptions were taken by the plaintiff in error to the action of the circuit court in admitting testimony and in giving and refusing instructions, but the view that we have taken of the case only renders it necessary to determine whether the court erred in refusing to charge that the city could not be held liable for the wrong and injury complained of.

The distinction that exists between the various powers ordinarily exercised by municipal corporations has been pointed out on numerous occasions, and is well defined. In exercising certain powers, such corporations act for the public at large as governing agencies, and for that reason, when so acting, they cannot be held liable for a misfeasance. When acting in a public capacity, as governing agencies, the rule of respondeat superior has no application to acts done by the officers of such corporations, but the responsibility for a wrongful act rests with the officer, and not with the municipality. In the exercise of many other powers devolved upon municipal corporations, commonly termed "corporate powers," such bodies act for the special benefit of the municipality, or the municipality derives some profit, emolument, or advantage from their exercise, and in such cases the municipality is liable for acts of misfeasance done by its officers that are positively injurious to individuals.

In Maxmilian v. Mayor, 62 N. Y. 160, Folger, J., says:

"There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * * In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for failure to use its power well, or for any injury caused by using it badly; but where the power * * * is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents." Citing Eastman v. Meredith, 36 N. H. 284.

The distinction thus referred to is also recognized in the state from which this case comes, (Hannon v. County of St. Louis, 62 Mo. 313, 318,) and is stated, and supported by numerous citations, in Dillon on Municipal Corporations, (vide 4th Ed. §§ 966--968, 974.)

In the case at bar we feel constrained to hold that the wrongful act complained of was done by the city under color of a power which it exercises as a governing agent for the benefit of the public at large, and not for the advantage of the inhabitants of Kansas City, except as they form a part of the general public. The establishment of a public show, such as a menagerie, circus, or hippodrome, on a tract of land dedicated to a city or town for the purposes of a graveyard, and actually used as such, would constitute

a public nuisance. A city has no more right to license a show of that nature in a graveyard than it has to license it to locate on the public streets and thoroughfares; and we entertain no doubt that when a municipality undertakes to prevent or to abate a nuisance of that kind by means of its police force it is acting for the state as a governing agency, and not merely in the discharge of a purely corporate power or duty.

In the case of Haskell v. City of New Bedford, 108 Mass. 208, 211, Mr. Justice Gray, then on the bench of the supreme judicial court of Massachusetts, used the following language:

"Acts done by the mayor and aldermen, or the mayor alone, to keep the streets clear of obstructions, are acts done by them as public officers, and not as agents of the city; and for such acts the city was not liable to be sued;" citing Walcot v. Swampscott, 1 Allen, 101; Griggs v. Foote, 4 Allen, 195; Barney v. Lowell, 98 Mass. 570; and Fisher v. Boston, 104 Mass. 87.

In a comparatively recent case—Culver v. City of Streator, 130 Ill. 238, 22 N. E. Rep. 810—it was held that the city was not liable for the negligent act of one of its police officers while endeavoring to enforce an ordinance forbidding dogs to run at large without being muzzled, for the reason that in the making and enforcement of the ordinance the city was acting merely as agent of the state in the discharge of duties imposed by law for the promotion of the general welfare. The court said that the ordinance was passed in pursuance of the police power vested in the municipality, and that acts performed in the exercise of that power were done in a public capacity as a governing agency, and not for the special advantage of the municipality.

It is also very generally held that a city is not liable for wrongful acts committed by its police officers in enforcing city ordinances, or in making arrests for alleged violations of law or local ordinances, or while endeavoring to suppress an unlawful assemblage, because while acting in such matters, police officers are not mere servants of the municipality, and the rule of respondeat superior does not apply. Buttrick v. City of Lowell, 1 Allen, 172; Fox v. Northern Liberties, 3 Watts & S. 103; Calwell v. City of Boone, 51 Iowa, 687 [1]; Odell v. Schroeder, 58 Ill. 353; Elliott v. Philadelphia, 75 Pa. St. 347; Dargan v. Mobile, 31 Ala. 469; Little v. City of Madison, 49 Wis. 605, 6 N. W. Rep. 249; Trammell v. Russellville, 34 Ark. 105; Worley v. Inhabitants, 88 Mo. 106; Dill. Mun. Corp. § 975.

We can entertain no doubt, therefore, that for the acts complained of in the present case there is no right of redress against the city, assuming them to have been done or authorized by the city, as stated in the plea, for the purpose of preventing a public exhibition on a tract of land dedicated and used as a graveyard. The act of the municipality in that behalf was an exercise of a power vested in it to promote the general welfare, as contradistinguished from those corporate powers which it exercises for the special advantage of the municipality.

It was said in the course of the oral argument that the plea interposed by the city, that the tract of land in question was a graveyard, and that the city had acted with a view of preventing its dese-

[1] 2 N. W. 614.

cration, was a mere pretense; that in fact it had some ulterior purpose in view, and was seeking some private gain or advantage, when it committed the wrongful acts charged in the complaint. With reference to this statement, it is sufficient to say that no such suggestion is found in the pleadings. To the plea that the premises were held in trust by the city as a graveyard, that the license issued by the city conferred no right to give an exhibition at the place in question, and that the city had acted solely with a view of preventing a public nuisance, the plaintiff merely replied that it was not a graveyard, and that that fact had been judicially ascertained and adjudged in a previous suit, whereto the city was a party. We think, therefore, that the suggestion above mentioned is of no avail to the defendant in error on this record. We must take it for granted that the plea interposed by the city was made in good faith, and correctly states the purpose which inspired its action.

Furthermore, if it be true, as suggested, that the city knew that the premises were not a graveyard, and that they were in fact private property, and that it had some ulterior object in view, and intended to wrong and oppress the plaintiff, then it is difficult to escape the conclusion that the acts said to have been committed by the police with the sanction of the mayor were so utterly beyond the scope of any corporate power vested in the municipality, that it could not be held liable on that ground. Dill. Mun. Corp. §§ 968–970.

Our conclusion is that the circuit court erred in refusing to direct the jury to find a verdict in favor of the city, wherefore the judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

DAVIS et al. v. PATRICK.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 265.

1. APPEAL—LIABILITY ON APPEAL BOND—EFFECT OF AFFIRMANCE—PRACTICE
A judgment of affirmance by the supreme court fixes the liability of the principal and sureties on a supersedeas bond, as it shows conclusively that the principal did not prosecute his appeal to effect; and where the mandate has been filed in the lower court it is not necessary for that court to make an order that the judgment be executed, before suit can be maintained on the bond. Babbitt v. Finn, 101 U. S. 7, followed.

2. SAME—RIGHTS OF SURETIES—STAYING SUIT ON SUPERSEDEAS BOND.
And the sureties are not entitled to have a suit on the bond stayed until attached lands of the principal are sold, and such security exhausted.

3. CONTINUANCE—DISCRETION OF TRIAL COURT—REVIEW.
A motion for a continuance is addressed to the discretion of the trial court, and its action in overruling such a motion cannot be reviewed on writ of error.

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

At Law. Action on a supersedeas bond, brought by Algernon S. Patrick against Erwin Davis, principal, and J. N. H. Patrick and James M. Woolworth, sureties. Judgment for plaintiff. Defendants bring error. Affirmed.

R. S. Hall, for plaintiffs in error.

John L. Webster and George W. Doane, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is an action upon a supersedeas bond which was executed by the plaintiffs in error on the 11th day of February, 1890, for the purpose of staying proceedings pending the prosecution of a writ of error to the United States supreme court, on a judgment in the sum of $65,000, which was recovered by the defendant in error against Erwin Davis on the 21st of January, 1890, in the United States circuit court for the district of Nebraska. The petition on which the case was tried alleged the recovery of the judgment against Erwin Davis, the due execution of the supersedeas bond on February 11, 1890, and further averred that at the October term, A. D. 1891, of the United States supreme court, said judgment against Davis was by said court affirmed, with costs, and that it thereupon, on March 1, 1892, sent down its mandate of affirmance to the circuit court of the United States for the district of Nebraska, which mandate had been duly filed in the clerk's office of the last-mentioned court. It was further averred that the obligors in the bond, although often requested to pay the said judgment, had hitherto failed and refused to do so, wherefore a judgment on the bond was demanded in the sum of $65,000, with interest and costs. The trial in the circuit court resulted in a verdict against the plaintiffs in error in the sum of $78,905, to reverse which they have prosecuted the present writ of error.

To the petition filed by the plaintiff in the circuit court the defendants pleaded, among other things, "that upon the mandate of the supreme court of the United States mentioned and referred to in said petition, and therein alleged to have been filed in this court, no order had been or ever was entered in this court [i. e. the circuit court] directing the execution of the alleged judgment of the supreme court of the United States, nor other action had in or taken by this court upon or in respect of the said mandate." To such plea the plaintiff below demurred, and the circuit court sustained the demurrer. Its action in that respect constitutes one of the principal errors that have been assigned. It is contended by the learned counsel for the plaintiffs in error that when a judgment in a law case has been affirmed by the supreme court of the United States, and a mandate has been sent down and filed with the clerk of the circuit court, no action can be maintained on a supersedeas bond which may have been given in the case until the circuit court has made an order thereon, directing the judgment to be enforced or carried into effect.

It is conceded that there are no decisions which in terms announce the doctrine last stated, but it is nevertheless argued that such is the correct practice. We are constrained to take a contrary view, and for the following reasons: The liability of the obligors in a supersedeas bond is determined by the language of the bond. They undertake that the judgment debtor will "prosecute the writ of error to effect, and answer all damages and costs if he fail to make his plea good." The writ of error is not prosecuted to effect if the judgment is affirmed, and it seems obvious that on the rendition of a judgment of affirmance the obligation of the principal and sureties to pay the debt, damages, and costs becomes absolute, without any further order by the court whose judgment is affirmed to the effect that the judgment be enforced or carried into execution. In the case of Babbitt v. Finn, 101 U. S. 7, 13, it is said that "the rule is universal that the affirmance of the judgment in the appellate court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect." In the same case it was further held that a judgment creditor whose judgment has been affirmed on appeal to the supreme court is under no obligation to take out an execution against the judgment debtor before suing on the appeal bond; and with reference to the contention that such preliminary action was necessary the court again declared that "it was the affirmance of the judgment that fixed the liability of the sureties," and that, inasmuch as the defendants bound themselves that the principal should pay the judgment if he failed to make his plea good, no such preliminary step was required. As it is the order of affirmance by the appellate tribunal which fixes the liability of the principal and sureties in a supersedeas bond, we fail to see how it can be deemed essential, when a judgment is simply affirmed, that the lower court should make a further order that the judgment be executed, before a suit can be maintained on such bond. An order of that nature would give no additional efficacy to the judgment of affirmance, which operates proprio vigore, and we are satisfied that it has not been customary, in this circuit at least, to enter such orders where a judgment is simply affirmed. On the contrary, the practice is quite uniform to file the mandate in the clerk's office of the trial court, which is authentic evidence that the supersedeas has been removed, and thereupon to sue out such final process as the judgment creditor may be entitled to. In the case at bar the petition showed that the judgment had been affirmed by the appellate tribunal, that the mandate had been duly filed in the clerk's office of the circuit court, and that payment of the judgment had been demanded and refused. Under these circumstances, we entertain no doubt of the judgment creditor's right to maintain a suit on the appeal bond, and the demurrer to the plea was properly sustained.

Another plea interposed by the defendants in the lower court, which was likewise adjudged to be insufficient, was to the fol-

lowing effect: That the original suit against Erwin Davis, in which the supersedeas bond had been given, was commenced by attachment, and that certain lands of said Davis, situated in the state of Nebraska, of the value of $75,000, had been levied upon under a writ of attachment issued in said case, the lien whereof was still in force. In view of this fact the defendants alleged that the plaintiff below was not entitled to prosecute an action on the appeal bond until he had discharged said attachment lien, or enforced the same against the lands. The action of the circuit court in overruling such plea is also assigned for error.

It is to be observed that the plea last mentioned merely asserts an alleged equitable right or defense, and it is doubtful, to say the least, whether such alleged equity could in any event be pleaded as a defense to a suit at law in the federal courts, where the distinction between legal and equitable defenses is still carefully preserved. But we do not care to dwell on the latter suggestion. It is obvious, we think, that the plea did not disclose a right on the part of the sureties to have the lien discharged, or the attached lands sold, before a suit was maintained on the supersedeas bond, which a court of equity would recognize and enforce, even on a bill filed for that purpose. In the case heretofore cited (Babbitt v. Finn) it was held, as before stated, that a surety in an appeal bond is not entitled to have an execution issued against the principal debtor, before suit is brought on the bond; that by the affirmance of the judgment the sureties became liable to the same extent as the principal obligor; and the same ruling has been made elsewhere. Tissot v. Darling, 9 Cal. 278; Murdock v. Brooks, 38 Cal. 596, 603; Anderson v. Sloan, 1 Colo. 484; Smith v. Ramsay, 6 Serg. & R. 576. If it be true that the liability of the surety is so absolute that he is not entitled to insist on the issuance of an execution against the principal debtor, it can hardly be contended that the defendants below were entitled to have the suit on the bond stayed until the attached lands were sold, and that security exhausted. If the sureties desired to avail themselves of the attachment lien, it was their plain duty to pay the judgment debt, and by so doing become subrogated to whatever lien the judgment creditor had acquired on the lands in question.

Some cases have been cited by the learned counsel for the plaintiffs in error, the authority of which we do not dispute, that under certain circumstances a court of equity, at the instance of a surety, will coerce a creditor to proceed with the collection of his claim against the principal debtor. But these are cases where, by the delays and forbearance of the creditor, the surety is liable to sustain loss, or where the creditor has access to a fund for the payment of his debt which the sureties cannot make available. The principle has never been extended to a case like the one at bar, where the creditor has merely exercised his right of election as between two remedies for the collection of a debt, and where the securities held by the creditor may be made imme-

diately available to the surety by his paying the debt and seeking subrogation. No error was committed in overruling the equitable defense to which we have last referred.

The plaintiffs in error finally insist that the circuit court erred in overruling their motion for a continuance. There are two good and sufficient answers to this assignment. In the first place, the record shows that no exception was taken to such action in the circuit court; and, in the second place, a motion for a continuance is addressed to the sound discretion of the trial court, and its action in overruling such a motion cannot be reviewed by a writ of error. This has long been the rule in the United States supreme court, and the doctrine is binding upon this court. Sims v. Hundley, 6 How. 1, 5, and notes; Insurance Co. v. Hodgson, 6 Cranch, 206, 216, 217; Thompson v. Selden, 20 How. 194, 198.

Finding no error in the record before us, the judgment of the lower court is hereby affirmed.

YARDE v. BALTIMORE & O. R. CO.

(Circuit Court, D. Indiana. September 30, 1893.)

No. 8,751.

REMOVAL OF CAUSES—REMAND—AMOUNT IN DISPUTE.

Where in an action for wrongful death the complaint lays the damages "in the sum of —— thousand dollars; wherefore plaintiff demands judgment for —— thousand dollars," this must be construed as a suit for $1,000 damages, and defendant cannot secure a removal of the cause to a federal court on the ground of diverse citizenship, by alleging in the petition for removal that the matter in dispute exceeds $2,000.

At Law. Action for damages for wrongful death, brought in a state court and removed to this court by defendant. Heard on motion to remand. Granted.

R. P. Barr, W. L. Penfield, and Wm. L. Taylor, for plaintiff.

J. H. Collins, for defendant.

BAKER, District Judge. The question for decision arises on the plaintiff's motion to remand. This action was brought in the circuit court of De Kalb county, in the state of Indiana, by John Yarde, Jr., as administrator of the estate of William L. Sanders, deceased, against the Baltimore & Ohio Railroad Company, to recover damages alleged to have been sustained by the widow and children of the decedent on account of his death by the negligent and wrongful acts and omissions of the defendant and its servants. After stating in detail the facts constituting the cause of action, the complaint concludes as follows:

"By reason of the premises said plaintiff widow and children have been damaged in the sum of —— thousand dollars; wherefore plaintiff demands judgment for —— thousand dollars."

The defendant seasonably filed in the state court its verified petition and bond, and asked that the cause be removed into the

circuit court of the United States for the district of Indiana. The petition set forth that the plaintiff was and is a citizen of the state of Indiana, and that the defendant was and is a corporation organized and existing under the laws of the state of Maryland, and a citizen thereof; and that the matter in dispute in the cause exceeded, exclusive of interest and costs, the sum or value of $2,000. Thereupon the state court ordered the removal of the cause into this court.

The plaintiff, in support of his motion, contends that, as the action sounds in tort, and is solely for the recovery of unliquidated damages, the amount stated in the complaint or asked for in the prayer must be taken as the true measure of the sum or value in dispute, and that in such case it is not competent for the defendant, by stating in his petition that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, to withdraw the cause from the jurisdiction of the state into the federal court. Counsel for defendant insists that the complaint does not state the amount for which judgment is demanded, and that in such case it may be shown by averment in the petition for removal that the matter in dispute exceeds the sum or value of $2,000. There are cases in which there is nothing in the pleadings showing the amount or value of the matter in dispute, and no facts from which it can be ascertained that the sum or value is less than $2,000, where it may be shown by a direct and positive statement in the petition for removal that the matter in dispute exceeds the sum or value of $2,000, and such showing will be sufficient to authorize a removal when such statement is not contradicted by special plea or affidavit. Langdon v. Iron Co., 41 Fed. Rep. 609. Whether this principle is applicable where the action is for the recovery of damages for a wrongful death, it is not necessary to determine. In an action sounding in tort, where the sole right of action is for the recovery of unliquidated damages, involving no right to nor interest in real or personal property, the amount, if stated in the complaint, or in the prayer for judgment, must, for the purposes of removal, be taken as the true measure of the value of the matter in dispute. Gordon v. Longest, 16 Pet. 97; Kanouse v. Martin, 15 How. 198. In such a case there can be no recovery beyond the amount of the judgment demanded. The complaint in this case, as the court construes it, asks judgment on the cause of action stated in it in the sum of $1,000. It is suggested, inasmuch as the statute under which the action is brought gives a right of action for the recovery of damages not exceeding the sum of $10,000 for a wrongful death, that the court ought to read the word "ten" into the blank space preceding the word "thousand," thus making the complaint one for the recovery of $10,000. Such a claim might be well founded if the statute in this state, as in one other at least, fixed an invariable amount of damages in every case of wrongful death. Here, however, the recovery may be in any sum not exceeding $10,000, and it can in no event exceed nominal damages, unless some larger definite amount is expressly demanded. Construing the complaint as containing a demand for $1,000 for the

wrongful death of the intestate, in my judgment it is not competent for the defendant to procure a removal by alleging in his petition that the matter in dispute exceeds $2,000.

It is urged that the motion to remand should be denied, because it is said that it is apparent that the blank space in the complaint was left unfilled simply as a device to prevent the removal of the cause to the federal court. It is due to the attorneys for the plaintiff to say that they explicitly disclaim any such motive. It is not material to the determination of the motion whether the omission was the result of oversight, or arose from a desire to defeat the right of removal. The right of removal is secured by the constitution and laws of the United States whenever the requisite diversity of citizenship exists, and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. This right cannot be defeated by any artifice, evasion, or omission. If at any time during the progress of an action in a state court, by amendment or otherwise, a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or a citizen of another state than that of which the plaintiff is a citizen, has the right to file his petition and bond, and secure a removal of the cause into the proper federal court. It has often been held that if the defendant have a right to the removal, he cannot be deprived of it by the allowance by the state court of an amendment reducing the sum claimed after the right of removal is complete. Kanouse v. Martin, 15 How. 198. The converse of this proposition must be true,—that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the state court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made. Huskins v. Railway Co., 37 Fed. Rep. 504; Evans v. Dillingham, 43 Fed. Rep. 177, 180.

The matter in dispute, as disclosed by the record, does not exceed, exclusive of interest and costs, the sum or value of $2,000. The motion will therefore be sustained, and the cause remanded, and it is so ordered.

NORTHWESTERN FUEL CO. v. DANIELSON.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 262.

1. MASTER AND SERVANT — UNSAFE WORKING PLACE — MASTER'S LIABILITY — ACTS OF FELLOW SERVANTS.
   A master is liable to his servant for injuries resulting from the unsafe condition of his working place, although that condition is brought about by the negligence of fellow servants of the injured person, acting under the master's orders.

2. SAME—RISKS OF EMPLOYMENT.
   Plaintiff was employed by defendant to shovel and remove coal from a burning dock. Thereafter defendant's vice principal, without notifying

plaintiff or his foreman, ordered two assistant foremen to remove the supports of a trestle work under which plaintiff was working. In so doing they negligently weakened the trestle, so that it fell upon and injured plaintiff. *Held*, that the risk of the trestle's falling in such a manner was an extraordinary one, not assumed by plaintiff, and of which the master was bound to notify him; and that the master was therefore liable.

3. SAME—NEGLIGENCE OF VICE PRINCIPAL—CONCURRENT NEGLIGENCE OF FELLOW SERVANTS.
A master is liable to his servant for an injury caused by the negligence of his vice principal and the concurrent negligence of a fellow servant.

4. NEGLIGENCE—TRIAL—INSTRUCTIONS—DUTY OF COURT.
In an action for negligence causing personal injuries it is not always for the jury to determine whether or not a given state of facts constitutes negligence. Where the facts are admitted or are undisputed, and are such that reasonable men can draw but one conclusion from them, it is the duty of the court to declare that conclusion to the jury.

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

At Law. Action by Karl J. Danielson against the Northwestern Fuel Company for personal injuries. Judgment was given for plaintiff. Thereafter a premature execution was quashed, 55 Fed. Rep. 49. Defendant now brings error to reverse the judgment. Affirmed.

Statement by SANBORN, Circuit Judge:

This is a writ of error to reverse a judgment against the Northwestern Fuel Company, the plaintiff in error, in favor of Karl J. Danielson, the defendant in error, for a personal injury.

The Northwestern Fuel Company, the defendant below, owned a dock at Duluth, Minn., on which there was a large quantity of coal. The dock had taken fire, and the defendant was removing the coal and other materials from a portion of it in order to reach and subdue the fire, which was burning at some distance from the place where this accident happened. A trestlework stood on the dock, which consisted of posts 18 feet high and 16 feet apart, toe-nailed to the dock, and fastened together by heavy timbers on top. Two of these posts held together by such timber constituted a bent. These bents were 22 feet apart, and were fastened together by planks or joists spiked upon them. Before the fire, railway tracks had been used on this trestlework, upon which cars ran to and fro upon this superstructure when coal was unloaded from boats to the dock. On November 11, 1891, the defendant hired the plaintiff, and set him at work under two of these bents, with a large number of men, shoveling coal into wheelbarrows, and wheeling it along the dock onto a car that stood by its side. The two bents which subsequently fell had no coal by their posts, but were fastened to each other, and the second bent was fastened to a third bent (which stood in the coal) by the planks or joists spiked upon them. The plaintiff was put at work under the direction of an assistant foreman, who had charge of the men shoveling the coal at this place, but had nothing to do with those who afterwards tore down the bents. The men who did this were two assistant foremen. It was the general duty of one of these foremen to direct the work on the superstructure when the defendant was unloading coal from boats, and at other times it was his duty to take care of the trestlework, the railroad tracks and cars upon it, to repair them and keep them in proper condition. One Stringer was the general superintendent of the defendant. He had charge of all the work about the dock, and was admitted to be the defendant's vice principal. He hired the plaintiff, and either set him at work, or directed some one to set him at work, shoveling coal. Some of the trestlework had been removed a day or two before, but none of it had been taken down that morning, and neither the plaintiff nor his foreman knew that any of it was to be taken down that day, until after it fell. Shortly after 10 o'clock in the forenoon the super-

intendent directed the two assistant foremen to take down the two bents under which the plaintiff and eight other men were shoveling coal. Thereupon they attached a rope to one of the bents, and some men below pulled upon it, but the timbers held fast. They then pried off the joists or planks which held these two bents to the third, and they fell sooner than they expected, and injured the plaintiff. The superintendent gave no notice to the plaintiff or his foreman that these bents were to be taken down, and they testified that they received no warning of it until they fell. The defendant requested that the jury be instructed to return a verdict in its favor, but the court refused the request, and charged the jury that if the plaintiff was set to work shoveling coal under this trestlework without any information as to the peculiar danger which might arise from taking it down, and was not informed that it was to be taken down, it was negligence on the part of the superintendent not to notify him of that fact, and not to give him some information as to the risks from it, since these were not the immediate risks of taking out the coal. This action of the court is the supposed error assigned.

C. D. O'Brien, (Thomas J. Davis, Warren N. Draper, and Theodore Hollister, on the brief,) for plaintiff in error.

John Jenswold, Jr., for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The ground on which it is contended that the court below should have instructed the jury to return a verdict for the defendant, is that the foremen who tore down the bents were the fellow servants of the plaintiff, and that their negligence was the cause of his injury. It may well be doubted whether these men were ever fellow servants of the plaintiff. That claim rests on the assumption that the plaintiff was engaged with them in the common employment of clearing the dock of coal and other materials. No trestlework was being torn down when the plaintiff was employed. He was hired to load coal from the dock into cars by its side. Neither he nor his foreman knew that any of the trestlework was to be torn down until the timbers fell. The superintendent, by his order, added the work of tearing down these bents to the work in which the plaintiff was engaged, if it ever became part of that work at all, after the plaintiff was hired, and without his knowledge. If, however, we concede that the foremen who took down the bents were the fellow servants of the plaintiff in the general work of clearing the dock when he was employed, it is clear that he cannot be charged with their negligence in tearing down the trestlework, for several reasons:

First. In removing these timbers that stood over the plaintiff's head these men were delegated to perform the personal duty of the defendant,—the duty to use ordinary care to keep the place in which the servant was at work reasonably safe. In the performance of this duty they were the representatives of the company. They were performing a duty which the master could not so delegate as to relieve it of liability, and their negligence in that respect was the negligence of the defendant. Railway Co.

v. Jarvi, 3 C. C. A. 433, 53 Fed. Rep. 65, and cases there cited; Railroad Co. v. Herbert, 116 U. S. 642, 648, 652, 6 Sup. Ct. Rep. 590.

Second. The danger from the negligence of these foremen in this work was a new and extraordinary risk, known to and created by the defendant after it employed the plaintiff. The plaintiff was ignorant of it. It was the defendant's duty to notify him of it, and it cannot charge him with the assumption of a risk which its own breach of duty kept him from having the opportunity to assume or escape from. A servant assumes the ordinary risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, including the ordinary risks from the negligence of fellow servants engaged in a common employment in the service of a common master. But he does not assume latent dangers known to the master, that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers. Manufacturing Co. v. Erickson, 55 Fed. Rep. 943, and cases cited.

The risk of injury from the tearing down of the trestlework above him was not one of the ordinary risks of shoveling coal or removing materials from the dock beneath it when the plaintiff entered upon his employment. No one was then tearing down the trestlework; no one had been directed to tear it down; the bents above the plaintiff stood firmly upon the dock, safely anchored to those held upright by the coal. He certainly assumed no greater risk than that of their falling by their own weight. He could not foresee that three hours later, by the master's order, they would be torn down upon him, and he could not assume a risk that did not then exist, and that ordinary prudence could not anticipate. The defendant had placed him there at work. The place was reasonably safe. He had a right to rely on the expectation that his master would use ordinary care to keep it reasonably safe, and would notify him of any extraordinary risks he was likely to incur. After the plaintiff had worked in this place for three hours, Mr. Stringer, the defendant's vice principal, created a new risk and danger unknown to the plaintiff. He directed the assistant foremen to take down the bents above the plaintiff. It was obvious to a man of the least sagacity that there was danger to the plaintiff working below in loosening and pulling down the timbers above him. Here was a new danger from the negligence of these servants in the performance of this new work, to which the plaintiff had not before been subject in the service he entered upon. This new and extraordinary risk the plaintiff did not then assume, because he was not aware of it. To him it was a latent danger. He was entitled to notice of it, and an opporutnity to exercise his option to leave the employment or to assume this risk, before he could be charged with its assumption. If one is employed to remove stone from a quarry where no powder is used, he does not

assume the risk of the negligence of a fellow servant who is subsequently directed by the master, without his knowledge, to drill a hole in the quarry, charge it with powder, and fire a blast to loosen the stone. Where such extraordinary risks are secretly added by the master after the employment is entered upon, he must be, and ought to be, held responsible for the result, unless the servant is informed, or by the use of ordinary care might have learned, of the dangers. Railroad Co. v. Charless, 2 C. C. A. 380, 51 Fed. Rep. 562; Railway Co. v. La Valley, 36 Ohio St. 221; Smith v. Car Works, (Mich.) 27 N. W. Rep. 662; Withcofsky v. Wier, 32 Fed. Rep. 301.

Third. The negligence of the superintendent was the negligence of the defendant. We think all reasonable men must agree that the superintendent was guilty of negligence in ordering this trestle-work torn down without notifying the plaintiff, his foreman, or any of the men working under it, that this was to be done. If the foremen were fellow servants of the plaintiff, and their negligence contributed to the injury, that did not relieve the defendant of its liability for the primary negligence of the superintendent. The master is liable for an injury to a servant which is caused by his own negligence and the concurrent negligence of a fellow servant. Railway Co. v. Callaghan, 56 Fed. Rep. 988; Railway Co. v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. Rep. 493; Harriman v. Railway Co., 45 Ohio St. 11, 32, 12 N. E. Rep. 451; Lane v. Atlantic Works, 111 Mass. 136; Griffin v. Railroad Co., 148 Mass. 143, 145, 19 N. E. Rep. 166; Cayzer v. Taylor, 10 Gray, 274; Elmer v. Locke, 135 Mass. 575; Booth v. Railroad Co., 73 N. Y. 38; Cone v. Railroad Co., 81 N. Y. 206.

In accordance with these views, the court below charged the jury, in substance, that if the plaintiff had no information that the bents above him were to be taken down until they fell upon him, and if the superintendent of the defendant ordered them to be taken down, but gave the plaintiff no notice thereof, and if the plaintiff's injury was caused by the failure to give such notice, the superintendent was guilty of negligence for which the defendant was liable. Two objections are made to this charge:

First. That the method of lowering the bents was left to the foremen who were directed to do the work; that the superintendent had a right to expect that they would discharge their duty carefully; that they were fellow servants of the plaintiff, and the defendant was not liable for their negligence. This is but a repetition of the argument presented in support of the position that the jury should have been instructed to return a verdict for the defendant, and it has already been disposed of. The risk of the negligence of these foremen while they were tearing down the timbers over the plaintiff was a new and extraordinary risk, which the defendant had no right to subject the plaintiff to without notice. There was no evidence that the plaintiff could have learned of this new danger by the exercise of ordinary care, or that he was guilty of any contributory negligence. He was working in the place where his master had stationed him. He was shoveling

coal into an iron wheelbarrow, and its rattling caused great noise. He worked bending forward over his shovel, and was continually urged by his foreman to hasten his work. Under these circumstances the charge properly stated the law applicable to the facts in evidence.

Second. The second objection is that it was a question for the jury, and not for the court, whether or not the action of this superintendent constituted negligence. It is insisted that the evidence was uncontradicted to the effect that the facts were as stated in the instruction, and that the legal effect of this charge was to instruct the jury to return a verdict for the plaintiff. It is not always a question for the jury to determine whether or not a given state of facts constitutes negligence on the part of the defendant. Where the evidence as to material facts is contradictory, or where the facts are admitted or undisputed, and are such that reasonable men can fairly draw opposite conclusions from them, the question of negligence is for the jury; but where there is no dispute about the facts, and they are such that but one conclusion can fairly be drawn from them by reasonable men, it is the duty of the court to declare that conclusion to the jury. If the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be bound to set aside a verdict returned in opposition to it, it is its duty to direct a verdict for the plaintiff or the defendant, as may be proper. Railway Co. v. Sullivan, 3 C. C. A. 506, 53 Fed. Rep. 219, 222; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Insurance Co. v. Doster, 106 U. S. 30, 32, 1 Sup. Ct. Rep. 18; Griggs v. Houston, 104 U. S. 553; Randall v. Railroad Co., 109 U. S. 478, 482, 3 Sup. Ct. Rep. 322; Commissioners v. Beal, 113 U. S. 227, 241, 5 Sup. Ct. Rep. 433; Schofield v. Railway Co., 114 U. S. 615, 618, 5 Sup. Ct. Rep. 1125; North Pennsylvania Railroad Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266.

The very question at issue here was presented to and considered by this court in Railway Co. v. Sullivan, supra. In that case Judge Caldwell, who tried the action in the circuit court, had charged the jury as follows:

> "If you find from the evidence that the defendant's engineer, at the time and place mentioned, and within the corporate limits of the city of Minneapolis, blew a loud blast or blasts of the locomotive whistle, and that at the time the act was done there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act."

The undisputed facts in that case were those stated in the instruction, so that its legal effect was, as in the case at bar, to direct a verdict for the plaintiff. This court held that the instruction correctly stated the law, that reasonable men could fairly draw but one conclusion from the facts there stated, and that it was the province and duty of the court to so inform the jury. For the reasons already stated we are of the same opinion regarding the instruction objected to in this case, and we think it was the

province of the court to give this instruction for the reasons stated in the opinion in the Sullivan Case.

The judgment below is affirmed, with costs.

MISSOURI PAC. RY. CO v. MOSELEY.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 187.

1. RAILROAD COMPANIES—LIABILITY TO TRESPASSER — NEGLIGENCE OF PERSON INJURED.
   On trial of an action against a railway company for personal injuries it appeared that plaintiff, an adult, while walking, for his own convenience, in defendant's private railroad yard, to avoid an approaching train, stepped between the rails of an adjoining track, whence any object approaching from the rear could be seen for at least 1,000 feet; that he failed to look behind him, and, after proceeding about 300 feet, was struck by an engine, the bell of which was not ringing, as required by a city ordinance. It further appeared that walking upon the tracks in the yard by strangers was forbidden by statute, but that persons did walk on the tracks daily without interference. *Held*, that plaintiff's injury resulted from his failure to exercise ordinary care, and that defendant was not liable.
2. SAME—CUSTOMARY USE OF TRACK.
   Conceding that the customary use of the yard by strangers amounted to an implied assent of defendant to such use, and placed plaintiff in the position of a licensee, yet his failure to exercise ordinary care in the presence of obvious danger was fatal to his right to recover.
3. SAME—FAILURE TO RING BELL.
   The fact that the roar of a passing train made plaintiff's sense of hearing practically useless, imperatively required of him frequent and diligent use of his eyesight, and consequently his failure to look to the rear amounted to gross negligence.
4. SAME—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE.
   The act of pliantiff in stepping upon the adjoining track, and continuing to walk thereon without looking behind him, was the primary and efficient cause of the injury, and the failure to ring the bell of the engine was at most concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of itself such negligence as would render defendant liable.
5. SAME—CONTRIBUTORY NEGLIGENCE.
   Where there is concurring negligence of both parties, in cases of personal injuries, the question is not whether the negligence of plaintiff or that of defendant is the more proximate cause of the injury, but whether or not the negligence of plaintiff directly contributed to it.
6. SAME—DUTY OF TRIAL COURT—INSTRUCTIONS.
   Where the contributory negligence is established by the uncontroverted facts of the case, it is the duty of the court to instruct the jury that plaintiff cannot recover.

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

At Law. Actions by Toliver Moseley against the Missouri Pacific Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

F. W. Lehmann, (H. S. Priest, on the brief,) for plaintiff in error.

Sterling P. Bond, for defendant in error.

Before BREWER, Circuit Justice, and SANBORN, Circuit Judge.

SANBORN, Circuit Judge. This is a writ of error to reverse a judgment against the Missouri Pacific Railway Company for a personal injury to the defendant.

On a bright afternoon in February, 1891, while Toliver Moseley, the plaintiff below, was walking for his own convenience on one of five parallel railroad tracks in the terminal yards of the Missouri Pacific Railway Company, in the city of St. Louis, Mo., at a point where he could see an object approaching him from the rear for at least a thousand feet, he was overtaken and injured by an engine that was backing down to the depot to take out a train. He sued the railroad company for this injury, and claimed that it was caused by its negligence in three particulars, viz.: First, that the engineer was running at a higher rate of speed than that permitted by an ordinance of the city of St. Louis; second, that the engineer and fireman did not exercise ordinary care in looking out for him, and preventing the accident; and, third, that they were guilty of negligence in failing to ring the bell of the engine, as required by an ordinance of the city of St. Louis. There was testimony to support each of these charges, but the defendant, at the close of the evidence, requested that the jury be instructed to return a verdict in its favor. The court refused this request, and charged the jury that the plaintiff could not recover on account of the speed of the engine, because there was no evidence that its excessive speed was the proximate cause of the injury; that he could not recover for the want of care of the engineer and fireman in failing to look out for or to discover him, and then to prevent the accident, because, if they were negligent in this respect, the plaintiff himself was equally guilty of the same species of neglect in failing to look out for and to discover the approaching engine; but that if the jury found that the bell was not ringing immediately before the accident, that, if it had been, the plaintiff would have heard it, and would have avoided the accident, and that he was at that moment taking such care to hear and to discover trains approaching him from the rear or front as a prudent person in his dangerous situation would have taken, they might return a verdict for the plaintiff. This action of the court is the supposed error complained of.

The rules of law by which this case must be determined are:

(1) In order to maintain an action for negligence, where the injury was not wantonly, maliciously, or intentionally inflicted, it must appear that the negligence of the defendant was the proximate cause of the injury, and it must not appear that the negligence of the plaintiff contributed to that injury.

(2) Where a diligent use of the senses by the plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court.

(3) Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to

instruct the jury that the plaintiff cannot recover. Railroad Co. v. Houston, 95 U. S. 697; Donaldson v. Railroad Co., 21 Minn. 293; Brown v. Railroad Co., 22 Minn. 165; Smith v. Railroad Co., 26 Minn. 419, 4 N. W. Rep. 782; Lenix v. Railway Co., 76 Mo. 86; Railway Co. v. Dick, (Ky.) 15 S. W. Rep. 665, 666; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. Rep. 1125; Aerkfetz v. Humphreys, 145 U. S. 418, 420, 12 Sup. Ct. Rep. 835; Powell v. Railway Co., 76 Mo. 80; Yancey v. Railway Co., 93 Mo. 433, 438, 6 S. W. Rep. 272; Kelley v. Railroad Co., 75 Mo. 138; Bell v. Railroad Co., 72 Mo. 50; Turner v. Railroad Co., 74 Mo. 602; Dlauhi v. Railway Co., 105 Mo. 645, 654, 658, 16 S. W. Rep. 281.

The scene of this accident was the private terminal yards of the defendant in the city of St. Louis. Those yards extend from Seventeenth street on the east to Twenty-Ninth street on the west. The city blocks are about 300 feet long. The width of the yard from north to south does not appear, but at the place of the accident there were at least five parallel tracks running east and west. Twenty-Second street crossed these tracks at grade. Between this street and Twenty-Ninth street, running parallel to the latter street, were East Jefferson avenue, which crossed the tracks on a viaduct, and West Jefferson avenue, Twenty-Sixth street, Twenty-Seventh street, and Twenty-Eighth street, which abutted upon, but did not cross, the yards at all. On each side of the yards were graded streets running north and south. Section 2611 of the Revised Statutes of Missouri provides that—

"If any person not connected with or employed upon the railroad shall walk upon the track or tracks thereof, except where the same shall be laid across or along a publicly traveled road or street, or at any crossing, * * * and shall receive harm on account thereof, such person shall be deemed to have committed a trespass in so walking upon said track in any action brought by him on account of such harm against the corporation owning such railroad, but not otherwise."

Notwithstanding this statute, persons were accustomed to walk on the railroad tracks in these yards daily. There was no evidence, other than this fact, tending to show that the plaintiff or any other strangers were licensed or given permission to use the tracks of this yard for a footpath. An ordinance of the city of St. Louis required the defendant to constantly ring the bells on its engines while they were moving in these yards, and there was evidence that the bell on the engine that struck the plaintiff was not ringing. The plaintiff was an adult, and a stranger to the company. He went upon the yards at Seventeenth street, and walked west, over the network of tracks, to some point west of Twenty-Third street, and there visited a friend of his who was at work cleaning cars. He then started back, and walked between two of the five parallel tracks. When he was 150 feet west of Twenty-Third street he saw a freight train approaching him from the east, and stepped between the rails of the adjoining track. From this point to the point where he was struck he could have seen any object that was approaching him from the rear for a distance of at least a thousand feet, if he had looked in that direc-

tion. He did not look behind him, but walked on along this track 300 feet, until he was overtaken and injured by the engine at a point some distance east of Twenty-Third street. The tender of the engine, which was backing down to take out a train, was piled high with coal, and neither the engineer nor the fireman saw the plaintiff until after he was injured. It conclusively appears from these facts that the plaintiff, without the defendant's knowledge, and without right, placed himself in an extremely dangerous place upon its tracks; that he knew his danger, and that the defendant did not; that he could still have avoided injury by the use of his eyes with any ordinary degree of care; and that he carelessly neglected to use them, and thereby suffered an injury. Can he be permitted to take advantage of his own carelessness, and to charge the damage he has suffered to the railroad company?

Here were the private yards in a great city of a large transportation system. They were in constant use in making up trains and distributing cars; engines were continually passing over their tracks. The business of the company demanded that these tracks should be used for this purpose, and the statutes of Missouri had wisely declared any interference with this use by a stranger a trespass. Upon this use, untrammeled by unnecessary restrictions, the advancement of commerce, the safety of the traveling public, the rapidity of transportation, and the business success of the company in large measure depended. Must all these wait while the agents of the railroad company carefully watch for, and remove from its tracks, an idle man, who wanders aimlessly there in violation of the law, too careless to turn his head to see whether the proprietor is using its property for the only purpose for which it is designed? That other men had walked there before him is not material here. Conceding all that he claims,—that the customary use of these yards by pedestrians proved the implied assent of the defendant to such use, and placed the plaintiff in the position of a licensee,—still he is not in a position to recover. A license did not relieve him from the duty of exercising ordinary care to protect himself from the obvious dangers from the engines and cars that were moving about him. It certainly gave him no higher right than that of a traveler on a public highway at a railroad crossing. It is the duty of such a traveler to stop and look and listen before he crosses a single track. Every railroad track is a constant warning of danger from the powerful machines that traverse it. The traveler on the public highway who, without looking both ways and listening for the coming locomotive, steps upon the railroad track, and is injured, is guilty of contributory negligence that bars his recovery, even though the railroad company may have been negligent. Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. Rep. 1125; McGrath v. Railway Co., 59 N. Y. 469; Rodrian v. Railroad Co., (N. Y. App.) 26 N. E. Rep. 741; and the other authorities cited supra. How, then, can this plaintiff recover when he deliberately stepped upon the track and walked 300 feet without once looking behind him? The fact that the roar of the passing freight

train made his sense of hearing practically useless, made the duty of the frequent and diligent use of his eyes more imperative. Mynning v. Railroad Co., (Mich.) 26 N. W. Rep. 514. If it is contributory negligence that bars recovery to cross a single track infrequently used, and but a few feet wide, without listening and looking for the coming locomotive, it is certainly gross negligence to step upon a track in busy railroad yards, and walk 300 feet without once looking to the rear, and especially when the sense of hearing is rendered practically useless by the noise of a long freight train passing over an adjoining track.

It is, however, urged that the proximate cause of the injury was the failure of the servants of the defendant to ring the bell of the engine, and not the carelessness of the plaintiff in walking on the track without looking for the engine. It is said that, if the bell had been rung, the plaintiff would have heard it, and have avoided the danger, and that he had a right to rely on the expectation that the defendant's servants would comply with the ordinance and ring the bell, and therefore he should be permitted to recover. This position is untenable.

First. The question here is not whether the negligence of the defendant or that of the plaintiff is the more proximate cause of the injury, but whether or not the negligence of the plaintiff directly contributed to it. An effect often has many proximate, and many remote, causes. If the negligence of the plaintiff was one of the proximate causes of the injury,—if it directly contributed to the unfortunate result,—he cannot recover, even though the negligence of the defendant also contributed to it. In such a case the plaintiff can recover only when the defendant's negligence is the only proximate cause of the injury. No argument is required to show that the negligence of the plaintiff in this case directly contributed to this injury. It was negligence for him to step upon this track without looking to the west; it was negligence for him to walk upon the track 300 feet without looking behind him. If he had looked to the west or the rear he would have seen the coming engine, and would not have been injured. In the absence of his own negligence, no act of the defendant would have harmed him.

Second. The negligence of the plaintiff was the more proximate cause of this injury. The proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces. In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the efficient moving cause, and yet subordinate to it, and often themselves influenced, if not produced, by it. Thus, a defect in the construction of a boiler of an engine may long exist without harm, and yet finally be the proximate cause of an explosion, to which the climate, through the negligence of the engineer, and other incidental causes nearer by years to the effect, may contribute. Cases illustrating this proposition are Railway Co. v. Callaghan, 56 Fed. Rep. 988, (decided at this term;) Railway Co. v. Kellogg, 94 U. S. 469; Insurance Co. v. Boon, 95 U. S. 117,

130; Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 Car. & P. 190, 192; Clark v. Chambers, 3 Q. B. Div. 327; Pastene v. Adams, 49 Cal. 87. That negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen, or reasonably anticipated, under the circumstances, as its probable result. That negligence which sets in motion a train of events that in their natural sequence might, and ought to be expected to, produce an injury, if undisturbed by any independent intervening cause, is the proximate cause of that injury. Railway Co. v. Elliott, 55 Fed. Rep. 949; Railway Co. v. Kellogg, 94 U. S. 475; Hoag v. Railway Co., 85 Pa. St. 293, 298, 299.

It goes without saying that injury from engines or cars can be, and ought to be, foreseen or anticipated as the probable result of walking across or upon a railroad track in frequent use, without looking both ways and listening for approaching engines. This is demonstrated by the fact that so universal is this experience that it has become a settled rule of law that such action is negligence. It was the negligence of this plaintiff in walking on the railroad track without looking to the west that put in motion the train of events that led to this disaster. He voluntarily placed himself in the dangerous situation. He knew his danger. The servants of the defendant were not advised of his position or of his danger, and they had a right to rely on the expectation that he would obey the law and discharge his duty. His greater knowledge imposed upon him the duty of greater care than was required of them. The natural and inevitable result of his continuance upon this track was a collision with an engine, unless some new cause intervened to prevent it. Without the intervention of such cause, the accident was only a question of time. The engine was certain to come. The only chance of his escape was that some independent cause, such as his own care and action, or the defendant's watchfulness, would intervene to turn aside the natural sequence of events, and to take him from the track before the engine passed over it. No independent cause did intervene, and his own negligence was permitted to work out the unfortunate result. It is certain that this result could not have been attained unless the plaintiff had first been negligent. It may be true that it would not have resulted if the bell had been rung. But, if this be so, the failure to ring the bell was not an independent intervening cause; it was entirely dependent for its evil effect upon the precedent negligence of the plaintiff in walking along the track without using his eyes. If he had not been careless, he would not have been on the track, and the failure to ring the bell could not have injured him. The negligence of the defendant's servants was at most concurring or succeeding negligence, which simply failed to interrupt the natural sequence of events, and permitted plaintiff's breach of duty to work out the disastrous result of which it was the primary and efficient cause. The injury was the natural result of the plaintiff's own carelessness, and the jury should have been instructed to return a verdict for the defendant.

The judgment below is reversed, with costs, and the case is remanded, with directions to grant a new trial.

NORTON et al. v. WHEATON.

(Circuit Court, N. D. California. July 10, 1893.)

1. PATENTS FOR INVENTIONS — CONSTRUCTION OF CLAIMS — CAN-HEADING MACHINES.
   Letters patent No. 267,014, issued November 7, 1882, to Edwin Norton for a can-heading machine, cover an invention of a primary character, are entitled to a broad and liberal construction, and are infringed by a machine which operates upon essentially the same principles, though differing structurally in some features from the patented machine. Norton v. Jensen, 1 C. C. A. 452, 49 Fed. Rep. 859, followed.

2. CIRCUIT COURTS—FOLLOWING DECISIONS OF CIRCUIT COURT OF APPEALS.
   It being a matter of opinion whether or not there is antagonism between certain cases, the circuit court cannot assume that there is antagonism between the decisions of the circuit court of appeals for that circuit and those of the supreme court, such as will warrant the circuit court in re-examining a question clearly decided by the circuit court of appeals.

3. SAME.
   Where the circuit court of appeals has decided that a claim in a patent is entitled to a broad and liberal construction, a circuit court cannot afterwards adopt a narrower construction, on the ground that the language of the claim was restricted while in the patent office.

In Equity. Suit by Edwin Norton and others against M. A. Wheaton for infringement of letters patent No. 267,014, issued November 7, 1882, to Edwin Norton for a "machine for putting on the ends of fruit cans." Decree for plaintiffs.

Munday, Evarts & Adcock and Haven & Haven, for complainants.
Wheaton, Kalloch & Kierce, for respondent.

McKENNA, Circuit Judge, (orally.) This is an action for an infringement of a patent for automatically applying tight-fitting heads on cylindrical cans. The case has been very ably presented, and I have given a very careful consideration to the testimony and to the arguments of counsel, oral and written. The impressions I expressed at the oral argument still prevail, and I am satisfied that the case is practically decided for me by the decision in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. Rep. 859, in United States circuit court of appeals for this circuit. In this case the court said Norton's patent was of a primary character, and "entitled to a broad and liberal construction," and held the Jansen machine, though in many respects an improvement on Norton's machine, an infringement; applying the doctrine of McCormick v. Talcott, 20 How. 405, and Machine Co. v. Lancaster, 129 U. S. 273, 9 Sup. Ct. Rep. 299.

The defendant in this case, however, insists that the doctrine in these cases is misapprehended in Norton v. Jensen; but this inquiry is hardly open to me, nor may I, as defendant urges I may, assume an antagonism between the decisions of the supreme court and the decision of the court of appeals. Whether there is or is not antagonism between cases must be a matter of opinion, and I surely have no power, if I had the inclination, to substitute my interpreta-

tion of the decisions of the supreme court for the interpretation of the court of appeals. If the court of appeals has made a mistake, it only can correct it.

Assuming the decision in Norton v. Jensen to be correct, the resemblances found in the Jensen machine to the Norton machine may be asserted of the defendant's machine. I do not mean structural similarity, but the similarity which in legal effect brings it within the scope of the decision. In the Norton machine the can heads are forced into or through certain spaces, called in the patent "annular." These spaces are of the diameter of the can heads, and were enlargements at the ends of the mold, which seized and held the can body while the head was applied. The purpose of this space was, to quote the patent, for the reception "of the flange of the can head." The combination of the first claim is the mold, with this space, with, to again quote the patent, "a device for forcing the can head into said annular space, and thereby applying the head outside of the can body." This device was a piston, which was really the instrument through which power was applied to force the head and can body together in a straight line. It not only pushed the can head into a space, but, by aid of the space, centered and applied it to the can body,—a function important to be remembered. In the Jensen machine the can head dropped, or was pushed by a spring, into a space which was not integrally a part of the seizing and holding mold, but which became substantially a part of it at the instant of the contact of the head and body; a piston being, as in the Norton machine, the instrument of application applied, not to the head, but to the body, pushing it to the head. The difference between the machines, therefore, is that in the Norton machine the head is pushed, by the operating piston, to the body, and in the Jensen the body was pushed to the head.

There was a dispute raised in the testimony as to whether the Jensen machine had a device which forced the can head into an annular space, and it is doubtful if it had, in a literal sense of the words of Norton's patent; but the court of appeals took no notice of the dispute, even when called to its attention in the petition for rehearing, as counsel for defendant has pointed out regarding the devices equivalent, notwithstanding the structural disparity. The court apparently considered the annular space but as a part of the mold, whether integrally so, as in the Norton patent, or substantially so, as in the Jensen patent; its purpose being not only to receive the can head, but to "center the can head accurately in line with the can body, as the head and body are forced together by the piston." In other words, the can head is not forced into the annular space as a seat, but through or rather by means of it the can head is accurately centered, and applied to the can body. It is manifest, without such space somewhere,—that is, a space excessive of the diameter of the can body,—either in the part which holds the can, or the part which holds the head, the can heads and bodies could not be applied at all. At any rate, the court found substantial sameness between the Norton and Jensen molds, and substantial same-

ness in principle. It said: "* * * The differences pointed out are mostly formal, and do not present any substantial differences in the principle of the operation of the respective machines." The defendant's machine differs in some particulars from the Jensen machine, and is probably an improvement, and, being so, properly patented; but I do not think the differences are great enough to avoid the comprehensive construction of plaintiff's patent given by the court of appeals.

It is claimed by the defendant that plaintiff changed his claim, in conformity with a ruling of the patent office, so as to make one of its elements a device for forcing the can head into the annular spaces, instead of making it a device for forcing the can head upon the body. There is no doubt that a claim restricted in the patent office cannot be afterwards enlarged; but what a claim at any time means is a matter of interpretation.

It is conceded that in the second of the original claims the annular space is mentioned, and the movement of the can body to the head, and the head to the body, are held by the court of appeals in Norton v. Jensen to be equivalent, and both movements covered by the language of the claims. In view of this it is not competent for me to hold that a change in the claims restricted the patent to a device only which forced the can head into an annular space.

There were a number of patents introduced in evidence, which it is not necessary to consider at length. The testimony shows that some were subsequent to Norton's invention, and the others were not introduced, counsel says in his brief, as anticipation.

Decree for plaintiff.

NORTON et al. v. EAGLE AUTOMATIC CAN CO.[1]

(Circuit Court, N. D. California. August 16, 1893.)

1. PATENTS FOR INVENTIONS—CAN-HEADING MACHINES.
Can-heading machines, made in accordance with the specification and drawings of United States letters patent No. 460,624, granted to Charles B. Kendall on April 21, 1891, are an infringement upon United States letters patent No. 267,014, granted to Edwin Norton on November 7, 1882.

2. SAME—PRELIMINARY INJUNCTION—QUESTIONS OPEN.
When a patent has been sustained by prior adjudications in the same circuit, on motion for a preliminary injunction in a subsequent suit against other parties, the only question open is that of infringement, and consideration of all other questions will be postponed until the final hearing, except in cases where new evidence is presented, which is, in itself, of such a conclusive character that if it had been presented in the former case it would have probably led to a different conclusion; but in such contingency the burden of showing this is upon the defendant.

3. SAME—ANTICIPATIONS—PRIOR SUIT.
Where, on motion for a preliminary injunction in a subsequent suit against other parties, certain prior patents are set up in anticipation, which were so set up in prior suits in the same circuit, and therein held not to

[1] Reported by J. H. Miller, Esq., of the San Francisco bar.

anticipate, such patents will not be considered on such motion, and the prior adjudications in that regard will be held conclusive.

4. SAME—PRELIMINARY INJUNCTION—ANTEDATING OF PATENTED INVENTION.
On motion for a preliminary injunction, where a patent is set up as anticipation which, on its face, antedates the patent in suit, complainant may show, if he can, that his patented invention was actually made prior to the date of the anticipating patent, and he will thereby avoid anticipation, and the alleged anticipating patent will not be considered.

5. SAME—LACHES.
Where, on motion for a preliminary injunction, it is shown that six months prior to commencement of the suit complainant's attorneys visited the factory of respondent, and there saw in operation respondent's machine, and it further appears that complainant had then pending, but undecided, in the same circuit a suit against another party upon a machine involving some, if not all, of the questions involved in the case at bar, complainant had a right to wait until a decision was rendered in the suit against the other party before bringing suit against respondent; and, where complainant commenced his suit against respondent two weeks after the decision against such other party in the other case, he is not guilty of laches such as will disentitle him to a preliminary injunction.

6. SAME—HARDSHIP.
Where a patent has been fully adjudicated and held valid by the court of last resort, and the respondent is aware of this fact, but nevertheless builds and puts in operation a large number of infringing machines at large expense, and enters into large contracts for operating the same, relying upon the opinions of his experts, as opposed to the decision of the court, that said machines are not an infringement, the respondent must be considered as acting with his eyes open to the exact condition of affairs, and in such case cannot avert a preliminary injunction on the ground of hardship; it being clear to the court that, under the prior adjudications, his machines are an infringement.

7. SAME.
There are cases where the courts have refused a preliminary injunction, and allowed defendant to give bonds in lieu thereof, on the ground of hardship that would be entailed upon the defendant by an injunction, notwithstanding the fact of prior adjudication of validity of the patent; but, upon consideration of the facts here, it is held that this is not such case, and the injunction is granted, although it may entail a hardship on respondent.

8. SAME—IRREPARABLE INJURY.
Although the patentees in this case have elected to enjoy the monopoly of their patent by granting licenses, nevertheless, it appearing that to refuse them a preliminary injunction would absolutely destroy the value of their patent, a preliminary injunction will be granted.

In Equity. Bill by Edward Norton and Oliver W. Norton against the Eagle Automatic Can Company for infringement of a patent. On motion for a preliminary injunction. Granted.

Munday, Evarts & Adcock and Estee & Miller, for complainants.
John L. Boone, W. F. Herrin, and N. A. Acker, for respondent.

HAWLEY, District Judge, (orally.) This cause is presented to me upon a motion for a preliminary injunction, the respondent having been served with notice to appear and show cause, if any it could, why the injunction should not be issued. The suit is in equity for the infringement of letters patent No. 267,014, dated November 7, 1882, granted to Edwin Norton for a machine for putting on the ends of fruit and other cans. The respondent, in its answer, admits

that it has made and used, and is using, can-heading machines which were constructed substantially in accordance with specification and drawings of letters patent No. 460,624, which were granted April 21, 1891, to one Charles B. Kendall. It avers that the invention claimed in said letters patent is a radically new, separate, and distinct invention in machines for putting heads on cans from that described and claimed in letters patent No. 267,014, and that it does not require, use, employ, or embody any of the mechanism described in or covered by letters patent No. 267,014.

It is shown in this case that the Norton patent has been upheld in the suit of Norton v. Jensen, in the circuit court of appeals in this circuit, (1 C. C. A. 452, 49 Fed. Rep. 859;) and also in the case of Norton v. Wheaton, in this court, (57 Fed. Rep. 927.) I understand the rule to be well settled that, where the validity of a patent has been sustained, as in this case, by prior adjudication in the same circuit, the only question open before the court, on motion for a preliminary injunction, in a subsequent suit against other parties, is the question of infringement; and that the consideration of all other questions should be postponed until all of the testimony is taken in the case, and the case is presented upon final hearing. There is, perhaps, an exception to this rule, that in cases where new evidence is presented, that is itself of such a conclusive character that if it had been presented in the former case it would probably have led to a different conclusion. The burden, however, of showing this is upon the respondent. Without attempting, at this time, to explain the operation, mode, or effect of the respective patents involved in this case, under the construction which is given to the Norton patent by the circuit court of appeals in Norton v. Jensen, and the decision rendered by this court in the case of Norton v. Wheaton, it is made perfectly clear to my mind that there has been an infringement of the Norton patent by the respondent in this case.

The patents set up in anticipation by the respondent in its answer are five: (1) Letters patent No. 152,757, issued to George A. Marsh on the 7th of July, A. D. 1874; (2) letters patent No. 235,700, issued to George H. Pierce on the 21st day of December, 1880; (3) letters patent No. 233,079, issued to P. Dillon and J. Cleary on the 12th of October, 1880; (4) letters patent No. 265,617, issued to George A. Marsh on the 10th of October, 1882; (5) letters patent No. 238,351, issued to W. J. Clark on the 1st day of March, 1881. Of these the first Marsh patent, No. 152,757, was not claimed in the oral argument to anticipate the Norton patent, but was introduced, as stated by counsel, for the purpose of showing the state of the prior art. The Pierce patent is disposed of by the decision of the circuit court of appeals in Norton v. Jensen. The Dillon and Cleary patent and the Clark patent, as well as the Pierce patent and the first Marsh patent, were before this court in Norton v. Wheaton, and it was there decided that they did not anticipate complainants' invention.

The only new evidence in this case, as I understand it, is the letters patent to George A. Marsh No. 265,617, dated October 10, 1882. This, it will be noticed, antedates the patent issued to Norton by about one month; but it was shown by the testimony in Norton v. Jensen that Norton's invention was long prior in time to the date of Marsh's patent,—about two years, if I remember rightly. It is therefore unnecessary on this hearing to construe the Marsh patent, for, unless the invention of Marsh is shown to be prior in time to Norton's invention, there can be no anticipation. It will be time enough to discuss the construction of the patent if it should be shown that Marsh's invention was prior in point of time.

It is claimed that complainants have been guilty of laches, and that respondent was misled by the conduct of complainants. The affidavit, upon the part of the respondent, of Irvin Ayres, president of the respondent, says:

"Affiant further says that he is informed and believes that the complainants herein were fully aware that respondent was using the machines which it now uses long prior to the commencement of this suit, and at least several months before the canning season commenced, and long before any contracts had been made to supply cans to orders for this season's work. Affiant is informed that the attorneys of said complainants personally visited respondent's factory at a time when respondent had only a single line of machinery at work, and that said attorneys then and there examined said machines, and that the delay and failure of complainants to bring suit against respondent misled respondent into the belief that no action would be brought against it, and induced respondent to make large investments in machinery and apparatus. Affiant further believes that said complainants delayed bringing this suit purposely, until respondent had entered into such heavy expenditures, and made its several contracts above referred to, and was engaged in filling the same, and that they now bring this suit hoping to use the power of this court to prevent respondent from filling said orders, and to injure respondent in the eyes of the public and its said patent."

And the affidavit of the secretary of respondent sets forth:

"That he knows John W. Munday and Edmund Adcock, the attorneys and solicitors for the complainants herein; that said Munday and Adcock visited the works of the defendant herein on or about the month of January, 1893, and discussed with affiant the kind and character of machines for heading cans which was used by respondent at that time, and affiant is satisfied that they knew what the construction of the machines used by said respondent was at that time. Affiant says that respondent was then using the same style of can-heading machines that it is now using, viz. the Kendall machine; that at that time respondent had only a single line of machines constructed and in use, and had no contracts on hand for furnishing cans to canneries; that, knowing that the complainants herein were aware of the character, kind, and construction of the can-heading machines used by the respondent, and not being troubled by said complainants, respondent was led into constructing other lines of can-heading machines of the same kind, at a large expense, and in expending large sums of money to fit up a cannery, and into entering into large contracts to supply cans to canning factories."

It will be observed that the affidavits do not state that the attorneys for complainants informed them that the Kendall patented machine, which respondent was operating, was not an infringe-

ment on the Norton patent. Upon this point the affidavits are silent, and the only reasonable inference that the court could draw from the affidavits would be that the officers of respondent were at that time notified that it was an infringement, because, if this were not so, it is evident to the court, upon an application of this kind, that that fact would be affirmatively stated; but I do not understand that respondent relies upon that ground in these affidavits. It is argued, because the complainants knew that respondent was operating machines of this kind in January last, and because they did not, with that knowledge, bring suit against it, that respondent was thereby misled into the belief that no suit would be brought against it, and that it had a right to go on, and that the complainants in this case were guilty of such laches in their failure to bring a suit against respondent that they ought not to be allowed to have an injunction against it. From the record before me, and from the arguments of counsel, and the judicial knowledge that the court has as to pending cases, it appears that the complainants in this case had instituted a suit against M. A. Wheaton upon a machine involving some, at least, if not all, of the questions involved in this case in this circuit, and that that suit had been pending for some months prior to the date of the conversation, and that at that time, or about the time of the conversation, the counsel for complainants, who live at Chicago, were here in San Francisco, to attend the final hearing and argument of the case of Norton v. Wheaton. It appears to me that, with the knowledge which both parties have been shown to possess in this case, the complainants having established the validity of the Norton patent and its infringement by Jensen in the case of Norton v. Jensen, and having commenced the suit against Wheaton, they had a right to wait until that suit was determined before bringing suits against other parties, and especially as against parties who had full knowledge of all of the facts with reference to the adjudications with respect to the respective patents. I do not think that complainants can be charged with laches for waiting until that suit was decided, which was only about two weeks, or thereabouts, before the commencement of this action. The parties had a right to wait until it was determined by the court whether or not the Wheaton patent was an infringement of the Norton patent, because, as I said, it involved many, at least, of the same questions that are involved in this case, and it also appears to me plain that the respondent could not have been misled by their delay.

The record shows that respondent, prior to the time of operating its machines, had submitted the matter of its infringement to several experts. It shows that it was informed by experts, many of whose affidavits were presented in this case, that the Kendall patent was not an infringement upon the Norton patent. It is therefore claimed that the respondent acted in good faith in proceeding to erect expensive machinery and enlarging its business. It is unnecessary, in this proceeding, to question the good faith of the respondent. If it relied upon the opinion of experts as opposed

to the decision of the court in Norton v. Jensen, it shows that respondent took the chances of having that matter determined by the court. In other words, the affidavits offered in this case clearly showed that the respondent, in erecting its machinery, acted with its eyes wide open as to the exact condition of affairs concerning those patents, and took the chances of having it determined by the court in its favor that the Kendall patent was not an infringement of the Norton machine.

I believe that I have noticed all the points relied upon by counsel except the one where it is claimed that, this suit having been brought by complainants, and it appearing that they themselves had not used the monopoly of their patent, they were not entitled to an injunction. I do not think that point is well taken. The action is necessarily for the benefit of their licensees, and it is their duty to protect their licensees by suits against parties who were infringing the same; otherwise, the value of the patent would be absolutely destroyed.

It was contended that this was a case of special hardship, and that for this reason a preliminary injunction ought not to issue. There are cases where the courts have held, on account of the peculiar facts of the case, that the court ought not to issue a preliminary injunction on account of the hardship that might result by such action to innocent parties. It is enough to say that I do not consider that this case comes within the rule that has been announced in decisions of that character.

My conclusion, therefore, is that the complainants are entitled to the preliminary injunction, and that order will be entered.

SMITH et al. v. VULCAN IRON WORKS OF SAN FRANCISCO.

(Circuit Court, N. D. California. December 5, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—BAND-SAW MILLS.
   Letters patent No. 442,645, granted to Samuel R. Smith on December 16, 1890, for improvements in band-saw mills are valid; and claims 1, 2, 3, 4, 5, 6, and 10 *held* to be infringed by mills made under and according to the specification of letters patent No. 468,303, granted to the Vulcan Iron Works, as assignee of Charles J. Koefoed, on February 2, 1892.
2. SAME—CONSTRUCTION OF CLAIM—FORMAL CHANGES.
   Where a patentee, in his specification, describes his device as being cast in one piece, and claims it in that form, but does not by express words disclaim other forms, it will be deemed that the specification specifies the single casting merely as the best form in which the patentee has contemplated embodying his invention, and accordingly the claim will be construed to cover a device performing the same function and similar in construction to that of the patentee, except that it is cast in two pieces, and bolted together.
3. SAME—INVENTION.
   Where there is doubt as to the presence of invention, the presumption arising from the grant of the patent will control, and the defense of non-invention will fail.

In Equity.

Suit by Smith, Myers, and Schnier, of Cincinnati, assignees of Samuel R. Smith, for infringement by the Vulcan Iron Works of San Francisco, upon patent No. 442,645, granted to Samuel R. Smith on December 16, 1890, for "improvement in band-saw mills." The invention consisted in an outside support for the front bearings of the band-wheel shafts, and also in a sensitive automatic straining device, whereby any slack of the saw is taken up, and the saw kept at the proper tension. The outside support consisted of a single hollow casting, described in the specification as follows: "The front support of the band-wheel shafts is a single hollow casting, consisting of the horizontal portion, D, which has outwardly projecting flanges, d, which are

FIG. 1

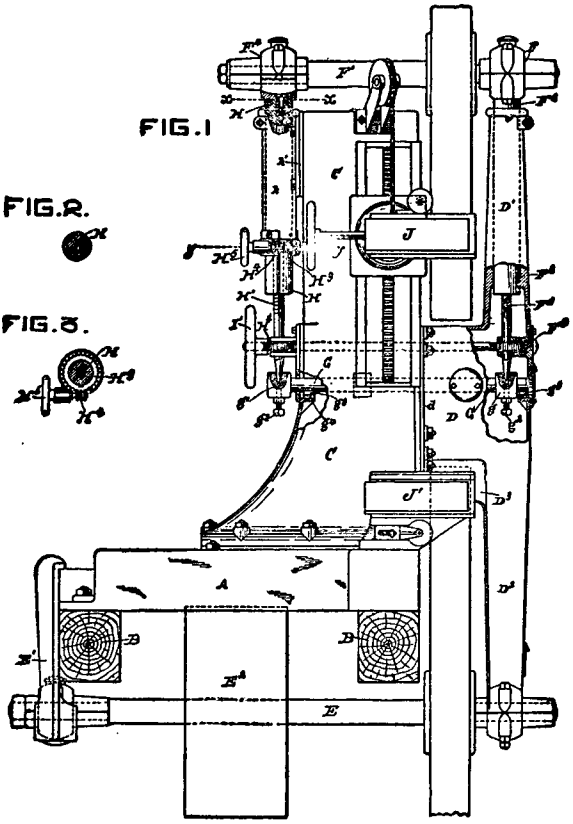


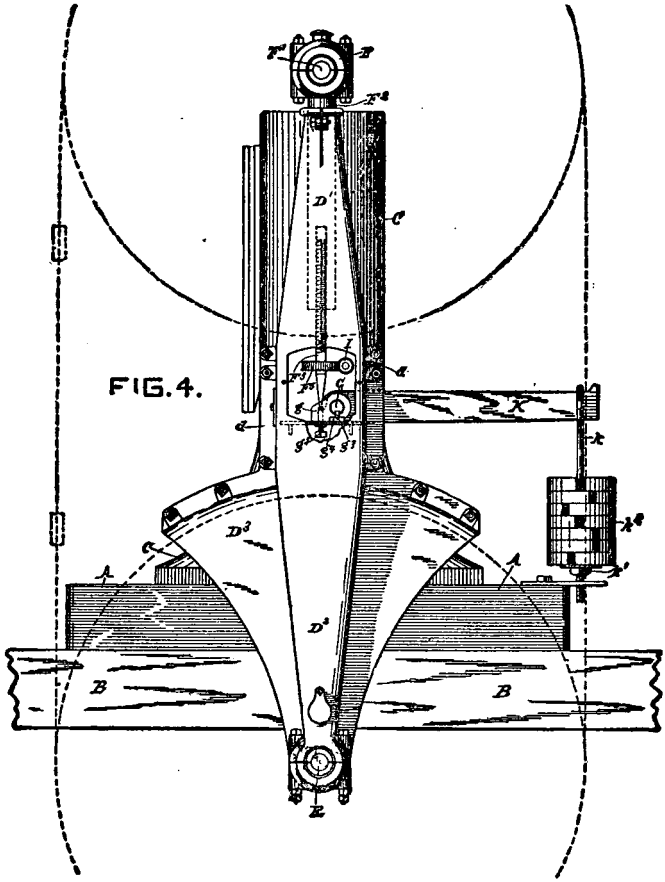
FIG. 2.

FIG. 3.

planed off to joint against the planed seat upon the column, C, to which it is securely held by bolts, and the vertical arms, D^1, D^2, which receive and support the boxes or front bearings of the band-wheel shafts."

The claims charged to have been infringed read as follows: "(1) In a band-saw mill, the combination, with the band wheels and main supporting frame or column, of an integral standard carrying the front bearings of the upper and lower band-wheel shafts, said standard being attached to the front side of said main frame or column, between said band wheels, substantially as hereinbefore set forth. (2) The combination, substantially as specified, of the hollow supporting column, C, and the hollow casting, D, D^1, D^2, centrally secured to said column, to furnish rigid supports for the front

bearings of the upper and lower band-wheel shafts. (3) A support for the front bearings of the band-wheel shafts, having the flanged horizontal portion, D, to be secured to the supporting frame, and the vertical arms, D^1, D^2, cast in one piece with said central portion, the said part, D, being bored to receive the adjustable bearing of the upper band-wheel shaft. (4) The combination of the base plate, A, cast in a single piece, the column, C, having a flanged base to be secured to said base, A, the front support for the band-wheel shafts consisting of the casting, D, D^1, D^2, and shield, D^3, together forming a supporting frame for band-saw mills, substantially as hereinbefore



set forth. (5) In a band-saw mill, the combination of the supporting frame, the vertically adjustable bearings for the upper band-wheel shaft, mounted in said frame, the transverse shaft, G, mounted on knife-edge bearings in said frame, and having arms, g, g^1, secured upon said shaft to support the bearings of said upper band-wheel shaft, and the weighted lever, K, secured upon said shaft between the knife-edge bearings to counterpoise the bearings of the upper band-wheel shaft, and provide a sensitive automatic adjustment for the same, whereby the saw is kept at the proper tension, substantially as hereinbefore set forth. (6) The combination, substantially as hereinbefore set forth, of the supporting frame, the transverse shaft,

G, having knife-edge bearings, g^3, secured in it, the supporting plates, g^4, resting on brackets in said frame, the arms, g, g^1, having steps at their outer ends, the hardened steel adjustment screws, g^2, passing through said steps, the vertically adjustable bearings for the upper band-wheel shaft resting upon said screws, the lever, K, secured upon said shaft, and projecting through the frame, the rod, k, upon the outer end of said lever, K, the cap nut, k^1, upon said rod, and the removable weights, k^2, for the purpose specified." "(10) In a band-saw mill, the combination of the column, C, brackets projecting from said column, a rock shaft having knife-edge bearings resting upon said brackets, a weighted lever, and two arms, g, g^1, secured upon said rock shaft, with the band-wheel shaft and its boxes, and rods supporting the boxes, said rods resting upon the arms, g, g^1, substantially as shown and described." The defendant made and sold band mills constructed under the patent No. 468,303, granted to it as assignee of the inventor, Charles J. Koefoed, on February 2, 1892, in which was shown an outside support for the front bearings of the band-wheel shafts, differing from that of Smith only in being cast in two pieces, and then bolted together. In the straining device of complainants' patent, the rock shaft was mounted on knife-edge bearings by inserting the knife edges into the under side of the shaft at each end, and allowing them to vibrate in a small grooved plate resting on a bracket attached to the frame. In the defendant's straining device, this arrangement was reversed, the knife edges being inserted into the brackets and the grooved plates in the rock shaft.

J. H. Miller, M. M. Estee, and Geo. J. Murray, for complainants.
John A. Wright, for respondent.

McKENNA, Circuit Judge, (orally.) This is an action for the infringement of a patent for a band-saw mill. The defense is want of invention and of novelty, and that respondent has not infringed. A great deal of testimony was taken, and the case ably and elaborately argued, but the demands of the court prevent a review of the evidence. I do not know that it would be useful any way. While the machine is not a complicated one, yet it cannot be understood except by reference to drawings and models and explanations of them. A verbal description would only confuse; hence I will not attempt it. It may be said generally, quoting counsel for complainants, that—

"The patent shows a main supporting frame securely attached to a base plate, consisting of an upright hollow metallic column, preferably of circular form. Attached to the front of this column is a hollow casting, consisting of three parts, the first a horizontal part bolted to the main column, and the second and third parts vertical hollow arms to receive the bearings of the upper and lower band-wheel shaft. The entire casting is of T shape, horizontally disposed, with the stem bolted to the main column, midway between the band wheels. Through the center of this outside column and the main column is a horizontally disposed transverse rock shaft, resting on knife-edge bearings attached to brackets, and having a straining weighted lever attached to the center of the rock shaft at right angles. The weight on this lever, which can be increased or diminished at will, operates to vibrate the rock shaft on its knife-edge bearings. The front bearing of the upper band-wheel shaft is axially secured upon the top of a depening trunnion, which fits snugly into the bore of the upper hollow arm of the outside supporting column, and is tapped at its lower end to receive a screw shaft, which rests in a step in the outer end of a short arm secured to the rock shaft. The rear bearing of the upper band-wheel shaft has a similar arrangement for its support. It will thus be seen that the weighted lever secured to the rock shaft between the knife-edge bearings counterpoises the two bearings of the

upper band-wheel shaft, and provides an exceedingly sensitive automatic adjustment for the same, whereby the saw is kept properly strained. The front bearing of the lower band-wheel shaft is secured to a permanent fixed shaft, which has its front end secured to the lower member of the outside supporting column, and its rear end to a hanger depending from the base of the main frame. This bearing is not adjustable. A hood or shield overhangs the lower band wheel, and has an upper segmental flange through which it is bolted to the main frame."

The patentee's specification and drawing show the front supporting column to be cast in one piece, and a portion of his language, considered by itself, justifies the contention that this was his invention; that is, the casting in one piece. He says, after describing the defects of other machines, what he claims as his own:

"In machines of this kind heretofore constructed, the supports for the bearings of the upper and lower band wheels were made separate and independently attached to the supporting frame. The strain of the saw, of course, tended to draw the upper and lower band wheels at an angle to each other, thereby causing the saw to run unevenly, or require separate adjustment of the upper band wheel vertically, as well as what is known as 'cross-line adjustment,' to make the saw run true after each straining or slackening of the saw tension. To overcome these defects, I have provided a single casting, which is firmly secured to the supporting frame in such manner as to receive the front bearings of both band wheels. I have also provided a back bearing for the shaft of the upper band wheel," etc.

But on page 3 he further says:

"I have shown and described what I believe to be the simplest and best means of embodying my invention; but it is obvious that many mechanical changes may be made without departing from its spirit and scope, and I would hence have it understood that I consider all such mechanical changes as mere modifications of my invention."

But manifestly, if casting in one piece is the best, its advantages are secured by casting in two pieces, and bolting them together, as in the machine of the respondent. It is certainly an equivalent, and could not be excluded except by express words of the patentee, confining his invention to the other form. However, it is a close question if there is invention in it, and I have yielded somewhat to the presumptions of the patent.

The view is clear as to the straining devices. There are undoubtedly invention and novelty in them, and those used by the respondent are substantially similar. It imitated as clearly as it dared, and not make exact resemblance. A decree will be entered for the complainant.

PRINCE'S METALLIC PAINT CO. v. PRINCE MANUF'G CO. et al.

(Circuit Court of Appeals, Third Circuit. September 18, 1893.)

No. 9.

1. TRADE-MARK—SUIT FOR INFRINGEMENT—ESTOPPEL.
Where the purchaser, on foreclosure, of a property and business which had long been conducted in connection with a trade-mark, uses the trade-mark under claim and color of title, with the full knowledge of the

former owner, for eight years without objection, this amounts to an acquiescence which will estop the latter, and a subsequent purchaser of the trade-mark from him at sheriff's sale, from afterwards maintaining a suit to restrain such user.

2. SAME—EQUITY—ESTOPPEL.
In a suit in the courts of a state for infringement of the trade-mark "Prince's Metallic Paint," title to the trade-mark being claimed by both parties, relief was refused, on the ground that, even if plaintiff had title, it had forfeited its equity by using the trade-mark in connection with paints made from ores dug from other than the original Prince mine. *Held*, that the defendant in that litigation, who had always used the trade-mark in connection with paints not coming from the Prince mine, had no equity to sustain a suit for infringement against the former plaintiff.

3. SAME—SALE OF BUSINESS—WHEN TRADE-MARK PASSES.
A trade-mark for metallic paint, which has been used for many years by the first producer and his successors solely in connection with paint made at a fixed place, and from ore dug from a certain mine, becomes localized and identified with the mine and place of manufacture so as to pass to the purchaser of the factory, mine, and business, as incident thereto.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit for infringement of a trade-mark. The bill was dismissed by the circuit court, (53 Fed. Rep. 493,) and complainant appeals. Affirmed.

John G. Johnson and Charles Barclay, for appellant.

Richard C. Dale, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. This is an appeal by Prince's Metallic Paint Company, a corporation of the state of Pennsylvania, from the decree of the circuit court, at final hearing upon full proofs, dismissing its bill of complaint, filed June 1, 1888, to restrain the defendant, the Prince Manufacturing Company, also a corporation of the state of Pennsylvania, from using the trade-mark "Prince's Metallic Paint." The court, expressing no positive opinion upon the question of right, based its decree mainly upon want of jurisdiction. Now, undoubtedly, as originally framed, the bill lacked the necessary averments to bring the case within the act of congress for the registration and protection of trade-marks used in commerce with foreign nations; but this defect was cured by appropriate amendments, which, it would seem, were not brought to the attention of the learned judge who heard the case. It is therefore incumbent upon us to consider the merits of the controversy.

The material facts are these: In the year 1858, Robert Prince, as the agent of his wife, Antoinette Prince, commenced the manufacture of metallic paint at Big Creek, in Carbon county, Pa., from iron ore—which he had discovered could be so used—mined from the property of his wife, a tract of about 44 acres of land in that county. The mill, which was also the property of his wife,

at which he manufactured the paint, was in the neighborhood of the ore bed. It was designated "Prince's Metallic Paint Mill." The product was called "Prince's Metallic Paint." He adopted as a trade-mark a label containing the words "Prince's Metallic Paint" in circular form, which he attached to the packages of paint so manufactured and sold by him. Mrs. Prince having died in 1859, thereafter, and until his own death, in November, 1870, Robert Prince, as executor of his wife's will, continued the business, but, from about 1866, in connection with Albert R. Bass, his son-in-law, who had become the owner of the equal undivided one-half of the mill, ore property, and business. Upon the death of Robert Prince, David Prince, as surviving executor of Antoinette Prince and individually, and Albert R. Bass and wife, formed a copartnership under the name of Prince & Bass to manufacture Prince's Metallic Paint, and they continued the business as before until the fall of 1871, when Bass purchased the interest of the estate and of David Prince, and became the sole owner and proprietor of the mill, ore property, and business. Bass continued the business until 1873, when a company was formed by him and others under the name of Prince's Metallic Paint Company, which, as an unincorporated association, carried on the business until 1875, when the company became incorporated under the same name, and to the corporation the mill, ore property, and business were transferred. In the year 1875 the corporation abandoned the old mill at Big Creek, and erected a new mill at Bowman's, several miles distant from the old mill, but nearer the ore bank, on a site then purchased by the company for the purpose. There it manufactured Prince's Metallic Paint until 1878, when it became insolvent and ceased to do business.

During this whole period of time the trade-mark "Prince's Metallic Paint," which Robert Prince had adopted, was used successively by all the above-named proprietors of said business and owners of the said properties which originally belonged to Antoinette Prince. Bass had given a purchase-money mortgage to David Prince, executor, covering the undivided one-half of the original mill and the ore property, and the other undivided one-half thereof was incumbered by a mortgage by Bass to one Heather. The new mill property was also incumbered by a mortgage. In the year 1878 all these mortgages were foreclosed, and the entire properties sold. About the same time the personal effects of Prince's Metallic Paint Company seem to have been sold upon execution, so that that company was deprived by judicial sale of all its tangible property. The sheriff's vendees of the new mill were Balliett and Meendsen. Shortly after he thus acquired title to the mill, Meendsen, who was a judgment creditor of Prince's Metallic Paint Company, caused an execution (plur. fi. fa.) to be levied by the sheriff of Carbon county upon the said trade-mark, which was particularly described in the sheriff's levy, and the same was publicly sold by the sheriff by virtue of said writ to Meendsen in November, 1878.

Early in the year 1879 the Prince Manufacturing Company, the defendant in this bill, was incorporated under the laws of Pennsylvania, A. C. and Robert Prince, sons of Robert and Antoinette Prince, and their wives, being corporators and principal stockholders. In May, 1879, this company acquired the title to the new mill property at Bowman's together with a transfer to the company of such title to the trade-mark in question as Meendsen took under the sheriff's sale thereof. This company also acquired the title to the undivided one-half of the old mill and the ore property which had been sold under the Prince purchase-money mortgage, and the right of possession and use of the other undivided one-half thereof from the sheriff's vendee of that interest. Very soon thereafter the Prince Manufacturing Company began the manufacture of Prince's Metallic Paint at the mill at Bowman's, using the said trade-mark, and it has ever since continued so to do without interruption. From the beginning of its business it has openly claimed the exclusive right to use the trade-mark, and in the year 1879 obtained an injunction against Bass to restrain him from using it upon a paint which he individually was then making With the exception of this brief use by Bass, the Prince Manufacturing Company was in the exclusive, and, so far as appears, the unquestioned, use of the trade-mark, until the year 1888, a term exceeding the statutory period of limitations. Its product was labeled and sold in the market as Prince's Metallic Paint. The company extensively advertised its paint by that designation. David Prince, the secretary of the company, testifies, without contradiction:

"We advertised it in every possible way we could through the company. We made the name prominent before consumers, large and small; so much so that the name of the paint was a great deal better known than the name of our company. * * * Our name was known comparatively only to the wholesale buyers, while the name of the article was known throughout the country to all consumers, wherever we could make it known."

It is shown that the company's business constantly increased from year to year, insomuch that whereas, prior to 1879 no one year's sales of Prince's Metallic Paint had exceeded 800 tons, the yearly sales by the Prince Manufacturing Company had run up to about 5,000 tons when this suit was brought. The officers of Prince's Metallic Paint Company undoubtedly knew from the first, and all along, that the Prince Manufacturing Company claimed and used the trade-mark as its own.

In the month of November, 1887, certain judgment creditors of the old corporation, Prince's Metallic Paint Company, caused to be issued writs of fi. fa., and, upon returns of nulla bona, alias writs, by virtue of which the sheriff of Philadelphia county, under the act of April 7, 1870, levied upon "the franchises and rights of the Prince's Metallic Paint Company' heretofore granted by the commonwealth of Pennsylvania," and in the succeeding January the sheriff sold and conveyed the same, together with "all trade-marks belonging to the said company," to one Richardson, who, with his

associates, in March, 1888, organized a new corporation, adopting as its name the old title, "Prince's Metallic Paint Company." This new corporation was the plaintiff below, and is here the appellant.

Shortly before this present suit was commenced, the Prince Manufacturing Company brought suit in the supreme court of the state of New York for the city and county of New York against Prince's Metallic Paint Company, (the appellant here,) to restrain it from the use of the trade-mark in question. The court at special term decided that the plaintiff had not established its title to the trade-mark and its right to the exclusive use thereof, and therefore dismissed the complaint. Upon appeal, however, the general term of the supreme court reversed the judgment, holding that the plaintiff had an exclusive title to the trade-mark. Prince Manuf'g Co. v. Prince's Metallic Paint Co., 15 N. Y. Supp. 249. But upon further appeal the order of the general term was reversed, and the judgment of the special term affirmed by the court of appeals, upon the ground, however, that the plaintiff (the Prince Manufacturing Company) had made a misuse of the trade-mark, in that it had applied the same to paints manufactured by it from ore taken from mines other than the original Prince mine. Prince Manuf'g Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 32, 38, 39, 31 N. E. Rep. 990. After stating that "this defense was set up in the defendant's answer," the court of appeals said:

"Whatever contradiction may be found in the record as to other facts, there is one which admits of no dispute, and that is that from 1858, the year in which the manufacture of metallic paint was established by Robert and Antoinette Prince, until the incorporation of the plaintiff in 1879, the label 'Prince's Metallic Paint' had been exclusively applied, first, by the originators of the article, and subsequently, after their death, by their successors in the business, to paint made from ore taken from the so-called original Prince tract of forty-four acres. * * * The label or trade-mark came to have a broader meaning than it originally possessed, and, when attached to packages of paint, indicated not only that the paint was made by Prince or his successors in business, but also that it was made from ore taken from the original Prince mine, and this latter indication constituted an important element of the good will of the business. * * * The plaintiff and its predecessors in the use of the label have by their conduct warranted the public in believing that the words 'Prince's Metallic Paint' meant metallic paint made by Prince or his successors from the ore of the Prince mine."

And at the conclusion of its opinion the court of appeals said:

"It is probable that the plaintiff has acted without any actual intent to defraud; but what it did upon the evidence and findings operated as a deceit upon the public, and this is sufficient to bar relief. The attitude of the defendant does not commend itself to a court of equity. Even if its right to use the label was established, it is aiding outside manufacturers to sell their goods under the label of the corporation. But we place our judgment on the inequitable use of the label by the plaintiff."

It is not pretended that in the manufacture of its paint the plaintiff in this bill (the appellant) uses ore taken from the old Prince tract. In fact, the plaintiff uses ore mined from other lands in that vicinity, through which the same vein of ore as that in the Prince tract extends. It manufactures its paint at Ruther-

ford & Barclay's mill, of which it has had a lease since December 1, 1890. At that mill, and out of the same ore, it makes paint, some of which is called and labeled "Prince's Metallic Paint," and is sold as such, and some of which is called and labeled "Rutherford's Metallic Paint," and is sold as such.

The plaintiff, it is contended, is precluded by the decision of the court of appeals of New York from asking an injunction here. The argument has great force. These two companies were the parties to the New York suit. The court had jurisdiction. The subject-matter of controversy there was this trade-mark. The court held that its use was limited to paint made from ore taken from the original Prince mine, and upon that ground, coupled with the fact that the Prince Manufacturing Company did not confine its brand to paint made from that ore, there was judgment in favor of the defendant, the present plaintiff. Enjoying the benefit of that judgment, it is not easy to comprehend what equity the plaintiff has, seeing its paint is wholly made from other ore.

Waiving, however, the question of estoppel, the plaintiff's title, for which it seeks the protection of a court of equity, is very far from clear. As between the two sheriff's sales of the trade-mark, (if, indeed, either had any efficacy,) much is to be said in favor of the earlier one. Appeal of Lusk, 108 Pa. St. 152, 157. But we strongly incline to the opinion that in 1878–79 the trade-mark "Prince's Metallic Paint" had become so localized—so identified with the Prince mine and the place of manufacture—that it was inseparable therefrom. There is sanction for this conclusion in the adjudged cases. Congress Spring Company v. High Rock Spring Co., 45 N. Y. 291, 302; Manufacturing Co. v. Hall, 61 N. Y. 226; Pepper v. Labrot, 8 Fed. Rep. 29; Kidd v. Johnson, 100 U. S. 617; Milling Co. v. Robinson, 20 Fed. Rep. 217. It was the judgment of the general term of the supreme court of New York, in view of everything, that the trade-mark passed as an incident of the property to the Prince Manufacturing Company with the possession of the works; and that conclusion is the logical deduction from the above-quoted declarations of the court of appeals.

But if the Prince Manufacturing Company was not clothed with a perfect title originally, the long acquiescence by Prince's Metallic Paint Company in the open and exclusive use of the trade-mark by the Prince Manufacturing Company, under a known assertion of right, and, at least, a color of legal title, is a bar to the equitable relief here sought. Assuredly, the new company (the plaintiff) has no greater rights than had the old company when its corporate franchises were levied on in November, 1887. But there had then been such acquiescence for more than eight years in the prosecution by the Prince Manufacturing Company of the business of making and selling Prince's Metallic paint. Its conduct of the business being marked by constant and successful efforts, by advertisement and otherwise, to extend the market for the article, and enhance its reputation, to take from the Prince Manufactur-

ing Company the trade advantages thence ensuing and give them to the plaintiff—the certain effect of an injunction—would be unconscionable.

Now, it is true that, where the plaintiff's title to a trade-mark is clear, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. Fullwood v. Fullwood, 9 Ch. Div. 176; McLean v. Fleming, 96 U. S. 245; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. Rep. 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. Creath's Adm'r v. Sims, 5 How. 192; Godden v. Kimmell, 99 U. S. 201; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. Rep. 350. Again and again has it been judicially declared that nothing can call into activity a court of equity but "conscience, good faith, and reasonable diligence." McKnight v. Taylor, 1 How. 161; Sullivan v. Railroad Co., 94 U. S. 806, 812. In McLaughlin v. Railway Co., 21 Fed. Rep. 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. Ashhurst's Appeal, 60 Pa. St. 290, per Strong, J. In Lewis v. Chapman, 3 Beav. 133, the master of the rolls refused an injunction to restrain the infringement of a copyright solely on the ground of six and a half years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. Browne, Trade-Marks, § 497. Hence, in Manufacturing Co. v. Garner, 55 Barb. 151, a delay of nine years in applying for an injunction to restrain infringement of a trade-mark was held to be good cause for refusing it.

Having regard to the whole case, viewed from every standpoint, our conclusion is that the plaintiff has not shown itself to be entitled to the interposition of a court of equity, and accordingly the decree of dismissal is affirmed.

LAKE ERIE & W. R. CO. v. BOARD OF COM'RS OF SENECA COUNTY et al.

(Circuit Court, N. D. Ohio, W. D. October 24, 1893.)

1. EMINENT DOMAIN—SECOND APPROPRIATION.
In Ohio the rule is well established that a second appropriation of lands formerly appropriated to a public use cannot be made when the second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use from the full and free enjoyment thereof.

2. SAME—DITCHES AND DRAINS—RAILROAD RIGHT OF WAY—POWER OF COUNTY COMMISSIONERS.
County commissioners in Ohio have no power, under the statutes authorizing them, under certain conditions, to appropriate lands for public ditches or drains, to construct a large ditch for a long distance upon a railroad right of way in such manner as would prevent the railroad company from constructing a side or double track, or from using the ground for other purposes essential to the full enjoyment of its corporate powers.

In Equity. Bill by the Lake Erie & Western Railroad Company against the board of commissioners of Seneca county, Ohio, William H. Schlosser, auditor, and William Collins, to enjoin them from constructing a ditch on complainant's right of way. On motion to dissolve a temporary injunction. Denied.

J. M. Lemmon, N. E. Hackedorn, and J. B. Cockran, for complainant.

George E. Schroth, for defendants.

RICKS, District Judge. This case is now before the court upon a motion to dissolve the temporary restraining order heretofore allowed upon the filing of the complainant's bill, restraining the commissioners of Seneca county from constructing a ditch upon the right of way of the complainant near the city of Fostoria. The complainant alleges in its bill that it is a corporation created by the laws of the state of Illinois; that it operates a railroad between the states of Ohio, Indiana, and Illinois, and is engaged in interstate traffic, and the transportation of the mails of the United States, and passengers and merchandise. It alleges that the city of Fostoria is a flourishing city, for which and from which it transports a large amount of freight and merchandise. It further alleges that near said place, upon its roadway, and within 12 feet of its main track, the defendants propose to deepen and widen a ditch which has already been in existence along said right of way for some time; that the defendants propose to make said ditch 1,150 feet long, chiefly on the southerly side of their right of way, and to be from 15 to 17 feet wide at the top, and from 5 to 7 feet deep; that the construction of said ditch so near the main track would endanger the permanency of its roadbed, increase the dangers of accident, and, in cases of the derailment of a train, make the loss of life and injury to property much greater than it otherwise would be. It avers further that the enlargement of said ditch

would make it necessary to remove the telegraph poles along its right of way, would make the maintenance and cleaning of said ditch an annual tax upon the complainant, and otherwise impair the stability of its roadbed and superstructure, and greatly increase the risks and hazards of operating its road.

Upon the filing of this bill a temporary restraining order was allowed. In due course of time the defendants filed an answer denying that the enlargement of said ditch would imperil the stability of the complainant's right of way or increase the perils attending the operation of its railroad. Said answer further avers that, owing to the peculiar character of the soil at the place where said ditch is to be constructed, the enlargement and deepening of the same would not make any impression upon the remaining part of the complainant's right of way. The answer further claims that a ditch of considerable size has been in existence along said right of way where the proposed ditch is to be constructed for a great many years. Affidavits in support of the averments of the bill and the answer have been filed by the respective parties.

From the averments in the pleadings, and from the affidavits filed, it seems to me very clear that the enlargement of the ditch as now proposed by the county commissioners would be a substantial invasion of the complainant's right to the public use of its property, which it acquired by virtue of condemnation proceedings taken under the statutes of the state of Ohio. The state, by its legislative acts and policy, has invested railroad corporations with the right of eminent domain, and authorized them to acquire lands for public uses against the will of the owners. No exceptions are made, and the purpose of the legislation is unmistakable. The land so condemned and appropriated is impressed with a public use and trust. It cannot be appropriated to another public use, and to defeat the original grant, unless the sovereign power of the state has expressly delegated that power to some public corporation. If we look to the statutes of the state, we find authority invested in county commissioners and township trustees, under certain conditions, upon certain terms, and after certain procedure, to appropriate lands for public ditches or drains. But this authority is limited. While the power to use lands appropriated for railroad purposes for the construction of county or township ditches is given to county commissioners and township trustees, yet the grant is not express or broad enough to show that the legislature ever contemplated that such second appropriation should be made under circumstances which would deprive the railroads of the right to use such lands for railroad purposes. It was never intended to deprive such corporations of the right or power to use the lands condemned and paid for by them for the public uses for which they were seized and appropriated. It was not intended to nullify the original grant by conferring upon a second public corporation the power to appropriate such lands to another and different use, without the consent of the original appropriator. The court of appeals of the state of New York (In re New York, L. & W. R. Co., 99 N. Y. 23, 1 N. E. Rep. 32) says:

"The general authority conferred upon railroad corporations to acquire lands against the will of the owner is broad and comprehensive. In terms, it covers all and excepts none. But because it could not be contended that the state, having authorized one taking, whereby the lands became impressed, under authority of the sovereign, with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use, unless it so specifically decreed. Were the rule otherwise, this evil would result: a corporation (No. 1) having the right of eminent domain takes land from a similar corporation, (No. 2,) having the same right; No. 2 thereupon proceeds again to condemn it for its own use, and No. 1 retallates, and so the absurd process goes on."

But defendants' counsel call the attention of the court to several cases in Ohio where it is claimed the right to appropriate railroad lands for other public uses is upheld. The most important case to which reference is thus made is in 48 Ohio St., 273, 27 N. E. Rep. 464, the case of Cincinnati, S. & C. R. Co. v. Village of Belle Centre. In that case the land sought to be appropriated by the village was a lot acquired by the railroad company for depot purposes. The proof on the trial of the condemnation proceedings in the probate court failed to show that the property wanted by the village for a street was used or needed by the railroad company for public uses. The appropriation was therefore directed to land not a part of the railroad right of way, not necessary for tracks or side tracks, and not used or needed for the safe and necessary operation of the road. The supreme court put the power of the village to appropriate it upon the fact that the public use for which it was wanted was not inconsistent with that to which it was first dedicated. The court, referring to cases in which a second appropriation by a municipal corporation can be sustained, distinctly says:

"The criterion in all cases being whether such appropriation is reasonably consistent with the use to which the property has been subjected by the railroad company, and whether it is so consistent may in each case become a question of fact."

In the case of Little Miami, C. & X. R. Co. v. City of Dayton, 23 Ohio St. 510, the supreme court said:

"Land appropriated to a particular public use is not thereby withdrawn from the liability to be taken by legislative authority in the exercise of the power of eminent domain for another public use; but a subsequent grant cannot be construed to authorize subversion of the former use, unless such appears, by express words or by necessary implication, to be the legislative intent."

In the case cited in 19 Ohio St. (Iron R. Co. v. City of Ironton, p. 299) the only question decided by the court was that the Iron Railroad had no more right to claim ground along the river front in Ironton for wharf purposes than any other appropriator; that it was not authorized to hold wharf property for its exclusive use, as it was its right of way; and that, therefore, the city might appropriate to wharf purposes land held by the railroad the same as though held by private persons.

It will be seen, therefore, from these authorities, that in Ohio the doctrine is well established that a second appropriation of lands formerly appropriated to public use cannot be made when the

second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use from the full and free enjoyment thereof. Conceding that legislative power has conferred upon municipal corporations the right to extend streets across a railroad's right of way, conceding that it has extended to county commissioners the right to extend highway crossings over a railroad's right of way, conceding that it has conferred the same authority upon township trustees, it must nevertheless also be conceded that in neither of these cases can the power conferred be exercised so as to deprive the railroad company of the full and free use of the property first condemned by it for railroad purposes.

Under the facts in this case it is very clear that the ditch which it is now proposed to construct upon the right of way for 1,150 feet near the city of Fostoria cannot be placed there without a substantial impairment of the complainant's roadbed. A ditch so constructed would deprive the complainant company of the power to build a side track over the same ground, would prevent it from constructing a double track along the same ground, would prevent it from using said ground for other purposes essential to the full enjoyment of its corporate powers. I do not think it is necessary at this stage of the case for me to determine whether or not the construction of said ditch would increase the hazard of operating the complainant's road. There is strong testimony tending to support such a claim. It is sufficient, however, for me for the present to find that the construction of said ditch would deprive the complainant of the full enjoyment of the lands which it has appropriated under the laws of the state for public purposes, not only for present use, but for future probable use, and that, therefore, it ought not to be permitted.

The motion to dissolve the temporary injunction will be denied.

INTERSTATE COMMERCE COMMISSION v. TEXAS & PAC. RY. CO.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

1. CARRIERS—INTERSTATE COMMERCE LAW—DISCRIMINATION—OCEAN COMPETITION.

   Under sections 2 and 3 of the interstate commerce law (24 Stat. 379, 380,) the mere fact of the existence of ocean competition (assuming that such competition may in some cases and in some degree warrant a difference in rates) will not justify a railroad company's rates for carrying merchandise from New Orleans to San Francisco which comes to New Orleans from domestic points, which rates are treble, and in some cases four times, the rates charged for carriage of like kinds of merchandise from New Orleans to San Francisco which reach New Orleans from foreign ports, although such lower rates constitute the only condition on which the carrier can obtain any part in such foreign traffic. 52 Fed. Rep. 187, affirmed.

2. SAME—CIRCUIT COURTS—ENFORCING INTERSTATE COMMERCE COMMISSIONERS' ORDER.

   The circuit court should enforce an order of the interstate commerce commission forbidding any discrimination in rates, even though some

discrimination might be justifiable, when it appears that the rates actually charged are unlawful, and the carrier makes no showing as to what would be a lawful discrimination in view of the circumstances.

3. SAME—PARTIES—JOINT RATES.
An order of the interstate commerce commission, made against two railroad companies in respect to a joint rate, in a proceeding to which both were parties, may be enforced by a circuit court against one of the companies which is within its jurisdiction, although the other is without its jurisdiction, and cannot be made a party. 52 Fed. Rep. 187, affirmed.

4. FEDERAL COURTS—JURISDICTION—DOMICILE OF RAILROAD COMPANY.
In the absence of any charter provision on the subject, the principal office and domicile of a railroad corporation, for the purposes of suit in a federal court, is in the district where its stockholders' and directors' meetings are held, where the records thereof are kept, together with the stock certificate book, and where the principal officers have their offices, rather than in a different district, where the general administrative offices of the heads of departments are located.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Application by the interstate commerce commission to enforce an order made by it against the Texas & Pacific Railway Company forbidding discrimination in freight rates. The petition was granted by the circuit court, (52 Fed. Rep. 187,) and the respondent appeals. Affirmed.

Winslow S. Pierce and David D. Duncan, for appellant.

John D. Kernan and Edward Mitchell, U. S. Dist. Atty., for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On March 23, 1889, the interstate commerce commission made, not upon contention of parties, a general order, which, among other things, provided as follows:

"Imported traffic transported to any place in the United States from a port of entry, or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

This order was quite generally obeyed by those railroad companies and their connecting lines which carried imported goods westward from the northern Atlantic seaboard. At least six railroad companies ceased, after said order, their previous practice of discrimination in favor of imported traffic. On June 19, 1889, the commission filed its decision in regard to export rates in the case of New York Produce Exchange v. New York Cent. & H. R. R. Co., 3 Inter St. Commerce Com. R. 137. The opinion shows that the "trunk lines," so called, had, "under resolutions of their association, made through export rates, of which the inland proportion accepted by them was, at the port of New York, often ten cents or more per hundred pounds less on like traffic than the published tariff rates charged at the same time to the same port." It was held "that the discrepancy between the proportion of the through rate accepted and the established tariffs for seaboard consignments for

the same inland carriage is not shown to have been justified by any circumstances tending to show that it was just or proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port," and that "the only practicable mode yet devised for making through export rates, as appears by past experience, is to add to these established inland rates from the interior to the seaboard the current ocean rates." This decision was confined to export rates at the port of New York, but, as thus made, was of almost national importance. It is believed that the railroad companies which were parties to the litigation complied with the order of the commission.

In this state of the general railroad policy which had been established by the commission in regard to rates which discriminated in favor of either import or export traffic against inland traffic, the New York Board of Trade and Transportation filed before the interstate commerce commission, on November 29, 1889, a complaint against the Pennsylvania Railroad Company and its connecting western railroad companies, charging, in substance, that these corporations were, in violation of the act to regulate commerce, guilty of unjust discrimination, in that, for the transportation of property to Chicago and other western points, which was delivered to them at New York or Philadelphia by vessels or steamship lines from foreign ports, under through bills of lading, they were charging rates 50 per cent. lower than for the like and contemporaneous service rendered to property delivered at New York or Philadelphia which did not arrive from foreign ports. Subsequently, the San Francisco Chamber of Commerce became a party complainant, and divers other railroad companies, among them the Texas & Pacific and the Southern Pacific Railroad Companies, were made parties defendant, until 28 companies were defendants. This complaint was apparently brought to compel universal obedience to the order of March, 1889. The commission dismissed the complaint as to 18 defendants and found that its averments were true as to 10 defendants, among which were the Texas & Pacific and the Southern Pacific Companies, and as to said defendants ordered, on January 29, 1891, that each of them, on and after May 5, 1891, cease from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, which order was duly served upon the Texas & Pacific Railroad Company.

On or about January 18, 1892, the commission brought its petition against said company before the circuit court for the southern district of New York, alleging that it had willfully violated said order by charging, collecting, and receiving freight rates which had been declared to be illegal, and by way of specification the petition alleged that the offending and also the regular inland rates were shown in a table annexed to the petition, marked "Exhibit 36."

The findings of fact by the commission upon the original complaint were made part of the petition. The prayer of the petition was for an injunction against further disobedience of the order. The defendant's answer denied that its principal office was in the state of New York. It denied no other allegations of fact, but denied that the order was a lawful order. It stated that the rates which were complained of were, so far as they were made for inland carriage, the joint rates over its railway and the Southern Pacific Railway, and cover the carriage by the rails of the defendant from New Orleans to El Paso, Tex., and by the rails of the Southern Pacific road from El Paso to San Francisco. The answer admitted that it charges, demands, collects, and receives, and has since the date of the order charged, demanded, collected, and received, rates for the transportation of commodities from Liverpool and London via New Orleans and said two railways to San Francisco, and also from New Orleans via the same route to the same destination, substantially as stated in Exhibit 36. Its reason for a discrimination in inland rates between foreign and domestic merchandise will be stated hereafter. The answer further said that the order affected its rates from London, Liverpool, and other European points to Missouri river points, but that these rates became so low that it had canceled its tariff, and was charging on such business as it received, destined from Europe to the Missouri river, the local rates from New Orleans. The answer further stated that the order also affected its rates of transportation on articles from Europe to towns in Texas and Colorado. No testimony was taken before the circuit court. The case was heard upon petition and answer, and an injunction was directed against the defendant in accordance with the prayer of the petition. From this decree the defendant has appealed to this court.

Exhibit 36 shows a very marked discrimination in rates from New Orleans to San Francisco between those charged upon merchandise shipped by through bills of lading from Liverpool to San Francisco and those charged upon the same kind of goods delivered to the defendant at New Orleans from places in this country for transportation to San Francisco. For example, the through rates from Liverpool to San Francisco, per 100 pounds, on books, shoes, carpets, cashmeres, cutlery, and woolen goods were $1.07, of which the railroads received for carriage from New Orleans to San Francisco 80 cents; while upon the same classes of goods received from points in this country at New Orleans the rates for carriage from New Orleans to San Francisco, per 100 pounds, were as follows: Upon books and carpets, $2.88, upon shoes, cashmeres, cutlery, and woolen goods, $3.70. The finding of facts by the commission shows that in 1889 the importations of the Texas & Pacific Railway were about 5,000,000 pounds, of which about 2,500,000 pounds went to Missouri river points, about 2,000,000 pounds to the Pacific slope, California terminals, and Oregon points, and the remainder was distributed mostly in Colorado and Utah, while a little of it went to Texas. As the defendant is charged with a violation of the order only with respect to

its rates to California terminals, it is necessary to state no other facts than those which related to that part of its business. The through rates from Liverpool to San Francisco are controlled by the competition at Liverpool and London of steamships connecting with railroads across the Isthmus of Panama, and in a small degree, with respect to cheap heavy goods, of sailing vessels around Cape Horn. The defendant carries import traffic at the reduced rate to California terminals only. To intermediate points the regular inland rates are charged. This traffic is taken at the reduced rate, because, unless so taken, the defendant would, by reason of the competition, lose the business which it is expected will increase. The defendant places the dissimilarity of conditions between the transportation of imported and domestic goods solely upon this ocean competition. There is apparently no other reason why the inland rates should not be applied to all business, both domestic and foreign. No finding was made as to the profit upon the San Francisco business. There was a profit, when the case was heard before the commission, upon the Missouri river business. It was found that the Southern Pacific proportion of the through rate would not, in the absence of competition, be a full and fair return for the transportation service rendered. It gave the road something more than the actual cost of the movement of the freight.

The commission contended that upon these facts the defendant had violated the second section of the act to regulate commerce, which prohibits unjust discrimination in the compensation charged for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and had also violated the third section, which prohibits any undue or unreasonable preference or advantage to any particular description of traffic. The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute. The commission was of opinion that this class of dissimilar conditions was not in the contemplation of the statute, and was not to be regarded in the regulation of inland tariffs of rates. Its language was as follows:

"These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the states of the American Union by rail carriers; but, as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States, or a port of entry of an adjacent foreign country destined to a place within the United States, should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States, over the same line, and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute; and no other power but congress can create such exceptions in the exercise of legislative authority."

It further said:

"Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports. It also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event, upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preference must be given to it in carriage or facilities of carriage of that freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise, thus brought from a foreign port, is not a circumstance or condition under the operation of the act to regulate commerce which entitles it to lower rates, or any other preference, in facilities and carriage, over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States, for the same distance, and over the same line."

Its conclusion was that foreign and home merchandise, "under the operation of the statute, when handled and transferred by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges, and treatment for similar services rendered."

This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration under the operation of the statute, is an exceedingly important one, whose ultimate decision may have a wider influence upon the interstate commerce of the country than we can foresee. This legal question was not discussed in the export rate case, which was treated "as one of practical policy." We are not disposed to pass authoritatively upon this question, except in a case which demands it, and in which the effect of this construction of the statute is naturally the subject of discussion.

This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between the same points to an undue disadvantage. The same conditions exist between New Orleans and San Francisco, with reference to each class of goods. There was no "difference in cost, expense, or the exceptional character of the service." The only reason which induces the defendant to take the import business is competition in Great Britain between water routes, which drives it to carry an imported case of cutlery for 80 cents per hundred pounds, when it requires a hundred pounds

of domestic cutlery to pay $3.70 for the same carriage. Assuming that ocean competition can create a dissimilar condition, which is to be considered in determining whether discriminations against particular classes of traffic are unjust, and is a fact to be taken into account in determining whether a particular traffic is subjected to an unreasonable disadvantage, (Phipps v. Railroad Co., [1892] 2 Q. B. 229,) does this condition justify the great disparity in rates in this case? While it is true that under sections 2 and 4 of the statute substantially dissimilar conditions may justify dissimilarity in rates, it does not follow that any dissimilar condition, of whatever kind it may be, justifies any discrepancy in rates. Gross inequality shows either that the road which makes the inequality is unjust to itself in carrying goods without profit, "or else the larger rate gives an unwarranted return for the services rendered." Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co., Inter St. Commerce Decisions, Dec. 30, 1892. In this case it may fairly be presumed that the joint rates gave each road something more than the cost of movement, leaving repairs, interest upon floating debt, and all fixed charges to be paid by the rates upon some other traffic. The rates were not entirely unremunerative, and, if so, the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return. Exhibit 36 cannot be examined, in the light of the admitted facts of equality of conditions from the port of New Orleans, without the conviction that, unless the defendant is injuring itself by its rates upon imported goods, it is imposing an exceedingly high rate upon domestic goods. It is true that a person who pays only a fair price for a service cannot justly complain merely because another pays too little for the same service, (Garton v. Railroad Co., 1 Best & S. 112,) but this general truth does not meet the conditions of this case, which are of such inequality that the larger rates must be found to be excessive. It has been justly said by the commission that rates should not only be reasonable, but be relatively reasonable, and thus not become unjust in their results. Boards of Trade Union v. Chicago, M. & St. P. R. Co., 1 Inter St. Commerce Com. R. 215. It follows that the conduct of the defendant was in violation of sections 2 and 3 of the statute in question, and was properly attempted to be corrected by the order which was disobeyed.

But it will be urged that, if it is assumed that ocean competition can create a dissimilar condition, it follows that it is a condition which may rightfully be regarded in establishing rates for import and domestic traffic, and that the order of the commission which directed equality should not be enforced, because some inequality might be justifiable. The accusation against the railroad companies in the original complaint before the commission was not that they were charging too low rates upon import traffic, but that by these relatively excessive rates upon domestic traffic they were unjustly discriminating against the latter. The underlying question which arises upon the petition to the circuit court is the same. The defendant's answer before the commission averred that its "domestic rates are fair and reasonable in themselves." In its

answer to the petition it omits this averment, does not justify its rates upon domestic traffic, and does not state, if a reduction should be made, what excess of rates could properly be placed upon that kind of traffic; but defends the existing difference in rates solely upon the ground that if it charged higher rates upon the import traffic it would lose that class of business.

The final question before the circuit court was: "Is the order of the commission a proper one, and should obedience to it be insisted upon?" In order to decide that question, the answer presented two questions upon the subject of rates: (1) Can ocean competition be regarded, in any event, as creating a dissimilar condition? (2) If it can, is the difference in the existing rates justified by that condition? A third question might have been, but was not, presented, viz. in the event that the first question is answered in the affirmative, and the second is answered in the negative, does the dissimilar condition justify any, and, if so, what, dissimilarity in rates? To answer this question the court should have been informed in regard to the reasonableness of existing rates upon domestic traffic. This court is of opinion that, assuming that the first question can be answered in the affirmative, the second must be answered in the negative, and that an unfair inequality of rates is plainly manifest. There is nothing in the record which enables the court to determine that the assumed dissimilar condition justified any substantial dissimilarity in rates, and it ought not to permit disobedience to an order until it can suggest a better one as a substitute.

The defendant's apparent position that, inasmuch as substantially dissimilar conditions create dissimilarity in rates, the amount of dissimilarity in rates is not important,—cannot be sustained. That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make, is not true. To set aside the order of the commission, and permit the present excessive inequality of rates, in the absence of any attempt to show the reasonableness of the inequality, would not accord with justice.

Two objections which have been taken by the defendant to the jurisdiction of the court remain to be considered. Section 16 provides that in case of the disobedience of a common carrier, which is subject to the provisions of the act, to a lawful order of the commission, the latter can apply for an injunction by petition to the circuit court sitting in equity in the judicial district in which the carrier has its principal office, or in which the disobedience of such order has taken place. This petition was brought in the southern district of New York, upon the ground that the principal office of the defendant was in the city of New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the company shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the president, first vice president, secretary, and treasurer of the company, and where the stock certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus

the domicile of the corporation, and the principal office, while the general or administrative offices of the heads of departments are in Texas.

It is also contended that, inasmuch as the rates upon import traffic were joint rates with the Southern Pacific Railway Company, and as any order of the circuit court requiring the defendant to desist from carrying business upon such joint rates would abrogate contracts and agreements to which said company is a party, it is a necessary party to the petition. It is true that in proceedings before the commission to test the legality of through rates, the commission, which has the power to make other common carriers parties, irrespective of their places of residence, has insisted upon the necessity of bringing in all the corporations which make the rates, and has said "They must be brought in—First, because they have a right to be heard; and, second, because an order made and purporting to control their action when they were not parties would be improper on its face, and in a legal sense ineffectual." Allen v. Railroad Co., 1 Inter. St. Commerce Com. R. 199. In the proceeding before the commission the Southern Pacific Railway Company was a party. The present proceeding is a petition to compel obedience to an order, made upon hearing, and presumably correctly made, which is brought before a circuit court whose jurisdiction over parties is limited and controlled by statute. The circuit court for the southern district of New York has no jurisdiction over the Southern Pacific Railway Company, whose principal office is not in that district. Neither would a circuit court in any one district in which the violation was committed, in Texas or Louisiana or California, probably be able to obtain jurisdiction over both the railroad companies which made the rates. The proceeding before the circuit court should not be rendered impossible in the event of its inability to obtain jurisdiction over all the disobeying companies which have united in making through rates, and inasmuch as the proceeding is to enforce an order already made, after hearing all the parties in interest, the presence of all the parties who have jointly disobeyed is not necessary or indispensable.

The decree of the circuit court is affirmed, with costs.

POURIER et al. v. BARNES. CHIPPEWA CO. v. WARNER. SAME v. RUTAN. SAME v. COFFIN. SAME v. PIPER. SAME v. WEBSTER.

(Circuit Court, D. Minnesota. October 18, 1893.)

PUBLIC LANDS—SOLDIERS' ADDITIONAL HOMESTEAD RIGHTS—ASSIGNABILITY.

The right to enter a soldier's additional homestead under Rev. St. § 2306, is an absolute right, not subject to the restrictions of the homestead act, and is assignable before entry made. Anderson v. Carkins, 10 Sup. Ct. Rep. 905, 135 U. S. 483, distinguished.

In Equity. Suit by Camille Pourier, Albert Pourier, Louis Rouchleau, Byron G. Segog, Becker Svendson, Samuel A. Siverts, Emma Bjoraker, and Anna M. Costello, Richard A. Costello, and John

T. Lucas, executors of the estate of John J. Costello, deceased, against Francis A. Barnes, to determine adverse claims to vacant lands. Decree for complainants.

Statement by NELSON, District Judge:

This action is instituted under the laws of the state of Minnesota for the purpose of determining adverse claims to the following tracts of land: The N. ½ of the S. W. ¼, section 5, and the S. E. ¼ of the N. E. ¼ of section 6, all in township 62 N., range 14 W. of the fourth principal meridian, the same being vacant and unoccupied. Defendant denies plaintiffs' ownership, and alleges title in himself.

The facts are that on February 10, 1880, Louisa Dryer executed and delivered to one James A. Boggs a power of attorney, whereby he was authorized to sell and convey, as he saw fit, any lands which she then owned, obtained by her as an "additional homestead" under section 2306, Rev. St. U. S., or that she might acquire under said act. The power of attorney further provided that Boggs should receive for his own use and benefit the proceeds of the sale of such lands, and all claim to the same was expressly released to him by Louisa Dryer. Power of substitution was also given to Boggs, and for a valuable consideration the power was made irrevocable. The lands referred to therein are those above described. The power of attorney was duly recorded in the office of the register of deeds for St. Louis county, Minn., January 11, 1888. On January 5, 1888, Louisa Dryer entered the lands above described in pursuance of section 2306, Rev. St. U. S., and the receiver's receipt for said entry, which was duly recorded in the above-mentioned office June 11, 1888, is as follows:

"Final Receiver's Receipt No. 1,354.

"Application No. 3,938. Homestead.

"Receiver's Office, Duluth, Minn., Jan'y 5th, 1888.

"Received of Louisa Dryer the sum of three dollars —— cents, being the balance of payment required by law for the entry of S. E. ¼ of N. E. ¼ of Sec. 6, and N. ½ of S. W. ¼ of section 5, in township 62 N. of range 14 W., containing 120 acres, under section 2306 of the Revised Statutes of the United States. C. P. Maginnis, Receiver."

On January 5, 1888, Boggs as the attorney in fact for Louisa Dryer, and in pursuance of the power of attorney, executed and delivered on her behalf certain warranty deeds purporting to convey, for a valuable consideration, an undivided one-fourth interest in the lands above described to each of the following persons, viz. Joseph Le Page, John J. Costello, Camille Pourier, and Albert Pourier, all of which deeds were duly recorded in the office of the register of deeds for St. Louis county, Minn., on the 11th day of January, 1888. The interest of Joseph Le Page in the real estate so conveyed to him has passed, by duly-executed deeds of conveyance, to the complainants Louis Rouchleau, Byron G. Segog, Becker Svendson, Samuel A. Siverts, and Emma Bjoraker. On September 2, 1888, a patent issued to Louisa Dryer for the lands described in the receiver's certificate, which was duly recorded in the office above named for St. Louis county, Minn. In 1890 and 1891 the heirs at law of Louisa Dryer, deceased, conveyed by quit-claim deed all the premises above described to Francis A. Barnes. The title of complainants to the land in controversy rests entirely upon the validity of the power of attorney executed by Louisa Dryer to Boggs, and the question is thus presented whether or not that power is valid under the statutes relating to additional homesteads.

Alfred Jaques, Theo. T. Hudson, and Draper, Davis & Hollister, (J. H. Chandler, of counsel,) for complainants.

D. H. Twomey and Page Morris, for defendant.

NELSON, District Judge, (after stating the facts.) Conceding that the instrument executed by Louisa Dryer to Boggs gives, not

only the right to sell and convey the land after location, but includes also an assignment of the right to enter the additional land under section 2306, the question arises, is that right assignable? The answer must be that it is, unless the power so to do is expressly or impliedly restrained. The original homestead act of May 20, 1862, required occupation, an oath of exclusive use and benefit at the time of entry, and of nonalienation at the time of final proof. April 4, 1872, an act was passed, the second section of which gave additional homesteads to soldiers, and as first enacted it seemed to indicate that the entry of the additional homestead must be made in accordance with the provisions of the act of 1862, above referred to. This section was amended June 8, 1872, and subsequently March 3, 1873; and if we look at the history of this legislation, and examine the original act and amendments thereto, (contained in 17 Stat. 49, 333, 605,) it seems clear that the right to enter additional land was given to the soldier as a gratuity. As said by Judge Brewer in Mullen v. Wine, 26 Fed. Rep. 206.

"Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts simply to this: In view of what has been done, congress makes this gift. It places no restriction on the donee, but leaves him to use the gift as he sees fit."

I think the amendment of March 3, 1873, which is section 2306, Rev. St. U. S., granted the absolute right to the extra land, to be taken, not necessarily contiguous to the original homestead, nor subject to the restrictions of the homestead act, and was tantamount to the right formerly held by the holder of a land warrant. Nothing had to be done to perfect it, and it was therefore the subject of sale. It seems to me that to ingraft the restrictions in the homestead act of 1862, as modified by the first section of the act of 1872, upon section 2306, would tend to defeat the legislative will, for the terms of that section are plain, and the rule established in such cases is that, where congress enacts a plain provision without limitation, no limitation can be imposed by the court.

Counsel for defendant assert that the power of attorney to Boggs is in contravention of the laws of the United States, and is against public policy. It is difficult to see how that can be, in the absence of restrictive or prohibitory legislation. An individual owning property, or a right to property, necessarily has the power of alienation; and public policy rather favors the theory that a man may do what he chooses with his own, unhampered by restrictions or hindrances. As said by the supreme court of Wisconsin in Knight v. Leary, 54 Wis. 459, 11 N. W. Rep. 600:

"It is sufficient to say that the law does not favor restraints upon alienation, and nothing short of a positive provision to that effect will justify the court in holding that a statute imposes such restraints."

I find nothing in the case of Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. Rep. 905, cited by counsel for defendant, conflicting with the view taken by me in this case. There the question arose

under the homestead law proper, and the affidavits required by law seem to forbid alienation before the homestead title is perfected.

Entertaining these views, without any further discussion of the question, I am of the opinion that the complainants are entitled to a decree. Let an order be entered accordingly.

Mem. The several cases of Chippewa Company v. Amos L. Warner, Andreas M. Rutan, Herbert W. Coffin, Charles W. Piper, and Alfred F. Webster, defendants, are controlled by this decision, and a decree in each of those cases will be entered for the complainant.

HATCH v. FERGUSON et al.

(Circuit Court, D. Washington, N. D. October 6, 1893.)

1. INDIANS—CITIZENSHIP—RIGHT TO SUE IN FEDERAL COURTS.
   An Indian woman who marries a citizen of the United States, voluntarily takes up a residence apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides, and may maintain a suit in the federal courts against citizens of other states.
2. EQUITY—DEEDS—CANCELLATION.
   A deed made by an attorney in fact of an Indian woman, who, though illiterate and unable to converse in English, is yet possessed of a good understanding, and is capable of acting independently, will not be set aside on the ground that she was imposed upon, and induced to give the power without knowledge of its effect, even if voidable for this reason, when it appears that the sale was to the promoters of a town-site company for a price largely in excess of the value of the land at the time; that she made no attempt to repudiate the sale, but accepted and used for her own benefit the purchase money, voluntarily delivered possession of the land, and, although the purchasers were making large expenditures on the property, and it was rising rapidly in value, made no claim until it had increased many fold, and until a lawyer sent by one of her friends had consulted her.
3. SAME.
   The mere fact that she still retains the legal title to the land by reason of the issuance to her of a patent from the United States, after the conveyance made by her attorney in fact, will, under the circumstances, give her no right to equitable relief.

In Equity. Suit by Josephine Hatch, an Indian woman, against E. C. Ferguson, Henry Hewitt, Jr., and the Everett Land Company, to determine adverse claims to land upon which the city of Everett is in part located, and to annul a deed conveying her title to said land, executed by said Ferguson as her attorney in fact. Dismissed.

A. D. Warner, Stratton, Lewis & Gilman, Junius Rochester, and W. Scott Beebe, for complainant.

Francis C. Barlow and Brown & Brownell, for defendants.

HANFORD, District Judge. The complainant is an Indian woman, born within the United States, and is the widow of Ezra Hatch, who was a citizen of the United States. Although she is

an illiterate person, and unable to converse in the English language, the evidence shows that upon her marriage she voluntarily took a residence apart from the tribe to which she belonged, and adopted the habits of civilized life, by reason of which fact and her marriage to a citizen she is entitled to the same rights as other female citizens. Supp. Rev. St. (2d Ed.) p. 536, § 6. Being a citizen of the United States and a resident of the state of Oregon at the time of the commencement of this suit, she is also a citizen of the state of Oregon, and entitled to prosecute this suit in this court against the defendants, who are citizens of the state of Washington.

The object of the suit is to obtain a decree canceling certain deeds affecting the title to a tract of 160 acres of land, situated within the limits of the city of Everett, in this state, enjoining the defendants from claiming any interest in said land, and declaring the complainant to be the true owner thereof. The history of the title which is the subject of controversy, in so far as material to the determination of this case, is as follows: The said Ezra Hatch, under the homestead law of the United States, with his family, consisting of the complainant and their children, settled upon and claimed said land in the year 1886, and did continuously reside upon and claim the same as a homestead until the time of his death, which occurred in July, 1890. During his last illness, being in need of money, and being assured by a neighbor that, if he would commute said homestead, and perfect his title thereto, by a cash entry, he could then sell said land to a person who was ready to buy it, for the price of $1,500 besides the amount necessary to pay the government price and all expenses of proving up, said Ezra Hatch initiated proceedings to perfect his title in that manner by causing the requisite notice of his intention to prove up to be published, but his death occurred before the time fixed in said notice for making the final proof and payment. By his last will and testament, said Ezra Hatch constituted the defendant E. C. Ferguson his executor, with authority to manage his estate and settle up his affairs, free from the control of the probate court, and without giving bonds, and also appointed said Ferguson to act as guardian of his minor children until they should each become of age or choose another guardian. That part of said will which makes disposition of the estate reads as follows:

"I give and bequeath to my daughter, Esther Hatch, and to my sons, Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch, all my estate, real and personal, of every name and nature whatsoever, owned by me at the time of my death, after paying all of my just debts and the admitting of this, my last will, to probate, and the sum of five dollars hereinafter bequeathed to my wife, Josephine Hatch; said estate being the one-half interest in the community property now owned by me and my said wife, from which I bequeath to my said wife the sum of five dollars, and it is my wish and desire that my said daughter and sons share and share alike in my said estate."

Said will was duly admitted to probate in the probate court for Snohomish county, and letters testamentary were issued to said Ferguson, July 22, 1890. Within a few weeks after the death of

her husband, the complainant, without consulting Ferguson, or being influenced by either of the defendants to take such step, caused a notice to be published of her intention to make final proof and entry of said land, in her right as widow of the deceased homestead claimant. She had at that time no money for the purpose, and had made no definite arrangement to borrow the necessary amount, but seems to have relied upon a neighbor to supply or obtain it for her. After giving such notice she went to see Ferguson, and had an interview with him, at his solicitation, in which he advised her to not borrow the money, giving as a reason that those upon whom she was depending were liable to disappoint her, or, if she mortgaged her land, she would be unable to pay interest, or raise money to discharge the debt, without sacrificing the property, and he also assured her that he would advance money to her for the purpose. After said interview Mrs. Hatch seems to have relied upon Ferguson to supply the money necessary to perfect the entry, and on September 19, 1890, she went before the county clerk of Snohomish county with her witnesses, and made the final proof. Ferguson was not present at the time this was done, but met her in Snohomish city on the evening of the same day, and made provision for her and her children to remain at a hotel that night; and on the following morning he obtained from her a power of attorney, which will be hereafter referred to. Two days after obtaining the power of attorney, Ferguson advanced $240 to pay for the land and fees; and on September 26, 1890, the proofs were filed and payment made in the United States land office at Seattle. On November 16, 1891, a patent for said land was issued to the complainant. Besides the said homestead claim, the estate of Ezra Hatch consisted of 160 acres of land in an adjoining section, to which he had acquired title by the location thereon of a land warrant issued to him for services in the United States navy during the Mexican War, (which land is also the subject of a kindred suit now pending in this court,) and personal property of trifling value. The two tracts of land are similar to each other as to situation, quality, and value, and until the scheme of building the city of Everett had taken definite form said lands were not worth to exceed $10 per acre. The most valuable timber had been sold and removed, and the family were unable to obtain any income from said land otherwise than by selling it. In the summer and fall of 1890 the defendant Henry Hewitt, Jr., was engaged in buying land in the vicinity of the Hatch lands, as agent for a syndicate having in view the founding and building of a city, in furtherance of which purpose the Everett Land Company, one of the parties defendant herein, was incorporated, a city was laid out upon the lands purchased by Hewitt and his subagents, and large sums of money have been laid out in the improvement of streets, the erection of buildings and industrial works, and in the construction of railroads. In consequence of said expenditures and operations, land in and about the said town site rose in value very rapidly during the last few months of 1890 and the year 1891. On the 21st of October, 1890, the defendant Ferguson, under the power of attorney given him

by the complainant, executed a deed to the defendant Henry Hewitt, Jr., of all her right, title, and interest in and to both tracts of land,—that is to say, the said homestead claim, and the 160-acre tract acquired by the location of said land warrant, which tract, for convenience of reference, has been designated in the evidence as the "Old Place,"—and received in payment from Hewitt $2,000 in cash, and took a mortgage back to secure a future payment of an additional sum of $2,000; said defendants having agreed together that said Hewitt should purchase the said interest, which they at the time supposed to be an undivided one-half of both tracts, for a price computed at the rate of $25 per acre for the entire property. The balance of said purchase price was afterwards paid to Ferguson, and said mortgage was canceled by him, as attorney in fact for the complainant. Since this suit was commenced, the defendants have been advised that the complainant acquired the said homestead in her own right, and that by said deed the whole title passed to said Hewitt, and he has paid to Ferguson an additional $2,000 to make up the full purchase price at the rate of $25 per acre. After obtaining said deed, the defendant Hewitt and his wife executed a deed for the homestead to one P. D. Norton, who afterwards conveyed it to the Everett Land Company, for the price of $128,000.

October 27, 1890, Hester Hatch, an adult daughter of the complainant, and said Ezra Hatch, (called "Esther Hatch" in her father's will,) executed a deed to the defendant Henry Hewitt, Jr., conveying all her undivided interest in both of said tracts for the price of $800. The defendant Ferguson negotiated said sale, and received the purchase money, as her agent. A suit to cancel said deed has been commenced by said Hester Hatch, and the same is now pending in this court. In April, 1891, the defendant Henry Hewitt, Jr., commenced proceedings in the superior court of Snohomish county against the minor children of the complainant and Ezra Hatch to partition the tract called the "Old Place." The defendant Ferguson appeared in said partition suit for said minors as their guardian, and, without a contest, permitted a decree to be rendered declaring Hewitt to be owner of an undivided three-fifths of said tract, and ordering a sale thereof in lieu of partition. At the sale pursuant to said order, Hewitt was the purchaser, for the price of $100 per acre, and Ferguson, as such guardian, received the portion of the money awarded to said minors. Six hundred dollars of the money paid for the complainant's interest in said lands was paid for eight lots in the village of Marysville. A house was erected thereon for use of the complainant and her family as a dwelling, which was also paid for by Ferguson out of the same fund, and in the winter of 1890 possession of both of said tracts was surrendered to Hewitt, and the family then went to Marysville, and occupied said new house. After this move, a tract of 40 acres near Marysville was deeded to the complainant for the price of $2,500, which sum was paid by Ferguson out of the money received from Hewitt for the interests of the complainant and Hester Hatch in the lands in controversy. The

foregoing are undisputed facts. Other statements embodied in this opinion are to be taken as my conclusions from consideration of the evidence.

The grounds upon which relief is asked for in this case are that Ferguson and Hewitt conspired and confederated together to acquire the Hatch lands for less than the value thereof, in order to further the scheme of the projectors of Everett, and to make a profit for themselves, and the price received by Ferguson is grossly inadequate; that the complainant, being an ignorant Indian woman, unacquainted with the methods of conveying title to real property, was overreached and deceived by Ferguson, who induced her to sign the power of attorney to him by falsely representing it to be a mere declaration of friendship; that she did not knowingly give Ferguson any authority, written or verbal, to sell her land; that said deed is void, because the power of attorney does not authorize Ferguson to sell or convey any property which the complainant did not own at the date of its execution, which was several days prior to the filing of her final proofs and payment of the government price for the land in the United States land office, and for the further reason that if effect be given to the power of attorney, so as to authorize the attorney in fact to sell the homestead, then it becomes virtually a contract made prior to final proof, whereby a title to land to be acquired under the land laws of the United States should inure to the benefit of parties other than the individual making the entry, and it is to that extent void, because contrary to public policy. The case has been contested very earnestly. The zeal of counsel to bring to bear every fact and circumstance having any bearing, direct or remote, upon the issues, is evidenced by the voluminous mass of testimony which I have been called upon to consider. Much of it relates only to the credibility of witnesses and incidental and collateral matters. I have given due consideration and weight to all the evidence presented, but I do not feel called upon to perform the amount of labor necessary to give in this opinion a close analysis or review of all of it.

In general, the evidence is probably sufficient to support findings of facts consistent with the theory of the complainant's contention, and sufficient to warrant a decree in her favor, if not counterbalanced by other facts equally well supported. The conduct of the complainant herself and members of her family who appear as her chief witnesses, as shown by a decided preponderance of the evidence, is so radically inconsistent, that I cannot say that the wrongful conduct of the defendants, charged in her bill, and her innocence, have been so clearly and convincingly proven by the whole evidence as to entitle her, upon equitable principles, to regain this property. There is no direct evidence of a conspiracy nor of any corrupt or unusual practice on the part of Hewitt or the Everett Land Company in purchasing complainant's interest in this land. There is no evidence tending to prove that at the time of the sale a better price could have been obtained from another purchaser. All the sales shown by the evidence to have been made near the time of this transaction were made to Hewitt, or his

agents, or persons who then were, or soon afterwards became, associated with him in founding a city. The prices which they paid for other land with river and harbor frontage affords no criterion for fixing the value of this land. The amount paid for the complainant's interest is more than double what it was worth at that time for any other than speculative purposes, and I cannot find that a higher price could have been obtained except upon the theory that Ferguson or some other person acting for Mrs. Hatch might have extorted a larger sum from Hewitt. He cannot be justly charged with the commission of a fraud simply by reason of the fact that the bargain which he made appears, in the light of subsequent events, to have been a good one for him.

There is a hopeless conflict of evidence relating to the acts, sayings, and doings of Mrs. Hatch, her daughter, who acted as interpreter for her, Ferguson, Heffner, the notary public who certified to the acknowledgment of the power of attorney, and Harris, a subscribing witness, in connection with the execution of that instrument; and, in my opinion, there is no preponderance in favor of either side. The notary public does not in the acknowledgment certify that he made known to Mrs. Hatch the contents or nature of the instrument. The decision of the supreme court of this state in the case of Jackson v. Tatebo, 28 Pac. Rep. 916, is to the effect that if a person who is unable to converse in the English language alleges that, at the time of executing a deed, he was misinformed, and did not intend to convey his property, and the certificate of acknowledgment does not state that the officer made known to him its nature or contents, the burden is upon the party claiming under such deed to prove that such person did understand the import of the instrument at the time of signing it. I assume that this decision establishes a rule of property in this state, and I should therefore hold the power of attorney to Ferguson to be void if I deemed it necessary to make findings upon this part of the case. I will dispose of this point in connection with the questions as to the proper construction to be given to the power of attorney, and the validity of the deed made under it. The power of attorney is general, and gives ample authority to sell and convey any lands in the state of Washington which Mrs. Hatch might have acquired while it remained in force. The argument that it should be so limited by construction as to except the homestead would merit serious consideration if the fact that, at the time of giving the power of attorney, she intended that Ferguson should have the right to sell said land, were to control my decision; for such a contract if made prior to the presentation of her proofs to the register and receiver of the land office, falsified the sworn declaration which she was required to make in proving up, to the effect that she had not made any contract or agreement whereby the title which she should acquire should inure to the benefit of any other person. A contract having that effect, being contrary to public policy, cannot be upheld judicially. Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. Rep. 905. And were this suit for the mere purpose of canceling the deed given by Ferguson, as her attorney in

fact, to Hewitt, and were the parties at the time of its commencement situated the same as they were immediately after the making of said deed, there would be no difficulty in granting relief to the complainant.

It is necessary, however, to take into account the changed situation of the parties, for which the complainant is responsible, by reason of her own acts subsequent to her entry of the land, whereby her right to a patent became perfected. The patent subsequently issued to her is a confirmation of her right to the land at the time of making her final proof and payment at the land office. After obtaining the receiver's receipt for the payment, she could lawfully dispose of the land. U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. Rep. 575. It is distinctly and fully proven by the evidence that, within a few days after Ferguson had given the deed to Hewitt, Mrs. Hatch was informed of the sale of her interest, and the price for which it had been sold, and the manner of payment, and at that time she did not disavow the transaction, nor make any protest. The only expression of dissatisfaction made at that time, according to the evidence given in her behalf, was the simple remark made by her daughter to Ferguson that he "did not get much." After being so informed, Mrs. Hatch, for her own reasons, chose Marysville as her place of residence, and, without being influenced or persuaded by any one, went there, and selected and bargained for eight lots, and authorized Ferguson to pay $600 for them. She approved a plan for a house, and authorized a neighbor to contract for building it, and with her consent it was built, and Ferguson paid for it. She selected and authorized Ferguson to pay for furniture for her new house, and, when it was ready for occupancy, she voluntarily surrendered to an agent of Hewitt possession of the land which Ferguson had sold to him. At different times she drew money from Ferguson, and used it as suited her, and she finally invested the residue of the $4,000 in the purchase of 40 acres of land. She kept silent while the Everett Land Company was making large expenditures in improving this land, and she appears to have been unconscious of having suffered an injury until a lawyer sent her by one of her friends had consulted with her.

The fact of her being thus unconscious was not because of lack of knowledge of what had transpired, nor incapacity to understand. She is able to think for herself and act independently. The friend who, after enhancement in the value of the land, sent a lawyer to consult with her, was near by, and could have counseled with her before she used the money which Hewitt paid. She cannot be classed with those who are under legal disability by reason of mental weakness, and whose contracts may for that reason be avoided, and none of her acts above mentioned were under duress, or brought about by intimidation or undue influence. By knowingly receiving and appropriating to her own use the money paid as the price for her land, and voluntarily giving possession of it to a purchaser, she has actually made a bargain, and transferred the land and all her rights therein. If the bargainee has

failed to obtain from her a valid conveyance of the legal title, she is not by reason of that fact entitled to aid from a court of equity in an effort to regain property which has been actually and fairly transferred.

Let a decree be entered dismissing this suit, with costs to the defendants.

HATCH et al. v. FERGUSON et al.

(Circuit Court, D. Washington, N. D. October 6, 1893.)

1. FEDERAL COURTS—JURISDICTION — CITIZENSHIP — DISTRICT OF RESIDENCE—WAIVER.
   Where a suit is brought in a federal circuit court, on the ground of diverse citizenship, to enforce a claim to land situated in the district, defendants, who have voluntarily appeared and submitted their claims to adjudication, cannot afterwards object to the jurisdiction, on the ground that the suit is not brought in the district of the residence of either plaintiffs or defendants.
2. INFANCY—SERVICE OF PROCESS.
   Service of summons upon a minor in the state of Washington, by delivering a copy to him personally, is invalid unless a copy is also delivered to his father, mother, or guardian, or person having him in care or control, or with whom he resides, as required by the statute, (Laws Wash. 1887–88, p. 26.)
3. GUARDIAN AND WARD—APPOINTMENT—BOND.
   The Washington statute requiring bonds from all guardians (Code 1881, §§ 1604, 1612, 1617, 1618) is mandatory, and, until such bond is given, no person is competent to act as guardian or to receive service of summons for the minors, even though appointed by a will which expressly dispenses with a bond.
4. SAME—JUDGMENT AGAINST MINORS—VALIDITY.
   A judgment against minors resulting from an appearance in the suit by one who assumed, without lawful authority, to be their guardian, does not conclude them, and they may question it in a collateral proceeding.
5. HUSBAND AND WIFE—COMMUNITY PROPERTY.
   In Washington, property acquired by a man during cohabitation with a woman, whom he afterwards marries, is his separate property, and is not affected by the community property law.
6. WILLS—CONSTRUCTION—COMMUNITY AND SEPARATE PROPERTY.
   Where a married man, owning separate property, makes a devise to his children of his estate, describing it as "being the one-half interest in the community property now owned by me and my said wife," this can only be regarded as the expression of his opinion, and does not convert the property into community property, or operate as a devise of one-half thereof to his wife; nor can the interest of his children be diminished by construing the will according to the intention of the testator, as shown by parol evidence.

In Equity. Suit by Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch, minors, by their next friend, Josephine Hatch, against E. C. Ferguson, Henry Hewitt, Jr., the Everett Land Company, Judson La Moure, and Minnie E. La Moure, to determine adverse claims to land upon which the city of Everett is in part located, and to annul a judicial sale of their title to said land. Decree for complainants.

For a prior opinion in respect to a jurisdictional question, see 52 Fed. Rep. 833.

A. D. Warner, Stratton, Lewis & Gilman, Junius Rochester, and W. Scott Beebe, for complainants.

Francis C. Barlow, Brown & Brownell, and Cy. Wellington, for defendants.

HANFORD, District Judge. This is one of three cases commenced by the family of Ezra Hatch, deceased, to recover portions of the land upon which the city of Everett is situated, the complainants herein being the four minor children of the said Ezra Hatch and Josephine Hatch. Their mother, Josephine, appears as prochein ami. The object of the suit is to annul a judicial sale of the interests of said minors in a tract of 160 acres, to which the said Ezra Hatch acquired the title from the United States, by the location thereon of a land warrant issued to him for services in the United States navy during the Mexican war. Said Ezra Hatch and Josephine commenced cohabiting together prior to the location of said land warrant, but their marriage was not solemnized until after a patent had been issued to said Ezra Hatch for said land. The will of said Ezra Hatch, which was duly admitted to probate after his death, contains a paragraph making disposition of his estate in the following words:

"I give and bequeath to my daughter, Esther Hatch, and to my sons, Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch, all my estate, real and personal, of every name and nature whatsoever, owned by me at the time of my death, after paying all my just debts and the admitting of this, my last will, to probate, and the sum of five dollars hereinafter bequeathed to my wife, Josephine Hatch; said estate being the one-half interest in the community property now owned by me and my said wife, from which I bequeath to my said wife the sum of five dollars, and it is my wish and desire that my said daughter and sons share and share alike in my said estate."

In the month of April, 1891, the defendant Henry Hewitt, Jr., commenced an action in the superior court for the county of Snohomish, in which said land is situated, against said minor children and E. C. Ferguson, as their guardian, to partition said tract of land, alleging in his complaint, filed in said action, that he (Hewitt) then had an estate of inheritance in said tract of land to the extent of an undivided three-fifths thereof, and that each of said children had an undivided one-tenth thereof. A summons was issued in said action, directed to the defendants therein, the said minor children, and E. C. Ferguson, as their guardian, upon which the sheriff of Snohomish county made a return, in the following words:

"Sheriff's Return: Office of the Sheriff of the County of Snohomish, State of Washington. I hereby certify that I received the within summons on the 7th day of April, A. D. 1891, and personally served the same on the 8th day of April, A. D. 1891, on E. C. Ferguson, and on Dexter Hatch, Arthur Hatch, Cyrus Hatch, & Ezra Hatch, on the 14th day of April, 1891, they being the defendants named in said summons, delivering to each of said defendants personally, in the county of Snohomish, a true copy of said original summons."

Ferguson appeared in said action, and filed an answer, admitting each and every allegation contained in the complaint. Afterwards a decree was rendered, pursuant to which the entire tract

of land was sold, and the proceeds divided, the defendant Ferguson receiving the portions awarded to said minor children. The defendant Hewitt was the purchaser at said sale, and he afterwards conveyed 10 acres of said land to the defendant Judson La Moure, and the residue to the defendant the Everett Land Company.

I have heretofore passed upon the jurisdictional questions raised by a demurrer to the bill of complaint. See Hatch v. Ferguson, 52 Fed. Rep. 833. The case having been brought on for final hearing, the defendants Judson La Moure and his wife, Minnie E. La Moure, again questioned the jurisdiction, on the ground that they are citizens and residents of the state of North Dakota, and were citizens and residents of that state when this suit was commenced, and the plaintiffs were at the time of the commencement of this suit citizens and residents of the state of Oregon; and in behalf of said defendants it was argued that under the provisions of the act of March 3, 1887, relating to the jurisdiction of United States circuit courts, as corrected by the act of August 13, 1888, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought in the district of the residence of either the plaintiff or the defendant." Supp. Rev. St. (2d Ed.) 612. This, however, is a suit to enforce a claim to the title to real property situated within this district, and all the defendants have voluntarily appeared herein, and submitted to the jurisdiction of the court, for the purpose of an adjudication of their adverse claims to said title. This court is therefore vested with complete jurisdiction by reason of said facts, and by virtue of the provisions of the eighth section of the act of March 3, 1875, (Supp. Rev. St. [2d Ed.] 84.)

The validity of the judicial sale of this land depends upon the question whether the superior court of Snohomish county acquired jurisdiction to render a decree binding upon these complainants. The statute of this state in force at the time relating to the manner of service of a summons prescribed that, if the action be against a minor under the age of 14 years, the summons shall be served by delivering a copy thereof "to such minor personally and also to his father, mother, guardian, or if there be none within this territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be." Laws Wash. T. 1887–88, p. 26. These plaintiffs were all at the time under 14 years of age, and the sheriff's return shows that service of said summons was not made in the manner prescribed by the statute; and the defect of service was not cured by the voluntary appearance of Ferguson, unless he was at that time the legal guardian of said minors. In the will of Ezra Hatch said Ferguson is named as the guardian of said minors, and, after the probate of said will, the probate court of Snohomish county issued letters of guardianship to said Ferguson, erroneously reciting that by said will he was appointed guardian to act without bonds, and it affirmatively appears from the evidence submitted in this case that said Ferguson has not qualified as the guardian of said minors by the execution of a bond. The Code of Washington Territory of

1881 contains the following provisions, and the same were in force as law in this state at the time of the proceedings referred to, viz.:

"Sec. 1604. The probate court of each county, when it shall become necessary, may appoint guardians to minors resident in said county, who have no guardian appointed by will; or who may reside out of the territory, having estate within the county." "Sec. 1612. The probate court shall take of each guardian appointed under this act, bond with approved security, payable to the Territory of Washington, in a sum double the amount of the minor's estate, real and personal, conditioned as follows: The condition of this obligation is such, that if the above bounden A B, who has been appointed guardian for C D, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the probate court of the county of ——, from time to time, as he shall thereto be required by said court, and comply with all orders of said court, lawfully made, relative to the goods, chattels, and moneys of such minor, and render and pay to such minor all moneys, goods and chattels, title papers and effects which may come into the hands or possession of such guardian belonging to such minor, when such minor shall thereto be entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, or otherwise to remain in full force and virtue, which bond shall be for the use of such minor and shall not become void upon the first recovery, but may be put in suit from time to time against all, or any one or more of the obligors, in the name and (for) the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon." "Sec. 1617. All the provisions of chapter 101 relative to bonds given by executors and administrators, shall apply to bonds taken of guardians. Sec. 1618. The father of every legitimate child, who is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time, and every such testamentary guardian shall give bond in like manner and with like condition as hereinbefore required, and he shall have the same powers and perform the same duties with regard to the person and estate of the ward, as a guardian appointed as aforesaid."

Chapter 101 of the Code referred to in section 1617 contains the following provisions:

"Sec. 1394. Every person to whom letters testamentary or of administration are directed to issue must before receiving them, execute a bond to the Territory of Washington with two or more sufficient sureties to be approved by the probate judge. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate; which values must be ascertained by the probate judge by examining on oath the party applying, and any other persons." "Sec. 1396. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law." "Sec. 1399. In all cases where bonds or undertakings are required to be given under this title the sureties must possess the qualifications and justify thereon in the same manner as required by the civil practice act for bail upon an arrest and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds or undertakings must be approved by the probate judge before being filed or recorded."

These provisions of the statute are, in my opinion, mandatory, and the giving of a bond is prerequisite to the assumption by any person of the guardianship of minors in this state, whether under an appointment by will, or by the court having probate jurisdiction. A question similar to the one I am considering was decided by the New York court of appeals in the case of Wuesthoff v. Insur-

ance Co., 107 N. Y. 580, 14 N. E. Rep. 811, and the court held a statute requiring testamentary guardians to give bond in such sum and with such sureties as the court having jurisdiction may approve, before exercising any authority over the minor or his estate, to be mandatory, and that such a statute makes the giving of security by the guardian a necessary qualification and a prerequisite to the exercise of any authority over the estate of the ward. The supreme court of California, also, in the case of Murphy v. Superior Court, 24 Pac. Rep. 310, held that one who was appointed a guardian by a deed of trust and also by the superior court, but who had not given a bond, was not a legal guardian.

In their argument, counsel for the defendants attempt to draw a distinction between this case, which they contend is one in which there was only a defective or imperfect service of notice, and cases wherein there has been no service of notice, and they have brought to my attention the cases of Isaacs v. Price, 2 Dill. 351; Shawhan v. Loffer, 24 Iowa, 226; Bunce v. Bunce, 59 Iowa, 533, 13 N. W. Rep. 705; and 1 Black, Judgm. § 224, note. But these authorities, in so far as they seem to sustain the argument that titles to real estate can be divested by judicial proceedings, without substantial compliance with the statutory requirements as to service of jurisdictional process, are in conflict with the decisions of the supreme court of the United States. See Galpin v. Page, 18 Wall. 350; Settlemier v. Sullivan, 97 U. S. 444. The cases of Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. Rep. 237; Bunce v. Bunce, supra; and Hamiel v. Donnelly, (Iowa,) 39 N. W. Rep. 210, —hold that where a guardian sells the property of his ward under an order of court without having given a sale bond, required by the statute, such sale is not void, the failure to give the bond in such a case being a mere irregularity, not affecting the jurisdiction of the court. But said authorities are not in point. The question which I am considering is whether Ferguson was guardian or not. This is certainly a jurisdictional question, for, if Ferguson was not the legal guardian of said minors, they were not represented in the partition suit, nor called upon to appear therein, and they are not bound by the judgment of the superior court, nor by any recital in its record. In the case of Moody v. Butler, 63 Tex. 210, the court held that the authority of an executor could not be impeached collaterally by the mere fact that the record of the court under whose direction he acted did not show affirmatively that he had given a bond. The reasons given in the opinion are very meager, and not sufficient to enable me to determine whether the case is in fact analogous, nor to convince me that my own views in this case are erroneous. Bloom v. Burdick, 37 Amer. Dec. 299, and Russell v. Coffin, 8 Pick. 143, are not in point. In the former, objection was made to the sufficiency of a bond with but one surety, and it was held that failure to exact a bond with two sureties was a mere error. It is a New York case, and, if it were in point, I should be inclined to yield greater deference to the later decision of the New York court of appeals in Wuesthoff v. Insurance Co., supra. In Russell v. Coffin the validity of a bond

with no sureties, given by guardians, was disputed; but the objection was adjudged to be immaterial in a collateral proceeding, for the reason that the law of Massachusetts, under which the case arose, confided in the court by whom the guardians were appointed power to remove them for failure to give a satisfactory bond. The theory of the decision appears to be that the manner of exercising discretionary powers cannot be made the subject of contention in a collateral proceeding. But questions as to the sufficiency of a bond, raised after its acceptance by a court authorized to approve or reject it, are in principle entirely different from the question as to the effect of the entire failure to comply with a mandatory statute requiring a bond as a prerequisite to the assumption of legal authority.

A judgment against a defendant upon an appearance for him by an attorney of record does not preclude such defendant from showing in a subsequent proceeding that the appearance was not authorized. Harshey v. Blackmarr, 20 Iowa, 161; Freem. Judgm. § 499; 1 Herm. Estop. § 523; 1 Black, Judgm. § 374; 2 Black, Judgm. § 901; Thompson v. Whitman, 18 Wall. 457; Knowles v. Coke Co., 19 Wall. 58; Hill v. Mendenhall, 21 Wall. 453; Hall v. Lanning, 91 U. S. 160; U. S. v. Throckmorton, 98 U. S. 61. Upon the principle of these authorities, I hold that minors are not concluded by judicial proceedings against them, founded upon acts of one who, without lawful authority, assumed to be their guardian; and from the evidence in this case I find that the defendant Ferguson was not the legal guardian of the complainants. Service of the summons in the partition suit upon him was not sufficient to bring them within the jurisdiction of the superior court for Snohomish county, and they are not bound by his appearance as their representative. The sale of their land pursuant to the order of that court is therefore void.

The land involved in this suit was the separate property of Ezra Hatch, the title having been acquired by him prior to any lawful marriage to Josephine, and his right to dispose of it by will was not abridged by any law of this state. The cases of McLaughlin's Estate, 30 Pac. Rep. 651, 4 Wash. 570, and Kelley v. Kitsap Co., (Wash.) 32 Pac. Rep. 554, are conclusive to the effect that the rights of said Ezra Hatch and Josephine as to property acquired during the time of their cohabitation together prior to their marriage were not affected by the community property law of this state. The declaration in the will of Ezra Hatch to the effect that his estate consisted of one-half the community property owned by himself and wife can only be regarded as an expression of his opinion, and cannot have the effect to convert his separate property into community property, nor operate as a devise to Josephine of one-half of his property in addition to the bequest of five dollars which he made to her; nor can the interests of his children as residuary devisees be diminished by construing the will according to the intention of the testator, as shown by parol evidence.

It is my opinion that, by said will, the complainants each took an undivided one-fifth of the land described in their bill of com-

plaint; that they have not been divested of their title; and that they are now entitled to have a decree declaring and establishing their title to the extent indicated, and to recover costs.

Decree accordingly.

HATCH v. FERGUSON et al.

(Circuit Court, D. Washington, N. D. October 6, 1893.)

EQUITY—DEEDS—CANCELLATION—ESTOPPEL.

Where a sale of land is negotiated by one who, without specific authority, assumes to act for the owner, and obtains from the owner a deed to the purchaser, and receives the purchase money, and immediately after completing the transaction informs the grantor of the sale and the terms, and the grantor fails to disavow the sale or make any protest until after receiving and expending the whole of the purchase money and great enhancement in the value of the land by reason of improvements by the purchaser and his vendees, such grantor will not be permitted in equity to claim that the deed was fraudulently obtained by false representations as to the nature and contents of the instrument by such agent in pursuance of a conspiracy between him and the purchaser.

In Equity. Suit by Hester Hatch against E. C. Ferguson, Henry Hewitt, Jr., and the Everett Land Company to determine adverse claims to the title to land upon which the city of Everett is in part located, and to annul a deed conveying her title to said land, for alleged fraud. Dismissed.

A. D. Warner, Stratton, Lewis & Gilman, Junius Rochester, and W. Scott Beebe, for complainant.

Francis C. Barlow and Brown & Brownell, for defendants.

HANFORD, District Judge. A general statement of the case, sufficient for the purpose of this decision, is contained in my opinion in the case of Hatch v. Ferguson, 57 Fed. Rep. 959. The complainant herein is the daughter of Josephine Hatch. In her complaint she charges that a deed to the defendant Hewitt of her interest in the lands referred to in said opinion was signed by her at the request of the defendant Ferguson, who at the time falsely and fraudulently represented the same to be merely a paper to show that she was of age, and not under his guardianship, and that, believing said instrument to be such a paper as he represented, she signed it without intending to convey her interest in said land. The testimony proves conclusively that she knowingly received and used the money paid as consideration for said deed, without making any protest against the sale, and the case might be disposed of in accordance with my opinion in her mother's case. There is, however, additional ground for pronouncing against this complainant. She is able to speak and understand the English language; and the rule in the case of Jackson v. Tatebo, (Wash.) 28 Pac. Rep. 916, therefore, does not apply in this case; and, even were the onus probandi upon the defendants, the suit, in my opinion, must be a failure, for the reason that by a decided preponderance of the evidence it is shown that the complainant was not

deceived, as she alleges, but, on the contrary, the deed was executed by her freely, voluntarily, and knowingly.

Let a decree be entered dismissing the suit, with costs to the defendants.

RUSS v. TELFENER.

(Circuit Court, W. D. Texas, Austin Division. July 11, 1893.)

No. 1,918.

1. PRINCIPAL AND AGENT — UNAUTHORIZED ACTS OF AGENT — RATIFICATION BY PRINCIPAL.
   Ratification by a principal of an unauthorized contract made by his agent relates back to the beginning of the transaction, and, when deliberately made, with a knowledge of the circumstances, cannot be recalled.
2. SAME—LIMITATION OF AGENT'S AUTHORITY—PRIVATE INSTRUCTIONS.
   Private instructions limiting the authority of an agent will not avoid the principal's liability for acts done by the agent in violation thereof, when the other party to the transaction had no reason to know, and no actual knowledge, of such limitation.
3. SAME—EXECUTION OF CONTRACT BY AGENT—EVIDENCE—BURDEN OF PROOF.
   The denial by defendant that an alleged contract was executed by his duly-authorized agent throws upon plaintiff the burden of proving by a preponderance of evidence the legal and binding execution thereof.
4. VENDOR AND PURCHASER—DAMAGES FOR BREACH OF CONTRACT—COLLATERAL CONTRACT.
   In an action for breach of a contract for the sale of lands by plaintiff he cannot recover any damages for the breach of a collateral contract whereby, for a consideration named, he has agreed to have the lands surveyed and the field notes returned, as required by law.
5. DAMAGES—MEASURE OF— BREACH OF CONTRACT — SALE OF RIGHT IN STATE LANDS.
   The measure of damages for breach of a contract assigning a right to purchase state lands, which has been acquired under Act Tex. July 14, 1879, is the difference between the price agreed upon by the parties and the market price of the right at the time of the breach.
6. PUBLIC LANDS—SALE OF STATE LANDS —TEXAS STATUTE — PUBLIC SURVEYOR'S DECISION—CONCLUSIVENESS.
   Under Act Tex. July 14, 1879, providing for the sale of certain lands owned by the state, the decision of the public surveyor is conclusive, in the absence of evidence to the contrary, on the question whether the purchaser is a "responsible party," within the meaning of section 3 of the act.
7. SAME—RIGHT TO PURCHASE.
   The right to purchase acquired by application to the public surveyor, as provided in Act Tex. July 14, 1879, providing for the sale of certain state lands, is assignable.

At Law. Action by George W. Russ against Joseph Telfener for breach of a contract for the purchase of certain rights acquired by plaintiff in state lands. Judgment was given for plaintiff, but on writ of error this was reversed by the supreme court. 12 Sup. Ct. Rep. 930, 145 U. S. 522. The cause is now up for a second trial.

Hancock & Shelley and Miller & Fiset, for plaintiff.

J. L. Peeler, for defendant.

MAXEY, District Judge, (charging jury.) Plaintiff brings his suit to recover damages because of alleged breach of contract on part of defendant. In his pleadings the plaintiff sets up two contracts which, he claims, were executed by the defendant. The first is known as "Exhibit M," and the second as "Exhibit N." Both were executed on the same day, to wit, the 1st day of November, 1882, and both were signed by the same parties. The plaintiff signs his own name in person, and the name of defendant is signed as follows: "J. Telfener, by C. Baccarisse, Ag't." The defendant denies that he executed the contracts in person, and further denies that Baccarisse had authority to execute them in his behalf, and hence he claims that they are not binding upon him.

The first question, therefore, presented for your consideration, is whether the contracts, particularly the one known as "Exhibit M," were executed in such manner as to be valid and binding upon the defendant. No formal power of attorney executed by the defendant has been introduced in evidence, expressly conferring authority upon Baccarisse to execute the contracts in question. You must therefore look to all the facts and circumstances in evidence, apart from the declarations of those professing to act as agents, to determine whether Baccarisse was duly authorized to execute the contracts declared upon. If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from, and knowledge and consent of, defendant, empowered Baccarisse to execute it. But if Baccarisse was neither empowered directly by the defendant, nor by Westcott, with authority from and knowledge and consent of defendant, to execute the contract, then it would not be binding upon the defendant, unless he ratified the same, as hereinafter stated. If Baccarisse had no authority from defendant or Westcott, as above stated, to execute the contract, then it would not be binding upon the defendant, unless he, having full knowledge of the terms of the agreement and the material facts and circumstances attending its execution, acquiesced in and recognized the same as his contract, in which event he would be held to have ratified it, and it would be binding upon him.

To make it binding upon him in such case, you observe, he must have ratified the contract with full knowledge of its terms and of the material facts and circumstances attending its execution. If he did so ratify it, then it would be binding upon him as though he had given authority to make the contract before the same was executed. It is a familiar maxim that ratification has a retroactive efficacy, and relates back to the inception of the transaction, and, when deliberately made with a knowledge of the circumstances, as before stated, cannot be revoked or recalled.

If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals gen-

erally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created, notwithstanding he might have given private instructions to Baccarisse not to purchase without referring the matter to him for his ratification, provided that such instructions were not communicated to and known by the plaintiff. If, however, the plaintiff knew that Baccarisse was instructed not to close any trade without first referring the matter to the defendant, then the plaintiff could not enforce a contract so made with Baccarisse without complying with such restrictions upon his authority.

To illustrate, (and in the illustration I quote the language of my predecessor in charging the jury upon a former occasion:)

"Suppose I send out agents to procure lands for me by purchase, or otherwise. I give my agents certain specific directions to govern them, and then say to them, 'You must, before closing the trade, submit the trade to me for my approval.' My agents go out and contract with persons, and do close a trade, but without referring the same to me before closing. The agent having pursued the ordinary mode for procuring lands, and the person with whom he deals not being advised of the restrictions by me placed upon my agent, but deals with him in good faith, and upon that faith changes his relation to the property, I am bound, because the agent acted within the general scope of his authority," and because the third persons are not affected by private instructions given to the agent which are not made known to them. "This is, of course, to be taken with the qualification that if the person dealing with the agent knew of the instruction which was a limitation upon his right to act, and made a contract in violation of that instruction, he cannot enforce it against me."

The defendant having denied under oath the execution of the contract by duly-authorized agent, the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the contract was executed in such manner as to be binding upon the defendant.

If, upon a consideration of all the facts and circumstances in evidence, taken in connection with the foregoing charge, you reach the conclusion that the contract is not binding upon the defendant, then you will proceed no further except simply to return a verdict in his favor. If, however, your finding upon that issue be in favor of the plaintiff, you will then proceed to the consideration of other issues involved in the cause.

Plaintiff's applications for the purchase of the lands involved in this controversy were filed, respectively, on the 4th and 5th days of October, 1882. On the 1st day of November following, as already stated, the contract designated "Exhibit M" was executed. This contract recites that plaintiff had, in due form, made application for the purchase of about 1,000,000 acres of land, more or less, in El Paso county, in accordance with an act of the legislature of Texas approved July 14, 1879; that defendant was desirous of purchasing from plaintiff all his rights, titles, and interest under and by reason of such application, provided it should appear that such application had been regularly made and filed

in such manner as would, under the terms of said law, entitle plaintiff to become the purchaser of said lands from the state of Texas; and in such case defendant agreed and promised to pay plaintiff, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, 25 cents per acre for each and every acre of land covered by his said application and file, and plaintiff agreed and bound himself, in consideration of such price and sum to be paid to him, to sell, transfer, and assign unto the defendant all his rights, titles, and interest in said lands acquired by said application and file. In short, it was provided that if, upon examination, it should be found that, by going forward under the law, the party could secure the land, then defendant was to pay said amount to plaintiff for the rights which he had acquired under his application to purchase, and plaintiff was to convey such right, title, and interest to the defendant. At the date of the contract it was not definitely known just how many acres were embraced in the applications, and the contract provides for the payment of 90 per cent. of the estimated quantity, and this payment was to be made on or before the 15th day of November, 1882. It was further provided therein that, upon the completion of the surveys and field notes, the number of acres embraced in said lands so sold and transferred by the plaintiff to the defendant should be ascertained, and, if the said 90 per centum to be paid by the defendant should not amount to the full purchase price of 25 cents per acre, then the deficit should be paid at once in cash by the defendant to the plaintiff in the city of Dallas or Austin, as the plaintiff might prefer.

Under the contract known as "Exhibit N," the plaintiff, for the considerations therein named, agreed to have the lands surveyed and field notes returned, etc., as required by law. In reference to this contract, known as "Exhibit N," the plaintiff cannot recover of defendant any damages because of a breach, or supposed breach, thereof, and you are instructed accordingly. You may, however, look to that contract, in connection with the evidence, to determine the exact number of surveys of land which are embraced in plaintiff's two applications. On this point the evidence from the land office clearly shows that 1,813 surveys of 640 acres each were made under plaintiff's two applications, and you are so instructed. Of the 1,813 surveys, plaintiff claims nothing as to 25 thereof, which must be deducted, leaving involved in the controversy 1,788 surveys of 640 acres each, or 1,144,320 acres.

The legislature of this state passed the act before referred to, of the 14th of July, 1879, by which the state put upon the market lands which had been reserved from location and sale, including those known as the "Pacific Reservation." This reservation embraced lands in El Paso county which were covered by the plaintiff's applications and surveys. The sections of said act which bear upon the questions in hand are the following:

"Sec. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by

causing the tract or tracts which such person, firm or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases.

"Sec. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act all legal surveyor's fees for work done by them.

"Sec. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the state the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for."

The two applications of plaintiff for the purchase of the land, filed in the surveyor's office of El Paso county, as before stated, are a sufficient compliance with the law of 1879 to constitute them valid applications. They were regularly made and filed in such manner as, under the terms of said law, would have entitled plaintiff to become the purchaser from the state of Texas of the lands embraced therein, had other provisions of the law been complied with in reference to making surveys, returning field notes, etc., paying patent and other fees and the 50 cents per acre required by the act. The certificate of the commissioner of the general land office shows that on the 8th day of January, 1883, plaintiff filed in the land office the field notes of 1,813 surveys of 640 acres each, and it is further shown that a map of said surveys was duly filed in the general land office. The certificate of the commissioner further shows that the surveys made for plaintiff were made beginning on the 20th day of October, 1882, and ending on the 9th day of November, 1882. It further appears from said certificate that all of said surveys were made on and prior to November 1, 1882, except blocks G, H, I, and J, embracing in the aggregate 98 sections, which were surveyed after November 1st, but prior to the 15th day of November, 1882. Hence it follows that all the lands were surveyed prior to the 15th day of November, the date provided in the contract for the payment of the 90 per cent. by defendant and the execution of transfers by plaintiff.

You observe, from reading the law, that the surveyor was required to make the surveys upon application by responsible parties. The question of the responsibility of the plaintiff, when he applied to have the surveys made, was one to be determined by the surveyor who surveyed the lands, and the presumption would be conclusive, in the absence of testimony to the contrary, that the plaintiff was such responsible person.

You are further instructed that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his appli-

cations as set forth in the contract and shown by the evidence, was a valuable right, and one which could be lawfully assigned.

If, under the foregoing charge and the evidence in the case, you conclude that the contracts were executed in such manner as to be binding upon the defendant, then you will determine, from all the facts and circumstances in evidence, whether the plaintiff has in good faith performed all things required of him by said contract marked "Exhibit M," and whether he stood ready on the 15th day of November, 1882, to execute transfers to defendant of his right, title, and interest in and to said 1,788 surveys embraced in his two applications. You will further look to the evidence to determine whether the defendant has performed his part of said contract marked "Exhibit M," as by its terms prescribed, and has, in accordance therewith, paid to the plaintiff the amount of money which he thereby agreed to pay.

If, upon consideration of the testimony, you find that plaintiff has in good faith performed his part of said contract marked "Exhibit M," and that the defendant has failed to comply with his part thereof by declining to pay plaintiff as provided therein, then it would be your duty to return a verdict in favor of the plaintiff for such amount of actual damages as you find from the testimony he has sustained by reason of the breach of said contract on the part of the defendant. As before stated, there remain for your consideration only 1,788 surveys of 640 acres each, containing in the aggregate 1,144,320 acres of land. The plaintiff claims that he is entitled to damages at the rate of 25 cents per acre on said 1,144,320 acres, as he contends that defendant agreed to pay him 25 cents per acre for his right, title, and interest in and to the lands embraced within his applications.

Upon this point it was said by the supreme court, when this case was recently before it, that—

"On the 15th of November he (the plaintiff) possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale." 12 Sup. Ct. Rep. 935.

Further on, the court uses this language:

"The measure of damages must be the difference between the contract price and the salable value of the right when payment was to be made."

If anything could have been obtained from the sale of that right, if you hold that the contract was binding upon the defendant, it was the duty of the plaintiff to make the sale when the defendant defaulted in his contract, and thus to have subjected him to as little loss as practicable. You will therefore look to all the evidence in the case to determine the salable value of plaintiff's right on the 15th of November, 1882. If you conclude, from the consideration of all the facts and circumstances in evidence, that at said date said right had no salable value,—in other words, that it was completely and absolutely worthless,—then the measure of damages would be 25 cents per acre on the 1,144,320 acres.

If, however, you find, from the testimony, that such right did have, on said 15th of November, 1882, a salable value, then you will determine what that salable value was, and the measure of damages would be the difference between the contract price and the salable value of the right at that date.

If you find a verdict in favor of the plaintiff for any amount of damages, you will award him interest thereon at the rate of 8 per cent. per annum from said 15th day of November, 1882, to the present time. If, under the evidence and the foregoing charge, your finding be in favor of the plaintiff, you will return a verdict in the following form:

"We, the jury, find for the plaintiff, and assess his damages as follows: (1) Principal amount, ——. (2) Interest at the rate of 8 per cent. per annum from Nov. 15, 1882, to the present time ——. Total amount of damages, ——."

You, gentlemen, to fill up the blanks with the amount of damages and interest found, and have the verdict signed by your foreman.

If, however, your verdict be in favor of the defendant, you will simply say, "We, the jury, find for the defendant."

You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony, and you are authorized to predicate your finding upon a preponderance of the evidence.

The case, gentlemen of the jury, is now in your hands. You will take it, and render such verdict as may be just and right, in view of the evidence and the instructions of the court.

CARLISLE v. COLUSA COUNTY.

(Circuit Court, N. D. California. April 10, 1893.)

COPYRIGHT—SUBJECT OF—ASSESSORS' STATEMENTS.

There can be no copyright in any particular arrangement of the matter which the California Code requires the assessors to deliver to each person as a blank form of property statement, for the assessors should not be embarrassed in the performance of their duties by any distinctions of convenience of forms prepared by private persons.

In Equity. Suit for infringement of a copyright. On demurrer to the bill. Sustained.

Myrick & Deering, for plaintiff.

Pringle, Hayne & Boyd, for defendant.

McKENNA, Circuit Judge, (orally.) This is an action for an infringement of a copyright for a form of a blank statement which the Political Code requires the assessor to exact of each person. The bill sets out the copyright's form and the alleged infringing form. They are substantially alike; but respondent demurs to the bill on the ground that complainant's form is not entitled to a copyright. Section 3630 of the Political Code requires the board of supervisors to furnish the assessor with blank forms for the

statements of property which section 3629 requires him to exact from each person. This section mentions by general description the kind of property the statement must show, and concludes with the comprehensive direction that it must also show "all other facts required by the state board of equalization or by the assessor." Other sections of the Code also give directions as to property and the manner of its assessment, and a blank form of assessment roll is given. It is not contended by complainant that his form is a "book," in the common acceptation of the term, or that it has any literary merit. His only claim is that he has put the requirements of the Code, which is claimed to be common material, in a convenient form, by "skill, labor, and knowledge," to quote his language. That the form is convenient may be admitted, but whether more convenient than any other form which may be made in conformity to the Code is not stated, nor is it apparent how much skill and legal knowledge were required or exerted other than what were necessary to read and understand the Code. But surely these are not so rare that they deserve to be encouraged and rewarded by a monopoly.

But the materials are not common. The law requires the board of supervisors to furnish the blank form, and, if one convenient form can be copyrighted and monopolized by the complainant, other convenient forms can be copyrighted and monopolized by others, and the board of supervisors of the counties of the state will be in the anomalous position of being unable to perform their legal duties legally. This is not an extreme statement of complainant's claim. The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it is voluntary on the part of the public. But the supervisors must furnish forms. It is their duty, and it seems to me it cannot be embarrassed by distinctions nice or broad of convenience of forms prepared by private persons. I do not think authors will be encouraged by such a copyright.

The demurrer is therefore sustained.

DAVID BRADLEY MANUF'G CO. v. EAGLE MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1893.)

No. 22.

1. JUDGMENT—RES JUDICATA—PATENTS FOR INVENTIONS.
   Where a suit for infringement of a patent is brought against a firm that is a branch of the company that manufactures the infringing device, and such company conducts the defense, raising the question of validity of the patent, a decree for complainant is conclusive as to the validity of the patent as against the company conducting the defense, even in regard to alleged anticipations not referred to in the suit, since under the issues all anticipatory inventions might have been shown in defense. 50 Fed. Rep. 193, affirmed.

2. SAME.
   Such decree is none the less conclusive because it was merely interlocutory at the bringing of the suit in which it is set up as a bar, and subsequently ripened into a final decree.

8. SAME—PLEADING AND PROOF.
Where such interlocutory decree in the first suit was alleged in the second bill, a final decree in the first suit, rendered pending the second suit, may be shown in evidence therein without supplemental pleading, where defendant took no exceptions to the bill, consented to the introduction of the final decree in evidence so far as the same was material, and only objected thereto on the ground that in rendering such decree the court erred through failure to understand the operation of an alleged anticipatory invention.

4. SAME—WAIVER.
Taking testimony in the second suit as to the validity of the patent is not a waiver of the bar of the final decree in the former suit where such testimony was taken before said final decree was rendered, since until rendition of the final decree the proceedings in the first suit were no bar.

5. SAME—DECREE ON STIPULATION.
In a suit to restrain infringement of a patent and to obtain an accounting, an interlocutory decree was rendered, granting a temporary injunction, and afterwards a final decree, making the injunction perpetual, and awarding only nominal damages, was rendered upon a stipulation which provided that such decree should not be a bar to the recovery of substantial damages in a subsequent suit. *Held*, that the decree was conclusive as to the validity of the patent, the stipulation only affecting its force as an adjudication on the subject of damages.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Bill by the Eagle Manufacturing Company against the David Bradley Manufacturing Company to enjoin infringement of a patent. Complainant obtained a decree. 50 Fed. Rep. 193. Defendant appeals. Affirmed.

Statement by JENKINS, District Judge:

The appellee, on the 11th day of June, 1888, filed its bill in the court below to restrain the alleged infringement by the present appellant of letters patent of the United States No. 242,497, dated the 7th day of June, 1881, issued to Edgar A. Wright for improvements in cultivators. The bill, besides the usual averments in such suits, charged that on December, 1887, the complainant (the present appellee) "commenced suit by bill in chancery against David Bradley & Co. in the circuit court of the United States for the southern district of Iowa to restrain the said David Bradley & Co. from infringing the aforesaid letters patent; that the said David Bradley & Co. is and was a branch house of the David Bradley Manufacturing Company, the defendant herein, and was engaged in selling the identical cultivators manufactured by the defendant herein; that the defendant herein undertook and managed the defense of said suit against its branch house, employing counsel for that purpose, and conducting the defense, but it conducted the defense in the name of the said branch house, the defendant named of record; that the defendant herein, answering said bill in the name of the said branch house, denied the validity of said letters patent, and any infringement thereof, to which answer a replication was filed by your orator, and thereupon your orator and the defendant proceeded to take and took their respective proofs, and, the same having been taken, the said cause was heard on final hearing at the May term of said court at Des Moines, A. D. 1888. And the said court, having considered the proofs and the arguments of counsel, did adjudge and decree that the said David Bradley & Co. had infringed the said letters patent, and did enjoin the aforesaid David Bradley & Co. from further infringement thereof, which said decree remains in full force and unreversed; all of which proceedings and things will more fully appear by a certified copy of the records of said court, which your orator is ready at any time to produce in court, as may be directed; and your orator attaches hereto a certified copy of said decree, marked 'Exhibit C.' And your orator further shows that the cultivators sold by the said David Bradley & Co. were made by the de-

fendant herein under letters patent of the United States No. 243,123, to C. A. Hague, dated June 21, 1881, and No. 270,629, to B. C. Bradley, January 16, 1883, which said patents were issued to the Furst & Bradley Manufacturing Company as assignee of said Hague and Bradley, and passed to the defendant herein, the successor of the said Furst & Bradley Manufacturing Company. The said cultivators as made by the defendant are correctly shown by the drawings in the said letters patent to said B. C. Bradley."

The decree referred to in the bill as "Exhibit C" is as follows: "This cause came on to be finally heard upon the pleadings and proofs, and was argued by counsel for the respective parties, and, the pleadings and proofs having been duly considered, it is hereby, this 23d day of May, 1888, ordered, adjudged, and decreed as follows, viz.: The letters patent referred to in complainant's bill, being letters patent of the United States, granted unto Edgar A. Wright, for improvements in cultivators, No. 242,497, and dated June 7, 1881, is a good and valid patent; and that the said Edgar A. Wright was the first and original inventor of the improvements therein described and claimed; and that the said complainant had at the commencement of this cause a good and legal title to said letters patent No. 242,497, as averred in complainant's bill; and that the said defendant has infringed the said patent, and upon the exclusive rights of the complainant under the same, as claimed in the first four claims of said patent. And it is further ordered, adjudged, and decreed that the defendant above named, its servants, agents, operatives, and workmen, each and every one of them, be, and they are, perpetually enjoined and restrained from either directly or indirectly making, using, or selling to others to be used, cultivators constructed and operated in the manner and upon the principle described in said letters patent of the United States No. 242,497. And it is further ordered, adjudged, and decreed that the complainant recover of the defendant the profits which it has received or made or which have accrued to it by the use or sale of the improvements described and secured by said letters patent at any and all times since June 7, 1881, and also the damages which the complainant has sustained thereby. And as it does not appear to the court what said profits and damages are, it is further ordered, adjudged, and decreed that this cause be referred to George F. Henry, Esq., a master of this court, to take and report to the court an account of the profits which the defendant has received, or which have arisen or accrued to it from the use or sale of said improvements, and to ascertain and report the damages which the complainant has sustained thereby since June 7, 1881, from the papers and evidence in the cause, and from any evidence which either party may produce before him of the same; and when he shall have taken an account of said profits and assessed said damages he shall return the same to this court for further action in the premises. And it is further ordered, adjudged, and decreed that the complainant on such accounting has the right to cause an examination of the officers, agents, and employes of the defendant ore tenus or otherwise, and also the production before said master at such time as said master may order of the books, vouchers, and documents of the defendant, and that the officers of said defendant attend before said master from time to time within this district as said master shall direct. And it is further ordered that the question of increase of damages, and all other questions, be reserved until the coming in of the master's report. And it is ordered that the parties and master may apply on the foot of this decree for such other and further order of instruction as may be necessary. And it is further ordered, adjudged, and decreed that the complainant recover of the defendant the costs of this suit to be taxed."

The answer of the defendant (the present appellant) contains the following admissions respecting such charges: "Fourth. This defendant, further answering, admits that a suit was commenced by the Eagle Manufacturing Company, the complainant herein, against David Bradley & Co. in the circuit court of the United States for the southern district of Iowa, substantially as in said bill alleged. They admit that said David Bradley & Co. was and is a separate corporation, and in part a branch house or agency of this defendant, and was engaged in selling, with other machinery, cultivators manufactured by this defendant. They admit that said suit was to a certain extent defended by this defendant. They admit that pleadings were filed, and proofs

taken, as set forth in said bill. Fifth. This defendant, further answering, admits that said last-named suit was heard at the time and place alleged in said bill, and that a decree was rendered adjudging that said David Bradley & Co. had infringed the said letters patent No. 243,497, and that the said David Bradley & Co. was enjoined from further infringement thereof; but this defendant avers that in said cause the finding of the court was against the defendant, largely, if not wholly, by reason of the said court not understanding the operation of the machine shown in one of the patents set up as anticipating the supposed invention of complainant's patent, to wit, the Dalton patent of 1869; and this defendant has reason to believe, and does believe, that if the court had fully understood the machine of said patent, the finding and decree would have been different. Sixth. This defendant, further answering, admits that the cultivators sold by the said David Bradley & Co. were made by this defendant under and in accordance with letters patent of the United States No. 243,123, dated June 21, 1881, to C. A. Hague, and No. 270,629, dated January 16, 1883, to B. C. Bradley."

There was given in evidence in this suit the following admission by the defendant: "In the suit pending in the circuit court of the United States for the southern district of Iowa, wherein the Eagle Manufacturing Company is complainant, and David Bradley & Co. defendant, and which suit was brought to restrain the infringement of the letters patent in suit herein, the defendant in this cause, the David Bradley Manufacturing Company, employed counsel, took charge of and conducted the defense of said suit in the name of the said Bradley & Co., and paid the expenses thereof. This was done by the defendant herein, the same as it would be done by it for any agent, branch house, or customer engaged in selling implements purchased of the defendants, if sued for infringement of a patent on account of selling such goods."

It also appeared in evidence that in the suit in the circuit court of the United States for the southern district of Iowa against David Bradley & Co., the master, to whom the cause was referred to ascertain and report the complainant's damages, on or before October 15, 1889, reported to the court as follows: "That the complainant has already brought suit against the manufacturer of the cultivators which were sold by the defendant, electing to recover in full of said manufacturer all profits and damages arising from the sales by the defendant herein as well as other profits and damages, and for that reason will offer no proof of profits and damages in the cause. Accordingly the master reports that the complainant is entitled to recover the sum of one cent nominal damages and costs."

This report was made pursuant to the following stipulation of the parties: "It is hereby mutually agreed by and between the Eagle Manufacturing Company and the David Bradley Manufacturing Company, on this 25th day of September, 1889, as follows, to wit: That said Eagle Manufacturing Co. may cause the master in the case of Eagle Manufacturing Co. v. David Bradley & Company, pending at Des Moines, Iowa, in the United States circuit court for the southern district of Iowa, to return to the court the annexed report; and the action of the court thereon shall not be claimed by said David Bradley Manufacturing Co. to be a bar to the recovery by the Eagle Manufacturing Company of the said David Bradley Manufacturing Company of all damages and profits, if any, arising from the sale of the cultivators by the said David Bradley & Co. in violation of the letters patent 242,497, to E. A. Wright, and by him assigned to the Eagle Manufacturing Co."

On the 23d day of October, 1889, the following written stipulation was signed and filed in the cause: "The following proofs were offered in evidence in said cause this 23d day of October, 1889: The complainant appeared by Nathaniel French, its solicitor, and the defendant, though not appearing, consented in writing to the introduction of said proofs, in so far as the same are material; and thereupon the complainant offered in evidence the final decree of the circuit court of the United States for the southern district of Iowa in the case of Eagle Mfg. Co. v. David Bradley & Co., which same is marked 'Complainant's Exhibit Bradley Final Decree;' and thereupon the complainant offered in evidence a stipulation entered into by defendant in regard to the testimony of E. A. Wright, A. K. Raff, G. W. French and E. P. Lynch, taken in the case of Eagle Mfg. Co. v. Miller, pending in the circuit

court of the United States for the southern district of Iowa, together with a copy of said depositions and the exhibits therein referred to. The complainant also offered in evidence the admission of the defendant that it conducted the defense in the said suit of Eagle Mfg. Co. v. David Bradley & Co., and also a copy of letters patent No. 226,833, to B. C. Bradley, dated April 27, 1880; and thereupon the complainant announced that its case was closed. The defendant herein hereby consents to the foregoing proceedings."

Under such stipulation the complainant offered and read in evidence the final decree of the circuit court of the United States for the southern district of Iowa in the case referred to, as follows: "This case coming on for hearing on October 15, 1889, being the first day of the May term of said court, on the report of the master, and thereupon, in addition to the matters adjudged and decreed in the decree hereinbefore rendered on May 23, 1888, it is now ordered, adjudged, and decreed that the report of the master be confirmed, and that the complainant have and recover of the defendant the sum of one cent nominal damages, and the costs of the reference to the master to be taxed."

The answer in this cause asserts that the defendant, appellant here, is now constructing, selling, and using cultivators which are exactly the same as those sold by David Bradley & Co.; that such cultivators are manufactured under and in accordance with letters patent of the United States No. 243,123, dated June 21, 1881, granted to Charles A. Hague, and No. 270,629, dated January 16, 1883, granted to Byron C. Bradley. It also asserts the invalidity of the appellee's patent for want of novelty, and that the invention was anticipated by certain letters patent specifically stated. These defenses were pleaded to the suit of this appellee against David Bradley & Co. See Manufacturing Co. v. Bradley, 35 Fed. Rep. 295. The defenses here and there are substantially the same, except that here, in addition to the assertion of the patent to Dalton, common to the defenses in both suits, prior knowledge and use by Dalton is asserted independently of his patent. It is not claimed, however, that such use and knowledge goes further than the patent to him, pleaded, and considered by the court in the Iowa suit. There is this further exception: that by an amendment to the answer here the appellant alleged prior use by "Charles A. Hague, at Chicago, in the shops of the Furst & Bradley Manufacturing Company, now the David Bradley Manufacturing Company," in addition to the prior use asserted theretofore in the answers, both in the case here and in the suit in the southern district of Iowa. The Hague patent was, however, asserted in the answer in the Iowa suit as one of the patents under which the appellant's cultivators were manufactured.

The court below entered an interlocutory decree for the complainant, containing the usual direction for an injunction, upon the ground that the decree in the Iowa case was binding upon the defendant, and precluded it from further contesting the validity of the complainant's patent. Eagle Manuf'g Co. v. David Bradley Manuf'g Co., 50 Fed. Rep. 193. The present appeal involves the correctness of that ruling.

Bond, Adams & Pickard, for appellant.
George H. Christy, for appellee.

Before GRESHAM and WOODS, Circuit Judges, and JENKINS, District Judge.

JENKINS, District Judge, (after stating the facts.) The general rule that a judgment or decree of a court of competent jurisdiction between two parties is conclusive in any other suit between them or their privies of every matter that was decided therein, and that was essential to the decision made, is not here called in question. It is objected, however, that the rule ought not to govern here, because—First, the decree in the suit in the southern district of Iowa was, at the bringing of this suit, interlocutory, and not final, and is not, therefore, res adjudicata; second, the ap-

pellee has failed by supplemental bill or otherwise to plead the final decree in the former suit, and the record thereof was therefore improperly allowed in evidence; third, that the appellee has by stipulation expressly waived its right to assert the former recovery; and, fourth, that a new defense, not involved in the former case, is here asserted.

1. The suit in the circuit court of the United States for the southern district of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was in fact the real party to that litigation, and, so far as the decree there is res adjudicata, is as effectively concluded thereby as if it were the actual defendant to the record. Lovejoy v. Murray, 3 Wall. 1, 18, 19; Robbins v. Chicago, 4 Wall. 657, 672.

That the decree was interlocutory at the bringing of this suit, and subsequently ripened into a final decree, does not impair its efficacy or conclusiveness when properly presented in this suit. The relative time of institution of suit, or the relative date of final decree, is not of consequence if the merits of the controversy be thereby fully and finally determined, and the record thereof is properly brought to the attention of the court. Duffy v. Lytle, 5 Watts, 120; Casebeer v. Mowry, 55 Pa. St. 422; Child v. Powder Works, 45 N. H. 547.

2. It is doubtless necessary, where special pleading is required, that a former recovery should be pleaded in bar. There are cases where the record of a former recovery can be given in evidence without being specially pleaded; but this case is not one of them. We are therefore to inquire whether the allegations contained in the bill are sufficient to admit the record, and whether any objection to its admission was laid upon failure to properly plead the former recovery; for, if the record be properly before us in evidence, although not well pleaded, we are not only at liberty to consider it, but are bound to give full effect to it.

The bill in apt terms pleads the former suit, and the interlocutory decree rendered therein. Whether the pleader so charged it in the bill with the view to invoke the doctrine of comity, or as a supposed bar to an apprehended attack upon the validity of the patent, we cannot say. If the latter, it may be doubted whether it would not better accord with correct principles of equity pleading to assert a former recovery in bar by replication or special plea. However that may be, the decree pleaded was not technically well pleaded as a bar, because, being interlocutory, while it affirmed the validity of the patent and the fact of infringement, it still remained in the breast of the chancellor, and was subject to change. But the appellant was advised by the bill that the interlocutory decree was relied upon by the appellee as a protection against further attack upon the patent in question, and no exception to the matter in the bill was taken. The object of all pleading is to fitly advise an opponent of the par-

ticular charges or defenses relied upon, that he may be prepared to meet the particular matter, and be not taken by surprise. Here the appellant—so far as respects the interlocutory decree—was not only fully apprised of the position of its opponent, but by its answer and stipulation conceded the facts charged, and objected only to the decree that in rendering such judgment the court erred through failure to understand the operations of the Dalton machine, asserted to anticipate the invention of the appellee. While, therefore, the bill did not, in the view of strict pleading, present the issue of a former recovery, because it did not allege what did not at the time exist,—the formal final decree,—still when that final decree was offered in evidence it was properly allowed, and should be considered, unless proper objection was made to its reception upon the particular ground that it had not been pleaded. Walsh v. Colclough, (7th Circuit,) 9 U. S. App. —, — C. C. A. —, 56 Fed. Rep. 778. It was incumbent upon the appellant by fit objection at the time, or by subsequent motion to expunge, to have informed its opponent of the precise ground of objection. The objection could then have been obviated by amendment to the bill, or by proper supplemental pleading. It is too late to urge such objection for the first time upon an appeal.

It is to be further observed that the record of the final decree was introduced in evidence upon the consent of the appellant. The language of the stipulation is: "The defendant, though not appearing, consented in writing to the introduction of said proofs in so far as the same are material." The stipulation covers four distinct matters allowed in evidence without other objection than that stated. The evident meaning of the stipulation is that the matters offered should all be received in evidence, subject only to the question of their bearing upon the merits of the controversy. It was a waiver, in our opinion, of all formal objection. "Materiality" means "the property of substantial importance or influence, especially, as distinguished from formal requirement," (Bouvier;) "substantial, as opposed to formal," (Johnson.) It is clear to our minds that the only reservation made in the stipulation was the question of the influence of the evidence upon the controversy between the parties,—whether the evidence tendered was of substance as affecting the matter in dispute. The stipulation ignores all formal requirements, all technical objections with respect to pleading. We conclude, therefore, that the final decree is properly in evidence, and should be considered, and given its proper effect.

3. We are of opinion that the third objection, that the bar of a former recovery has been waived, is not tenable. All that remained to give full and final effect to the interlocutory decree of May 23, 1888, was the ascertainment of the damages, and the formal entry of final decree. This bill was filed June 11, 1888. On the 25th September, 1889, the parties stipulated that in the suit in the southern district of Iowa the master should report that the complainant (the appellee here) had brought suit against the manufacturer (the appellant here) of the infringing machines

in controversy in that suit, "electing to recover in full of said manufacturer all profits and damages arising from the sales by the defendant herein, as well as other profits and damages, and for that reason will offer no proof of profits and damages in the cause;" and that the master should report nominal damages against the defendant there, which was done. The stipulation further provided that the action of the court upon such report "shall not be claimed by said David Bradley Manufacturing Co. to be a bar to the recovery by the Eagle Manufacturing Co. of the said David Bradley Manufacturing Co. of all damages and profits, if any, arising from the sale of the cultivator by the said David Bradley & Co. in violation of the letters patent 242,497, to E. A. Wright, and by him assigned to the Eagle Manufacturing Co." We cannot perceive that this stipulation has legal effect to waive the conclusiveness of the Iowa decree upon the validity of the patent and its infringement. The interlocutory decree had determined those questions; conclusively so when by final decree the matter was no longer at large. That would result, whatever the quantum of damages awarded. In the light of the situation of the parties at the time, the object and force of the stipulation is obvious. The validity of the patent, and its infringement, had been contested and determined against the agents of the appellant for the sale of its machines. The appellant had assumed the defense of that suit, and was defeated. It was, equally with its agents, the defendant in that suit, liable for all damages sustained. If the nominal defendant had ignorantly infringed, being employed to do it, there was a certain equity that only nominal damages should be exacted, reserving to the appellee recourse to the more guilty infringer, the manufacturer. The appellant had, immediately upon the rendering of the interlocutory decree, instituted this suit to recover damages of the manufacturer for all damages sustained, whether by reason of the manufacture and sale of the machines in that suit adjudged to infringe or of others. It was but just, under such circumstances, that substantial damages should be sought of the guilty manufacturer, rather than of a possibly innocent agent. Such proceeding was also in the way of economy in litigation. It was assumed that that course could be safely pursued, if by stipulation the manufacturer would waive the bar of a decree entered for nominal damages, and permit a recovery to be sought in this suit for the actual damages sustained by reason of the manufacture and sale of the infringing machines involved in that suit. The stipulation speaks that object and no other. It contains no intimation that the decree should be at large with respect to the more important matter thereby put at rest,—the validity of the patent. There is not any waiver of the bar of the decree in that respect. Nor does the record disclose to us any such purpose or intent. We cannot do violence to the plain language of the stipulation by importing into the agreement a stipulation not contained in it, nor authorized by the condition of the parties. It seems to us incredible that the appellee should release all the fruits of its victory without motive or apparent reason therefor. The stipulation in express terms

limits the release of the bar of the decree to the subject of damages, and is a release by the appellant. In no way did the appellee waive any claim with respect to the effect of the decree.

Nor do we see in the fact that testimony was taken in this suit touching the validity of the patent any reason to declare a waiver. Until final decree there was no res adjudicata. All such evidence was taken before the final decree of October 15, 1889, in the Iowa suit. Immediately thereafter, on the 23d day of October, 1889, the final decree was admitted in evidence here by consent of the appellant, together with the stipulation containing the admission of the appellant that it had assumed and conducted the defense of that suit; and the evidence was thereupon closed. We are not prepared to say that the taking of evidence upon the issue presented by a defendant is a waiver by the complainant of the bar of a former recovery, even when well pleaded; but if it be so, the rule cannot have application before such former recovery is rendered effectual by final decree. Nor do we perceive in the circumstances of the case any action of the appellee that tended to mislead the appellant to its prejudice. The latter consented to the admission in evidence of this final decree, coupled with its admission that it had assumed the defense of the Iowa suit. That record could have no other effect in evidence than as res adjudicata. It had no possible function to perform save as a bar to attack upon the validity of the patent. The appellant knew, or should have known, this. It knew, or should have known, that such was the purpose in its introduction. The right of appeal was perfect in the appellant, beyond the control of its opponent. It failed to assert its right. The appellee should not, therefore, lose the benefit of the decree. The consequences must fall where they justly belong,—upon the one failing to take advantage of an absolute right.

4. It is insisted that the matter is still at large with respect to certain defenses stated to have been not involved in the former case. This contention leads to the consideration of the question of the extent of the bar of the former recovery.

In Cromwell v. County of Sac, 94 U. S. 351, it was ruled that there existed a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. The distinction is thus stated by Mr. Justice Field:

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never

existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In that case Cromwell brought action against the county of Sac upon four bonds of the county, and four coupons for interest, attached to them. The county asserted a judgment in a prior action by one Smith upon certain earlier maturing coupons on the same bonds, and charged that Cromwell was at the time the owner of the coupons so sued upon, and prosecuted the action for his sole use and benefit. It was ruled in that action that the bonds were void, except in the hands of a bona fide holder for value, and, failing proof of that fact, judgment was rendered for the county. It was held that the judgment was conclusive only of the fact that the plaintiff could not recover the amount of the coupons sued for, and for the reason that he had not shown himself a bona fide holder for value, and that finding did not preclude Cromwell from showing in another suit, and as to bonds and coupons not therein involved, that he was a bona fide holder thereof for value.

In Davis v. Brown, 94 U. S. 423, two of a series of notes had passed into judgment upon the sole defense by the indorsers that they had not been legally charged as such. In a second suit upon certain other notes of the series the defense was asserted of an agreement by the plaintiff not to hold them liable for or to sue them upon their indorsements. The court held the former judgment not to be res adjudicata upon the new defense asserted to a different demand, saying by Mr. Justice Field, (page 428:)

"When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence."

In Campbell v. Rankin, 99 U. S. 261, 263, the doctrine is thus stated by Mr. Justice Miller:

"Whatever may have been the opinion of other courts, it has been the doctrine of this court, in regard to suits on contracts, ever since the case of Steam Packet Co. v. Sickles, 24 How. 333, and in regard to actions affecting real estate, since Miles v. Caldwell, 2 Wall. 35, that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also, that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in Cromwell v. County of Sac, 94 U. S. 351; Davis v. Brown, Id. 423."

In Block v. Commissioners, 99 U. S. 686, 693, Mr. Justice Strong asserts the doctrine as follows:

"Now, that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go further, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded."

In Wilson v. Deen, 121 U. S. 525, 532, 7 Sup. Ct. Rep. 1004, Mr. Justice Field restates the principle thus:

"In Cromwell v. County of Sac, 94 U. S. 351, we considered at much length the operation of a judgment as a bar against the prosecution of a second action upon the same demand, and as an estoppel upon the question litigated and determined in another action between the same parties upon a different demand; and we held, following in this respect a long series of decisions, that in the former case the judgment, if rendered upon the merits, is an absolute bar to a subsequent action, a finality to the demand in controversy, concluding parties and those in privity with them; and that in the latter case—that is, where the second action between the same parties is upon a different demand—the judgment in the first action operates as an estoppel as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered."

In Bissell v. Spring Valley Tp., 124 U. S. 225, 231, 8 Sup. Ct. Rep. 495, Mr. Justice Field again restates the doctrine as held by the court in clear and unequivocal language, as follows:

"In Cromwell v. County of Sac, 94 U. S. 351, we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the latter case—which is the one now before us—we held, following numerous decisions to that effect, that the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. The inquiry in such case, therefore, we said, must always be as to the point or question actually litigated and determined in the original action, for only upon such matters is the judgment conclusive in another action between the parties upon a different demand. Lumber Co. v. Buchtel, 101 U. S. 638; Wilson v. Deen, 121 U. S. 525, 7 Sup. Ct. Rep. 1004."

The rule thus settled has been reiterated by the court in Nesbit v. Independent Dist., 144 U. S. 610, 618, 12 Sup. Ct. Rep. 746; Railroad Co. v. Alsbrook, 146 U. S. 279, 302, 13 Sup. Ct. Rep. 72; McComb v. Frink, 149 U. S. 629, 641, 13 Sup. Ct. Rep. 993.

In the sense that the present suit is prosecuted for an infringement not involved in the prior adjudication, the demand is not the same. But that, we think, is not the proper criterion. The inquiry should be directed to the question whether the right asserted by the party as the foundation of this suit is the same right determined by the previous action; for, if the former test should prevail as the standard, a patentee could never be precluded from asserting the validity of his patent against subsequent infringements by the one who had by previous judgment obtained adjudication against its validity. The former recovery in such case would be conclusive only that the particular devices there involved did not infringe. The question of the validity of the patent

would thus forever remain at large, without conclusive determination. We are of opinion, therefore, that this suit is upon the same claim and demand, to wit, the patent that was involved and determined in the former suit. That this must be so appears clearly from an examination of the cases cited. Thus in Wilson v. Deen, supra, the lessor brought action for rental under a lease. The defense was that of fraud in procuring the lease, and judgment passed for the defendant. In another action between the same parties for rental subsequently accruing under the same lease, the former recovery was pleaded in bar, against which it was urged that the demand was not identical, and Cromwell v. County of Sac was invoked to sustain that position. The court, however, sustained the plea, saying of the former judgment that "it determined not merely for that case, but for all cases between the same parties, not only that there was nothing due for the rent claimed for the month of December, 1873, but that the lease itself was procured by fraud, and therefore void." The court cites with approval the case of Gardner v. Buckbee, 3 Cow. 120, where two notes were given upon the sale of a vessel. In an action upon one of the notes the maker pleaded fraud in the sale, and a total failure of consideration, and judgment was rendered in his favor. In an action upon the other of the notes the record of the judgment in the former suit was offered in evidence in bar of the action. The supreme court held the judgment conclusive. Instances might be multiplied of like adjudications. We deem it only necessary to refer to, without enlarging upon, the following cases: Lumber Co. v. Buchtel, 101 U. S. 638; Insurance Co. v. Bangs, 103 U. S. 780; Elgin v. Marshall, 106 U. S. 578, 579, 1 Sup. Ct. Rep. 484.

We are compelled, therefore, to the conviction that this suit falls within the first resolution in Cromwell v. County of Sac, namely, that it is a second action upon the same claim or demand, to wit, upon the claim for a monopoly granted by patent; and that the former decree, the question being necessarily involved and at issue in that cause, determines conclusively and for all time, as between the parties thereto and their privies, the validity of the patent. It can no more be made the subject of contention between them.

Nor do we apprehend the result could be different if the case could be held to fall within the second resolution of Cromwell v. County of Sac. If this suit can be construed to be upon a different claim or demand because the alleged infringement was in the use of machines not involved in the former suit, still the prior decree would be conclusive upon the matters at issue essential to a recovery, and actually determined in such action. The validity of the patent was there at issue. Its invalidity was claimed because, as there asserted, certain specified prior patents described the same invention, and because of prior use. The determination of the issue of invalidity was essential to any decree for the complainant in that cause, and was determined by the judgment. It is said here that the prior patent to Dalton, and prior use by Hague here asserted, was not then in issue. The Dalton patent

was distinctly passed upon by the court, and was held unavailing to defeat the invention claimed. As to the alleged prior use by Hague, it may be said that it was in the prior suit alleged by the defendant with the sanction of the present appellant that the cultivators complained of as infringing were manufactured under the letters patent to Hague of June 21, 1881. This patent was some two weeks subsequent in date to the complainant's patent, and was held to infringe. Prior use by Hague may not have been specifically alleged, but the defendant there attacked the validity of the patent because of prior use and of anticipation by other patents. It was a duty to have asserted all anticipating patents, and all prior use. The issue of the pleadings was novelty of invention. The testimony of prior use and of anticipatory patents bore upon the issue of novelty of invention. In a suit at law such issue is tendered by a plea of the general issue, and such evidence may be given thereunder upon giving a certain notice. So in a suit in equity, like defense of invalidity may be pleaded, "and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect." Rev. St. § 4920. The statement so required of particular anticipating patents, and of prior use, is clearly a mere bill of particulars of evidence to establish the issue of want of novelty; not independent issues. So no new defense is here asserted. The matter charged is merely additional evidence in support of the issue presented and determined in the former suit. It was competent evidence in that suit without any statement of it in the pleading, if the objection of the statute was not timely urged. Loom Co. v. Higgins, 105 U. S. 580; Zane v. Soffe, 110 U. S. 200, 203, 3 Sup. Ct. Rep. 562. The proposed evidence comes too late to be availing. The decree of a court is not the less conclusive because a party has failed to produce all the evidence at command, or because of newly-discovered evidence. "Expedit reipublicae ut sit finis litium."

The decree will be affirmed.

MOLINE PLOW CO. v. EAGLE MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1893.)

No. 26.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Bill by the Eagle Manufacturing Company against the Moline Plow Company to restrain the infringement of a patent. Complainant obtained a decree. Defendant appeals. Affirmed.

Bond, Adams & Pickard, for appellant.

George H. Christy, for appellee.

Before GRESHAM and WOODS, Circuit Judges, and JENKINS, District Judge.

JENKINS, District Judge. This case differs in no essential particulars from that of David Bradley Manuf'g Co. v. Eagle Manuf'g Co., 57 Fed. Rep. 980, herewith decided. It presents the same questions, and is controlled by the same rules of law. The decree is therefore affirmed.

LYNDE v. COLUMBUS, C. & I. C. RY. CO. et al.

(Circuit Court, D. Indiana. October 14, 1893.)

No. 8,867.

1. JUDGMENT—RES JUDICATA—PLEA IN BAR—PRESUMPTIONS.
When a former judgment of a court of general jurisdiction is pleaded in bar, it will be presumed that it had jurisdiction of the subject-matter and the parties, and the plea is therefore not bad for failing to aver that the court acquired jurisdiction of the parties by service of process or by appearance.

2. SAME—RAILROAD FORECLOSURE—DECREE—EXTRATERRITORIAL OPERATION.
In the foreclosure of a mortgage on a railroad situated partly in two states, a court of one state cannot merge into its judgment the lien on the property in the other state, and, while it may act upon the person of defendant, so as to compel it to make conveyances or releases, yet, if it has not done so, its mere judgment is not a bar to a suit in the other state, between the same parties, to foreclose the same mortgage there. Farmers' Loan & Trust Co. v. Postal Tel. Co., 11 Atl. Rep. 184, 55 Conn. 334, followed. Muller v. Dows, 94 U. S. 444, distinguished.

In Equity. Bill by Charles R. Lynde against the Columbus, Chicago & Indiana Central Railway Company, Archibald Parkhurst, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to foreclose a mortgage. Heard on a plea in bar. Overruled.

Kittridge, Wilby & Simmons, for complainant.
Watson, Burr & Linsay and L. Maxwell, Jr., for defendants.

BAKER, District Judge. The plaintiff brings this suit as a bondholder for whom the trustee has refused to bring suit against the Columbus, Chicago & Indiana Central Railway Company, Archibald Parkhurst, trustee, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, for the foreclosure of a trust deed or mortgage executed by the Columbus, Chicago & Indiana Central Railway Company to Archibald Parkhurst, as trustee, to secure 1,000 bonds, of $1,000 each, issued by it, and asking for the sale of its railroad embraced in said trust deed, extending from Indianapolis, Ind., to Columbus, Ohio, together with its franchises, equipments, property, tolls, and interests,—that is to say, the lands, tenements, hereditaments, fixtures, goods, and chattels of the Columbus, Chicago & Indiana Central Railway Company; its property, rights, privileges, interest, and estate of every description and nature; its rails, ties, fences, buildings, and erections; its right of way, cars, engines, tools, and machinery; its rents, reservations, and reversions, of every nature, or so much thereof as lies and is within the state and district of Indiana. The bill avers that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company claims some interest in the said premises, and prays that it may be required to make answer to, all and singular, the allegations and charges contained in the bill, and that said property may be decreed to be sold free and discharged from any and all claims or interest of the parties respondent to the bill.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company has filed a plea alleging, in substance, that the plaintiff herein, as plaintiff, brought suit against the defendants herein, as defendants, on the same bonds and trust deed or mortgage, in the common pleas court of Franklin county, Ohio; that said court is a court of general jurisdiction in law and equity; that the cause was tried, and that the court found the bonds in question to be valid obligations of the Columbus, Chicago & Indiana Central Railway Company, and that the plaintiff was entitled to a decree for their payment; and the court decreed that unless the defendant the Columbus, Chicago & Indiana Central Railway Company should, within 30 days, pay, or cause to be paid, the sum so found due, the mortgage should be foreclosed, and the mortgaged property sold, and that upon the sale the purchaser should be entitled to hold said railway and property free and discharged from the lien or incumbrance of all the parties to the suit. The plaintiff has set the plea down for argument, and the question raised is whether the facts pleaded are sufficient to constitute a bar to the maintenance of the present suit.

The plaintiff contends that the plea is insufficient because it contains no averment that either the mortgagor, the Columbus, Chicago & Indiana Central Railway Company, or the mortgagee, Archibald Parkhurst, trustee, was brought within the jurisdiction of the court in Ohio by process personally served, or by appearance in person or by attorney. The plea avers that the said Charles R. Lynde filed his bill of complaint, denominated by the law of the state of Ohio a "petition," against this defendant and its codefendants the Columbus, Chicago & Indiana Central Railway Company and Archibald Parkhurst, trustee, and it then proceeds to aver that the cause was heard, and a decree rendered against all the defendants; but it fails to show affirmatively that the court acquired jurisdiction of the persons of the defendants, either by service of process or by appearance.

Pleas in bar, in suits in equity, are not favorities of the law, because the defendant has other and ample modes of defense open to him. They are therefore required to be drawn with precision, and must disclose upon their face a complete defense. The facts necessary to render the plea an equitable bar to the case made by the bill must be clearly and distinctly averred, and such plea will not be aided by argument, inference, or intendment. McCloskey v. Barr, 38 Fed. Rep. 165. This rule, however, is not to be construed as conflicting with that other salutary rule that legal presumptions ought not to be stated in a pleading. Steph. Pl. (1871) p. 312 et seq. When the facts are stated from which the law raises a certain legal presumption, it is not necessary for the pleader to do more, in order to have the benefit of such legal presumption. In the case of Galpin v. Page, 18 Wall. 350, the rule is thus stated:

"It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law, in such cases, are in favor of its acts. It is pre-

sumed to have jurisdiction to give the judgment it rendered, until the contrary appears; and this presumption embraces jurisdiction, not only of the cause or subject-matter of the action in which the judgment is given, but of the parties, also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court, or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant, or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and it is asserted in all the adjudged cases. The rule is different with respect to courts of special and limited authority. As to them, there is no presumption of law in favor of their jurisdiction. That must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

The judgment in question was rendered by a court having general jurisdiction in law and equity, and the legal presumption is that the court had jurisdiction of the parties and subject-matter, and had power to pronounce the judgment it did; and this presumption cannot be overcome, except by averment and proof that it proceeded without jurisdiction. It is true that, when the record of a former judgment is set up as establishing some collateral fact involved in a subsequent litigation, it must be pleaded strictly as an estoppel; and the rule is that such pleading must be framed with the utmost precision, and it cannot be aided by inference or intendment. When, however, a former judgment or decree is set up in bar of a subsequent action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters set up in the antecedent pleading of the opposite party. Aurora City v. West, 7 Wall. 82; Gray v. Pingry, 17 Vt. 419; Perkins v. Walker, 19 Vt. 144; 1 Greenl. Ev. (12th Ed.) p. 566; Shelley v. Wright, Willes, 9. The plea is not bad for failing to aver that the court had acquired jurisdiction over the parties by service of process or appearance. If, in truth, the court proceeded to render the decree in question without having acquired jurisdiction of the defendants, that fact, to avail the plaintiff here, should have been set up by replication, instead of setting the plea down for argument. Rogers v. Odell, 39 N. H. 452; Spaulding v. Baldwin, 31 Ind. 376; Biddle v. Wilkins, 1 Pet. 686; Pennington v. Gibson, 16 How. 65; Campe v. Lassen, 67 Cal. 139, 7 Pac. Rep. 430; Vanfleet, Collat. Attack, §§ 846 and 847, and authorities there cited.

It follows that the sufficiency of the plea must be determined on the assumption that the court in Ohio had jurisdiction of the defendants when the cause before it was heard and decided. The cause of action there was founded on the same bonds and mortgage or trust deed which constitute the cause of action here. The mortgage or trust deed in suit was executed by a railroad corporation organized by the consolidation of two corporations, one of which was organized under the laws of the state of Ohio, and the other under the laws of the state of Indiana. The consolidated company, presumably, became invested with all the property and franchises of the constituent corporations. Its franchise to be a consolidated corporation, and to build, own, and operate a line of railway extend-

ing from Columbus, Ohio, to Indianapolis, Ind., is undoubtedly an entirety, while the immovable property of the company covered by the mortgage has its situs in both states. It is earnestly insisted that the decree of the Ohio court is binding and conclusive because the court had jurisdiction of the parties and of the subject-matter, and that the present suit to foreclose the same mortgage or trust deed cannot be maintained because by that decree the right of action growing out of the bonds and mortgage has passed in rem judicatam. It is undoubtedly true that courts possessing general chancery powers have jurisdiction to relieve against fraud, to enforce trusts, and to compel the specific performance of contracts in relation to immovable property having its situs elsewhere than in the state or country where the courts exist, whenever jurisdiction has been acquired, by appearance, or by personal service of process, over the persons on whom the obligation rests. Penn. v. Lord Baltimore, 1 Ves. Sr. 444; Earl of Kildare v. Eustace, 1 Vern. 419; Arglasse v. Muschamp, Id. 75; Toller v. Carteret, 2 Vern. 494; Massie v. Watts, 6 Cranch, 148; Mills v. Duryea, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234; McGilvray v. Avery, 30 Vt. 538; Davis v. Headley, 22 N. J. Eq. 115; Dobson v. Pearce, 12 N. Y. 156; U. S. Bank v. Merchants' Bank of Baltimore, 7 Gill. 415; Burnley v. Stevenson, 24 Ohio St. 474. In the case of fraud, trust, or contract, the jurisdiction of a court possessing general equity powers is sustainable wherever the person to be bound by the decree is found, though the decree may incidentally affect lands without its territorial jurisdiction. The decree proceeds in personam, and is binding on the conscience of the party; and the court may, by attachment or sequestration, compel the party to perform that which, in equity and good conscience, he ought to have done without coercion. Aequitas agit in personam. Conceding that the court in Ohio had jurisdiction of the parties and of the subject-matter, had it power, by its decree, to merge the lien of the mortgage on the property embraced therein, having its situs in Indiana? The Ohio court may compel the defendants to execute a conveyance or release of the mortgaged premises in such form as may be necessary to transfer the legal title to the property according to the law of this state, and such as will be sufficient to bar an action elsewhere. The plea does not aver that the execution of any such conveyance or release has been compelled. Until such conveyance or release has been executed, the lien of the mortgage on the immovable property embraced in it, situated in this state, remains unaffected, unless the court in Ohio was clothed with power enabling it to affect the status of real estate outside of the state which created the court, by a decree operating in rem.

It is elementary that no sovereignty can extend its process beyond its own territorial limits, to subject persons or property to its judicial decisions. Every attempted exertion of authority of this sort beyond its limits is a mere nullity, incapable of binding such person or property in any other forum. Story, Confl. Laws, (7th Ed.) § 539. A suit cannot be maintained against a person so as absolutely to bind his property situated in another sovereignty, nor so as absolutely to bind his right and title to immovable property whose

situs is elsewhere. "It is true," says Story in his Conflict of Laws, (7th Ed., § 543,) "that some nations do, in maintaining suits in personam, attempt indirectly, by their judgments and decrees, to bind property situate in other countries; but it is always with the reserve that it binds the person only in their own courts, in regard to such property. And certainly there can be no pretense that such judgments or decrees bind the property itself, or the rights over it which are established by the laws of the place where it is situate." And again he says: "In respect to immovable property, every attempt by any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution in rem." These principles have been recognized and acted upon by all courts as having their foundation in reason, and as essential to the peace and security of independent states. In Watkins v. Holman, 16 Pet. 25, it was held that a court of chancery might decree the conveyance of land in any other state, and might enforce the decree by process against the defendant, but that neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, could operate beyond the jurisdiction of the court. The same principle is affirmed and acted upon in Boswell v. Otis, 9 How. 336, and Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233. Indeed, no principle is more firmly settled than that the disposition of real estate, whether by deed, descent, or any other mode, must be governed by the laws of the state where the land is situated. It is argued that, in respect of immovable property mortgaged by an interstate railway company, a different rule has been established by the case of Muller v. Dows, 94 U. S. 444. It is contended that the court there held that, as the railroad and its franchise were an entirety, any court having jurisdiction of the parties and subject-matter could make a valid decree of foreclosure, which would operate on the entire railroad property, as well without as within the state where the decree was pronounced, and that it would completely merge the lien of the mortgage. What was there said, giving apparent support to this contention, was merely arguendo, and was not essential to the judgment pronounced. In that case the circuit court of the United States for the district of Iowa passed a decree of foreclosure and sale of a railroad extending from a point in Iowa to a point in Missouri, and owned by a corporation formed by the consolidation of a corporation of Missouri with a corporation of Iowa. The entire line was covered by one trust deed, and the suit to foreclose was brought by the trustee. The mortgagees were also before the court, and the sale was made by a master at the instance of the trustee. It was held that the decree was not void, so far as it directed the foreclosure and sale of that part of the railroad lying in Missouri, and that the trustee could be required by the court in Iowa to make a deed to the purchaser in confirmation of the sale. In my judgment, this case does not overturn the well-established doctrine that a court in one state cannot pass a decree which shall operate to change the title to, or merge a lien upon, immovable property in another state. The title in that case was trans-

ferred by the court compelling the execution of a power of sale, and not by force of the decree. Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. Rep. 337; Farmers' Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 334, 11 Atl. Rep. 184. The case last cited is exactly in point. The Postal Telegraph Company, a New York corporation, mortgaged all its property, which was situated in several states, including Connecticut and New York, to the plaintiffs, in trust, to secure the payment of its bonds. Upon a failure to pay the interest, the plaintiffs brought a suit for a foreclosure in the supreme court in the city of New York. Judgment was rendered for the plaintiffs, pursuant to which a referee was appointed, who sold all the property, including the real estate in Connecticut, and executed a conveyance of the same to the purchaser. Suit was brought to foreclose the mortgage on the Connecticut property, according to the laws and practice in that state. The defendant the Benedict & Burnham Manufacturing Company, an attaching creditor, appeared, and set up a special defense, alleging the foreclosure and proceedings in the state of New York. The defense was held insufficient, on the ground that the decree and proceedings had thereunder were nugatory as to the real estate situate in Connecticut. In my judgment, the doctrine of this case presents the better view, and it must be held that the decree of the Ohio court did not merge the lien of the mortgage on the real estate in Indiana.

It results from these views that the plea is insufficient, and it is so ordered, with leave to the defendant to answer within 30 days.

HUTCHINSON v. SUTTON MANUF'G CO.

(Circuit Court, D. Indiana. October 21, 1893.)

No. 8,691.

1. CORPORATIONS—POWERS—ACCOMMODATION PAPER.
   A business corporation has no power to accept accommodation paper, and the officers who cause it to make such acceptance are personally responsible to it for payments made or liabilities incurred in consequence thereof.

2. SAME—ASSIGNMENTS—PREFERENTIAL MORTGAGES.
   Where the controlling directors of two corporations are the same persons, a preferential mortgage given by one to the other as security for payments and liabilities resulting from an acceptance of drafts by the latter for accommodation of the former is invalid, because it operates to protect the officers of the accepting company against personal liability for their maladministration in accepting paper for accommodation.

In Equity. Suit by William B. Hutchinson, assignee of the Hopper Lumber & Manufacturing Company, against the Sutton Manufacturing Company, to set aside a mortgage. On exceptions to the master's report. Exceptions overruled, and decree for complainant.

Duncan & Smith, for complainant.

J. E. McCullough and Weir & Higgins, for defendant.

BAKER, District Judge. The bill of complaint seeks the setting aside of a preferential mortgage executed by the Hopper Lumber & Manufacturing Company to the Sutton Manufacturing Company to secure the latter from loss by reason of payments made and of liabilities incurred on account of accommodation paper drawn by the former and accepted by the latter. The business affairs of each company were managed by a board of three directors. The directors of the Sutton Company were James S. Hopper, Henry S. Hopper, and Benjamin F. Sutton; and the directors of the Hopper Company were James S. Hopper, Henry S. Hopper, and Fannie A. Hopper; and James S. Hopper was the president of both companies, and Henry S. Hopper was secretary, treasurer, and general manager of the Sutton Company, and also secretary of the Hopper Company, of which James S. Hopper was manager. The bill challenges the validity of the mortgage on the ground that it is an attempt by the officers and directors of the Hopper Company to prefer themselves, and to protect their interests as stockholders of the Sutton Company, and to save themselves from loss and harm by reason of maladministration of their trust as officers and directors of the Sutton Company in having accepted drafts of the Hopper Company for its accommodation. The answer admits that the indebtedness secured by the mortgage was given to secure payments made and liabilities incurred by the Sutton Company on account of accommodation bills accepted by it drawn by the Hopper Company. The majority of the directors of each company were the same persons, and they had no authority to draw or accept the accommodation bills in question. It is firmly settled that the directors of a manufacturing corporation have no authority to divert the corporate property by issuing accommodation paper, or otherwise loaning its money or credit without consideration. The directors participating in such acts (and James S. and Henry S. Hopper certainly did) became personally liable for breach of duty to the Sutton Company to the extent of the payments made or liabilities incurred by that company on account of such accommodation paper. Whether the pecuniary interest of James S. and Henry S. Hopper as stockholders of the Sutton Company would avoid the preferential mortgage in question, it is not necessary now to determine. The mortgage inures directly to the pecuniary benefit of James S. and Henry S. Hopper, because, if valid, it would relieve them wholly or pro tanto from their liability to the Sutton Company on account of the accommodation paper. Judge Woods, when making the order continuing a temporary injunction in this suit, well said: "This case not only comes clearly within, but strongly illustrates, the soundness of the rule declared in Lippincott v. Carriage Co., 25 Fed. Rep. 577, and Howe v. Tool Co., 44 Fed. Rep. 231." On the authority of these cases the exceptions to the master's report must be overruled, and it is so ordered, and a decree will be entered setting aside the mortgage.

INDIANAPOLIS WATER CO. v. AMERICAN STRAWBOARD CO.

(Circuit Court, D. Indiana. October 20, 1893.)

No. 8,719.

1. NUISANCE—EQUITABLE RELIEF—POLLUTION OF STREAM.
A corporation organized for the purpose of supplying a city with water can only gain a standing in a court of equity, to enjoin a pollution of the stream whence it obtains its supply, by reason of special pecuniary damage caused to it; but when it is thus in court the relief will be granted, not only on that ground, but also on the ground of benefit to the public, which uses the water.

2. SAME—DEFENSES.
It is no defense, to a suit for creating a nuisance by befouling a stream, that others are also engaged in committing similar acts.

3. SAME—ESTOPPEL.
Mere silence during the erection of a factory on a stream creates no estoppel against a riparian proprietor in respect to the enforcement of his right to have the water flow in its natural purity.

4. SAME—PUBLIC POLICY.
As against the right of a riparian proprietor to have water flow in its natural purity, there is no public policy in favor of industrial development which will justify the erection and operation of a factory that pollutes the stream, provided that the most modern appliances are used to prevent it.

5. SAME—EQUITY JURISDICTION—INJUNCTION.
Injunction is the only adequate remedy for the continued pollution of a stream by the operation of a factory, to the injury of a riparian proprietor, when the extent of the injury is contingent and of doubtful pecuniary estimation. 53 Fed. Rep. 970, reaffirmed.

In Equity. Suit by the Indianapolis Water Company against the American Strawboard Company to enjoin the pollution of a stream. A demurrer to the original and supplemental bills was heretofore overruled. 53 Fed. Rep. 970. Injunction granted.

A. C. Harris and Baker & Daniels, for complainant.

Jump, Lamb & Davis, George Shirts, and Kern & Bailey, for defendant.

BAKER, District Judge. The bill seeks injunctive relief to prevent the alleged pollution of the water of White river by the defendant to the damage of the complainant. It charges that the complainant is the owner of a system of waterworks constructed under statutory power for the purpose of supplying water for domestic uses and for the extinguishment of fires to the inhabitants of the city of Indianapolis, and that it is the owner of a canal by a title derived by mesne conveyances from the state. It avers that its water supply is obtained by the inflow of water into a gallery of more than 1,000 feet in length, and of considerable width, formed by an excavation made into the water-bearing gravel underlying the city, which gallery is dug alongside of, and several feet below, the bed of the river, and at a distance from it of a few feet at some points, and at a distance of more than 100 feet at other points. The inflow of water into the gallery is alleged to come from the water-bearing gravel on the one side, and

from the infiltration of water from the river passing through the loose gravel on the other side. It is also alleged that at times of drouth, when the water becomes low, and at all times when large quantities of water are required to extinguish fires, the natural inflow of water into the gallery must necessarily be supplemented by letting water through a flume or waterway provided with a filter, from the river into the gallery. It alleges that the canal, which is taken from the river at the upper side of the dam at Broad Ripple, extends to a point below Washington street, in the city of Indianapolis, and that for 50 years its successive owners have continuously used the water of the canal for hydraulic purposes, and for making ice upon the canal, and for supplying its water to adjacent ponds for making ice for domestic and other uses. It also avers that it has sold, under contracts running for several years, the privilege of taking ice from the canal, and of drawing water therefrom to supply ice ponds, from which it derives an annual income of $4,000. It charges that late in the year 1890, without complainant's consent, the defendant erected at Noblesville, near the bank of White river, a strawboard factory, and began to operate it in March, 1891, and has continued to do so ever since. That it daily discharges from its works 3,000,000 gallons of water, and uses 80 tons of straw, 27 tons of lime, and 5 gallons of muriatic acid, all of which are worked upon by the water passing through the factory, by which means the water passing from it into the river is charged with 67 tons of refuse matter. It is claimed that the water in the river is thereby polluted so as to become discolored, offensive to the smell and taste, unwholesome for domestic uses, and destructive of the fish in the stream. In the latter part of the spring, and again in September, 1891, the complainant notified the defendant that it was polluting the water of the river to its damage, and requested it to desist. The defendant thereupon agreed to stop the pollution of the river, and promised, if the complainant would refrain from any judicial proceedings for three weeks, that it would provide such appliances and devices as would remove the polluting substances from the water flowing from its works into the river. This, it is charged, the defendant attempted, but failed to accomplish. The case was put at issue, and a great mass of testimony was taken, and has been introduced on the hearing, to support the respective contentions of the parties. The case has been ably and elaborately argued, both orally and in printed briefs, and the court has given it attentive consideration. The testimony is too voluminous to justify, or even to permit, its review in detail, and the court must content itself with a statement of the conclusions it has reached.

The testimony, in my judgment, shows that the defendant, during the summer and fall of 1891, daily discharged from its factory, while in operation, into White river, large quantities of refuse and decomposable matter, which corrupted its waters so as to discolor the same, and to render them unfit for domestic uses and destructive of the fish in the river. This condition of the stream extended down the river to the dam and pond at Broad Ripple,

though the effect of these deleterious substances carried by the water in suspension and solution was somewhat less apparent at that point than in those parts of the river in closer proximity to the factory. The water in the canal, which is taken from the pond at the Broad Ripple dam, was discolored and was so injuriously affected in color and quality by pollution arising from the refuse matter passing from the factory as to be unfit for use in making ice for domestic purposes, though some of the ice formed from the water of the canal was used for the purposes of refrigeration. While the pollution of the water in the gallery arising from the operation of the factory was not great, I think it is fairly shown that at times the quality of the water was injuriously affected to such an extent as to materially and sensibly impair its fitness for drinking purposes. The water in the river was low during the greater part of the year 1891, in consequence of a severe and protracted drouth, and the injurious effects arising from its pollution were more observable than they were in 1892, when the river carried a much larger volume of water. When the complainant notified the defendant of the damage done to it by the discharge of the refuse matter into the river, and asked that it be stopped, the defendant acquiesced in the justice of the request, and promised to construct such appliances and devices as would prevent further injury. The defendant dug a settling pond of about five acres in extent, having a wasteway to conduct the water from the pond into the river. The most of the water escaped at first from the pond into the wasteway through a body of gravel intended to act as a filter. The testimony shows that it was never sufficient to remove more than one-half of the refuse matter from the water passing from the pond into the river, and that after a few months the bottom of the pond was covered to a considerable and constantly increasing depth with the decomposing and other refuse matter from the factory, and that the gravel filter became so clogged that the water passed from the pond over its top, having parted with only a small portion of its deleterious ingredients. I think the devices of the defendant are almost wholly valueless for the purpose of freeing the water from its pollution, and I entertain no doubt that whenever the river, in consequence of drouth, carries as small a volume of water as it did in 1891, its pollution will be substantially as great as it was in that year. The water in White river from February until August, 1892, was unusually high, and in the month of June there was a great flood. While the water in the river remained in this condition, the refuse matter discharged into it produced no sensible pollution in the canal or in the water gallery, though it was doubtless present in minute quantities. The channel of the river was thoroughly cleansed by the June flood, and the water of the river did not disclose any considerable pollution until the latter part of August. From that time until the latter part of October, when the taking of the testimony closed, it is fairly shown that the purity of the water in the pond at Broad Ripple and in the canal was materially and sensibly affected by the operation of

the factory. In my opinion, the testimony shows such adulteration of the water in the canal from the presence of the refuse matter held in solution and suspension, attributable to the operation of the factory, as to render the ice formed on the canal and in the adjacent ponds unfit for domestic use. The testimony does not show that the quality of the water in the gallery and in the water mains of the city was sensibly affected during the year 1892, except for a short period after the fire in January of that year. A large number of analyses of water taken from the river made in 1889, when compared with like analyses made since the factory went into operation, shows the purity of the water has greatly changed for the worse. No other efficient cause for such deterioration is shown except such as arises from its pollution by the deleterious substances discharged by the defendant into the river. In my judgment, the greater purity of the water in 1892 is attributable to the volume of the river, rather than to the remedial effect of the receiving pond and its appliances.

In ruling on the demurrer the court has passed upon the principal questions of law raised on the final hearing. Indianapolis Water Co. v. American Strawboard Co., 53 Fed. Rep. 970. But little more need be said. It is settled that the complainant owns the canal with its bed and banks in fee, and is clothed with the right to take and sell ice therefrom. Waterworks Co. v. Burkhart, 41 Ind. 364; Cromie v. Board, 71 Ind. 208; Nelson v. Fleming, 56 Ind. 310; Frank v. Railroad Co., 111 Ind. 132, 12 N. E. Rep. 105. Its right to enjoy the canal free from pollution is none the less because it is an artificial stream; nor can the defendant successfully contest the complainant's right to use the water of White river to feed its canal. Hydraulic Co. v. Boyer, 67 Ind. 236; Magor v. Chadwick, 11 Adol. & E. 571; Wood, Nuis. § 446. The canal was state property, constructed for public purposes. The complainant has become vested, by mesne conveyances and by various legislative acts, with authority to maintain a system of waterworks to supply the inhabitants of the city of Indianapolis with water for domestic purposes and for the extinguishment of fires. While it is a private corporation, it performs a most important public service; and, while the wrong complained of inflicts a special pecuniary loss on the complainant alone, it directly affects the health and comfort of the public. When a corporation thus obtains a standing in court by reason of its having suffered special damage, although it can only maintain its suit for an injunction on that ground, still the court will grant relief, not solely because the nuisance is private, so far as the complainant is concerned, but because the relief will inure to the public benefit. Woodruff v. Mining Co., 18 Fed. Rep. 753; Railroad Co. v. Ward, 2 Black. 485.

It is claimed that the people living along the river pollute the water by draining into it the filth and other refuse matter which accumulate on their premises. But it is no answer to a suit for creating and maintaining a nuisance that others, however many, are committing similar acts. Each one is liable to a

separate suit, and may be restrained. Wood, Nuis. § 689; Chipman v. Palmer, 77 N. Y. 51.

It is urged that the defendant is prosecuting a business useful in its character, beneficial to the public, and furnishing employment to a large number of men, and that it is conducted with skill and prudence, and with the most approved machinery, and, if damage results, it arises from no fault of the defendant; and that in such cases the ancient rigor of the law has been modified in furtherance of industrial progress and development. This contention finds no support, either in principle or authority. It is rudimentary that no man can be deprived of life, liberty, or property but by due process of law, nor can private property be taken, even for a public use, without just compensation first having been made or received; and under no form of government having regard for man's inalienable rights can one be permitted to deprive another of his property without his consent and without compensation, on the plea that the injury to the one would be small, and the advantage to the other, or even to the public, would be great. This principle has its sanction in the consciousness and right reason of every man, and is asserted by the concurrent judgments of all courts which administer an enlightened system of jurisprudence.

The complainant is not estopped to maintain its suit because it knew that the defendant was building large and expensive works for the manufacture of strawboard, and made no objection thereto. The defendant had better means of knowing whether the operation of its factory would create a nuisance than the complainant had. There is no proof that the complainant knew, or had the means of knowing, that the water in the river would be polluted by the factory until after it was in operation. In such case no estoppel can arise. To constitute an estoppel in pais it must appear that the person sought to be estopped has made an admission, or done or omitted an act, with the intention of influencing the conduct of another, or which he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up; that the other party has acted upon, or been influenced by, such act or admission; that the party so influenced will be prejudiced by allowing the truth of the act or admission to be disproved. I fail to discover any element of an estoppel in the case.

It was said, and I think correctly, in ruling on the demurrer, where the right of a riparian proprietor to the use and enjoyment of the flow of a stream of pure and wholesome water, free from corruption and pollution, has been actually invaded, and such invasion is necessarily to be continuing, and to operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and of doubtful pecuniary estimation, the writ of injunction is not only permissible, but it affords the only adequate and complete remedy. In my opinion, such a case has been made by the proof in this case. There will be a writ of injunction awarded.

INTERSTATE COMMERCE COMMISSION v. DETROIT, G. H. & M. RY. CO.

(Circuit Court, W. D. Michigan, S. D. October 6, 1893.)

1. CARRIERS—INTERSTATE COMMERCE COMMISSION—WHO MAY COMPLAIN.
It is no objection to the enforcement by the court of an order made against a railway company by the interstate commerce commission, that the complainants before the commission have no real grievance, but are instigated by a competing railroad, as section 13 of the interstate commerce act expressly provides that no complaint shall be dismissed by the commission because of the absence of direct damage to the complainant, and as the commission has power, of its own motion, to institute investigations, make orders, and apply to the courts for their enforcement.

2. SAME—INTERSTATE COMMERCE ACT—VIOLATION—FREE CARTAGE.
Free cartage by a railroad company, of goods shipped from without the state, from its station in Grand Rapids, Mich., to the business section thereof, an average distance of one and one-quarter miles, for delivery to the consignees, is a violation of the long and short haul clause of the interstate commerce act, (section 4,) where it appears that the same freight rates are charged to merchants of the city of Ionia, through which the railroad passes to reach Grand Rapids, but where such merchants are obliged to cart their goods from the railway station to their storehouses at their own expense. Severens, District Judge, dissenting.

3. SAME—"SIMILAR CIRCUMSTANCES AND CONDITIONS."
The grouping together by the railroad company of Ionia and Grand Rapids as stations to which freight rates from eastern cities may properly be made the same is a conclusive admission by the company that, so far as transportation from the east to the warehouses of the company at the two places is concerned, it is under substantially similar circumstances and conditions. Severens, District Judge, dissenting.

4. SAME—JUSTIFICATION BY CARRIER.
Such free cartage is not justified by the fact that competitors of the defendant company have stations at Grand Rapids in the business center, thus placing defendant at a disadvantage.

5. SAME.
Neither is the discrimination in rates justified by the fact that Grand Rapids is a much larger place than Ionia, and that the greater amount of business of the company with the larger place enables it to do carting more cheaply there than at the smaller place. Severens, District Judge, dissenting.

In Equity. Petition by the Interstate Commerce Commission for the enforcement of an order made against the Detroit, Grand Haven & Milwaukee Railway Company. Relief granted.

Statement by TAFT, Circuit Judge:

This was a bill in equity, exhibited by the interstate commerce commission, averring that the Detroit, Grand Haven & Milwaukee Railway Company, a common carrier corporation subject to the provisions of the interstate commerce law, had been duly impleaded in a controversy before the interstate commerce commission upon the petition of Mary O. Stone and Thomas Carten, residing at the city of Ionia, Mich., wherein it was made to appear to the satisfaction of the commission that the said defendant had violated the provisions of the interstate commerce law as alleged; that the commission had formulated an order and notice in relation to the matters charged in the petition, based upon findings and determinations of the commission with respect thereto, which order was still in force, but which the defendant refused to obey; wherefore the commission prayed for an injunction, mandatory or otherwise, to restrain the defendant, its officers, servants, and attorneys, from further continuing in their violations of and disobedi-

ence to the order of the commission. The facts found by the commission were as follows:

"(1) The complainants are copartners doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares, and merchandise in the city of Ionia, county of Ionia, and state of Michigan, purchasing said goods, wares, and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Mich.

"(2) That the respondent railway company is a corporation existing under and pursuant to the laws of the state of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railway being in the state of Michigan; that it does not own and control a line of steamboats plying across Lake Michigan, between Grand Haven and Milwaukee, Wis., but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan, between Grand Haven and Milwaukee, from which the respondent received traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road, destined to Milwaukee; that all of said boats are under the direction and control of an independent corporation, organized under the laws of the state of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company; that the management of the business of the last-named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

"(3) The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule or rates and charges, which makes on all freights from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule is hereto annexed, and deemed a part hereof.

"(4) The shipments of freight from Philadelphia, New York, Boston, and points east of Detroit, which are delivered to complainant's road at said city of Detroit, and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

"(5) That the respondent provides, at its own expense, drays, carts, and trucks at the city of Grand Rapids for the service of transporting merchandise and freights generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders, and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for 25 years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is on an average one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads,—the Michigan Central Railroad and the Grand Rapids, Lansing & Detroit Railroad,—both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short hauls to and from their stations,—on an average about one-quarter of a mile; that the respondent did the carting of

freight to and from its station at Grand Rapids substantially in the same manner as at present, long prior to the time when either said Michigan Central or Grand Rapids, Lansing & Detroit Railroads were constructed to that place.

"(6) That the actual cost of carting or draying freight from the respondent's warehouse in the city of Ionia to the several places in said city of Ionia to and from which traffic has to be hauled is two cents per hundredweight; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders, and other patrons of its road at Grand Rapids is two cents per hundredweight.

"(7) That there is but slight competition encountered by the complainants and other persons, firms, and corporations engaged in business at the city of Ionia, interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

"(8) * * * * * * * * * * * * * * * * *

"(9) The complainants have not brought any suit for the recovery of money or damages for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

"(10) The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6,000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 982,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

"(11) Cartage by railway companies in a similar manner to that at Grand Rapids is conducted by other railway companies at exceptional stations in the state of Michigan, and more or less extensively practiced by companies in other states at exceptional stations."

On this statement of facts, a majority of the commission, the chairman, Judge Cooley, and Commissioners Morrison and Schoonmaker, held that the cartage at Grand Rapids was a violation of the long and short haul clause of the fourth section of the act to regulate commerce, because its result was that the merchants at Grand Rapids obtained transportation of freight from Boston, New York, and Philadelphia at two cents a hundred less than the merchants of Ionia, the free cartage at Grand Rapids being in effect a payment in money's worth to the merchants at Grand Rapids of two cents a hundred. Commissioners Morrison and Schoonmaker also held that the free cartage was unlawful on the further ground that it was in effect a device for receiving less than the established tariff rate from and to that point,—that it was a rebate, in violation of the second section of the act.

The answer of the defendant to the bill herein admitted the averment of the findings of fact embodied in the opinion of the interstate commerce commission, and averred that it had been the practice of railway companies engaged in interstate commerce to do free cartage as a means of obtaining traffic at exceptional stations on the lines of the railroads where the business was of sufficient magnitude to warrant the carrier in incurring the expense, and that such expense was deemed to be legitimate as a means of securing traffic for the railroad, and of affording increased facilities and dispatch for doing its business; that on every railroad in Michigan and in the United States there were tracks constructed by the railway company, at its own expense, at exceptional stations on the line of road, leading from the main track of the road to private business establishments, which were used solely for delivering and receiving freight in the business between such private business establishments and the railway and without any charge being made by the railway company therefor, though there were private business establishments at the same stations of the railroad not furnished with these advantages in connection with such traffic; that such practice did not infringe any provision of the interstate commerce law, and yet it involved quite as clear an element of discrimination as the cartage system at Grand Rapids; that the practice of freight cartage was originally adopted because it was less expensive than would be a change of its line so as to bring it into nearer proximity to the business center of the city, or the construction and operation of spur tracks from the main line of road into the

business center, where the main line tracks of its competitors, the Michigan Central and the Detroit, Lansing & Northern Railroad Companies, were laid in said city; that the free cartage had the additional advantage of enabling the carrier to promptly clear the freight buildings of traffic, and prevent its burdensome and expensive accumulation, and that it secured a method and order in the delivery of its traffic from its buildings, and that it also saved the expense of sending notice to the consignees of the arrival of freight; that the free cartage at Grand Rapids was an absolute condition of the respondent's procuring for its road any considerable part of the freight traffic of the city; that the two cents a hundred pounds paid for cartage at the city of Grand Rapids by respondent was not paid alone for the cartage, but included the services of the cartage agents, acting in behalf of respondent, in soliciting freight traffic for its road and collecting bills for freight charges; that the value of these services, aside from the mere matter of carting the freight, was not less than one-third the sum which respondent paid.

Wherefore the defendant submitted that, in view of all these considerations, the free cartage was not an undue or unreasonable preference or advantage to said city of Grand Rapids as against the city of Ionia, and was not in conflict with the long and short haul clause of the law.

L. G. Palmer, Dist. Atty., and J. B. McMahon, (Ashley Pond, of counsel,) for complainant.

E. W. Meddaugh, (Otto Kirchner, of counsel,) for defendant.

TAFT, Circuit Judge, (after stating the facts.) The first objection made by defendant to granting the relief asked is that the complainants before the commission, Stone & Carten, had no real grievance, but were instigated to their prosecution by a competitor of the defendant, the Michigan Central Railway, which is paying the expenses of the litigation. This objection is not founded on any finding of the commission, but on an admission of counsel for the complainants below before the commission, and is referred to in the dissenting opinion of Mr. Commissioner Bragg. Were this a mere private action by private litigants, the objection, if founded on anything in the record, (as this does not seem to be,) might have weight, but under the provisions of the interstate commerce law we are not permitted to entertain it. The act by section 13 provides for the lodging by any person of complaints with the commission of a common carrier's violations of the law, and expressly enjoins upon the commission "that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant." Moreover, the same section provides that "said commission * * * may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 15 of the act the commission is required, in any case where investigation has been made by it, if the law has been violated, to notify the common carrier to cease from further violation, and by section 16, in case of the refusal of the common carrier to obey, it becomes the duty of the commission to apply by petition to a circuit court in equity to enforce its order and restrain the further violation of law by the carrier. It is obvious from these provisions that when the case reaches the circuit court on petition of the commission, it is the complaint of the commission which gives the court jurisdiction, and that the

bona fides of the complaint cannot be attacked by impeaching the good faith of those who, in the first instance, induced the commission to take action.

Although the question was made in the original answer before the commission, it is not seriously disputed here that the defendant is a common carrier, subject to the provisions of the interstate commerce law. The question at issue is whether the practice of free cartage at Grand Rapids is, with reference to the shippers at Ionia, a violation of the following sections of the interstate commerce law:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance: but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property: that the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

It is conceded that the contract of carriage of a railway common carrier, as usually understood, is the transportation of the goods from the warehouse of the railway at the point of shipment to the railway warehouse at the point of destination. Generally the cartage from the railway warehouse to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee. Now, it is admitted that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids, and not at Ionia. Why should not its exact equivalent—the furnishing of free cartage—be also a violation? It is said that it is not, because the

transportation to Ionia and that to Grand Rapids are not under substantially similar circumstances and conditions. In accordance with a practice which has been approved by the interstate commerce commission, (Imperial Coal Co. v. Pittsburgh & L. E. R. Co., 2 Inter St. Commerce Com. R. 618,) Ionia and Grand Rapids are grouped together by the defendant company as stations to which the freight rates from the far east, Boston, New York, and Philadelphia, may properly be made the same. This is a conclusive admission by the defendant that, so far as the transportation from the east to the warehouses of the company at the two places is concerned, it is under substantially similar circumstances and conditions. The question remains whether the conditions existing with reference to the delivery of goods from the warehouses to the storehouses of the consignees are such as to warrant a full charge for the same at Ionia, and no charge at all at Grand Rapids. If not, then the free cartage at Grand Rapids is, in fact, a reduction in the cost of transportation to Grand Rapids, and illegal. We do not see how this result can be escaped. The reasoning is said to be mathematical, but that is a term not ordinarily used to describe defective reasoning. Any benefit in relation to the shipment of goods, having a definite money value, conferred gratis by the carrier upon one shipper which is not conferred upon another, when the service to each is admittedly under substantially similar circumstances and conditions, is an undue reduction in the price of carriage to the former, and is illegal. If this were not true, then the provision against undue discrimination, of which the long and short haul inhibition is only one instance, would be a dead letter.

It may be admitted that the terminal facilities may be varied at different stations without causing undue discrimination, provided such a variation is not such a departure from the usual facilities as to make it an obvious reduction in the cost of transportation to the shipper. It is very clear that free cartage is exceptional, and that it is a departure from the usual terminal facilities furnished either at large or small cities and towns. Of course it would not be a discrimination that could be complained of, that one company puts its station at one town nearer the business center than another, and, if free cartage could be said to properly make up for the greater distance of defendant's station from the business center of Grand Rapids, and in this respect to put Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would seem to be unobjectionable, because justified by the dissimilar circumstances. But can this be said? We think not. If at Grand Rapids the defendant's station were moved into the business center, the consignees would still have to pay for the cartage. It may be that it would be for a less price, but still they would have to pay. The equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. Free cartage from defendant's station at Grand Rapids con-

fers on the shippers a benefit of a definite money value over and above that usually included in a transportation tariff, equal to the cost of cartage from a station in the center of the city.

What has been said with reference to the difference between the distance of the station at Grand Rapids from the business center and that of the station at Ionia has equal application to the contention of the defendant that the free cartage is justified by the fact that the competitors of the defendant have their stations at Grand Rapids in the business center, and that this places defendant at a disadvantage, which creates a dissimilar condition. Even if competition under such circumstances can produce dissimilarity of conditions, the extent of the discrimination founded thereon must be commensurate with and limited to the dissimilarity. It will fully equalize the conditions if the defendant furnishes cartage for a mile and a quarter at a price equal to that at which cartage for a quarter of a mile could be furnished without loss. To do more is to bid for competition by reducing the cost of transportation, and this cannot be done except by proportionately reducing the rates at Ionia also.

But it is said that Grand Rapids is a much larger place than Ionia, and therefore a carrier may confer favors on a shipper at the former place. In so far as the greater amount of business enables the railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places; but cartage at Grand Rapids must cost something, and free cartage, therefore, confers on the shipper a benefit which dissimilarity of conditions does not justify.

The chief argument for the defendant is based on the custom among railroads to furnish those of their customers whose storehouses are convenient to the railway track with switch tracks, so that upon these tracks consignments in car loads are delivered at the door of the consignee. If free cartage is to be prohibited, it is said that the same principle must prevent the use of switch tracks for such a purpose, because this is a benefit to certain customers of a similar character not enjoyed by others. We do not think the cases are parallel. The providing of a switch track depends on two things: First, the proximity of the consignee's storehouse; and, second, business of a character to require or permit consignments in car load lots. The first of these conditions, and perhaps the second, entitles the customer to a lawful discrimination in his favor. The favorable location of his storehouse with respect to the track is an advantage which he may rightly improve, and it may be that the wholesale character of his business is another element which may justify a discrimination in his favor over smaller shippers. Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263, 12 Sup. Ct. Rep. 844. If a case were presented where a merchant at Ionia, with his storehouse convenient to the track of the defendant, had been refused a switch track and delivery thereon of merchandise in car load lots, when

such a benefit was conferred on merchants at Grand Rapids, not differently situated, a question might then arise similar to that at the bar, but it is not presented by a discrimination between merchants with storehouses far from the railroad track, or who receive consignments of small bulk, and those who are near the track and receive car load lots. Even if it be conceded that a construction of the interstate commerce law which would prohibit so general a practice as the delivery of consignments on private switch tracks must be erroneous, the prohibition of free cartage does not involve any such result. In order that a railway may reach many customers, it sometimes builds a belt railroad. This is a mere extension of its track, and, if the business to be obtained thereby will justify, there is no more objection to it as undue discrimination than there would be to the building of a branch road, or the delivery of goods from several warehouses. It is part of the railroad business, and the means of delivery is by railroad. Cartage is not usual railroad business, but is something not usually undertaken by them. The free cartage, as furnished at Grand Rapids by the respondent, is as foreign to ordinary freight business as it would be for the company to do the packing for shippers free of cost.

For the reasons given the prayer of the petition must be granted, and a decree entered accordingly.

SEVERENS, District Judge, (dissenting.) The finding of facts by the commission is adopted for the purposes of this opinion, together with some further facts not inconsistent therewith, proven by the testimony, or of which judicial notice is taken.

It is a legitimate rule in the construction of language employed in statutes that attention should be given to results which will follow from a proposed interpretation, and if those results are contrary to the general purpose and object of the act, and are plainly seen to be such as were not intended, it should be rejected, unless the terms employed are too rigid to bear some other interpretation in harmony with the general policy of the law. The object sought to be attained is the guiding light always, and in the construction of this statute, couched as it is broad and general language, it should be kept constantly in sight. For reasons presently to be stated, it appears to me that the conclusions of the commission, and the order founded thereon, are productive of results quite different from those intended. The general purpose of the interstate commerce act was to prevent the practice of extortion by common carriers in the transportation of freight and passengers between the states by the imposition of unjust and unreasonable rates. This is well known as matter of history, and the courts take judicial notice of it. The law was passed for the protection of the public, and not for the benefit, or to redress any grievance, of common carriers. They were known to be able to take care of themselves. And the closing paragraph of the first section sounds the keynote to the whole act when it says that "every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

And this suggests a question somewhat preliminary in its nature,

concerning the purpose of the proceeding, and the province and duty of the court in dealing with it, which appears to me to deserve consideration. The act provides by the thirteenth section that any person, corporation, or association, or any body politic, may make complaint to the commission for any violation by a common carrier of its provisions. Notice is thereupon required to be given by the commission to the carrier of the charges preferred, and it is called upon to satisfy the complaint, or give its reason for refusal. If the carrier makes reparation for the injury complained of, it is relieved from all liability to the complainant for the particular violation complained of. If this is not done, or if there shall be reasonable ground for investigating the subject of complaint, it is the duty of the commission to investigate it. The commission may also institute an inquiry upon its own motion in the same manner and to the same effect as though complaint had been made. In the latter case it is clearly implied, as well from the language of the act as from the nature of the proceeding, that any order it may make as the result of its inquiry must be upon notice of the particular violation which is charged against the carrier. However the proceeding may be commenced, the commission is required by the fourteenth section, if it makes investigation, to make report of the facts found by it, and its conclusions thereon, and its recommendation in respect to the reparation which should be made to any injured party, if there be such. By the fifteenth section, if the commission finds the charges to have been sustained, it is required to give a copy of its report to the carrier, together with a notice that it desist from the violation charged, and make the reparation it has recommended to be made to any injured party. If the carrier complies with this notice, it is thereupon relieved from any further liability or penalty for such particular violation of law. Then, by the sixteenth section, provision is made for an appeal to the courts in case of noncompliance with the notice of its duty enjoined in respect of the matters charged against the carrier by the commission. If that refusal is in respect to a matter not triable by jury, the commission, or any party interested in the order or requirement it has made, may apply to the circuit court in equity upon petition for such order or process, mandatory or otherwise, as shall be necessary and appropriate to compel obedience to the order of the commission; and if, upon due hearing, the court shall find that the carrier has been guilty of the matter charged, and the order or requirement of the commission was such as the law required in such case, it will enforce obedience accordingly. It is to be observed that the whole scope of the duty thus imposed upon the court is the trial of the questions of fact and law involved in the inquiry as to whether the respondent was by the particular order of the commission required to execute a duty enjoined upon common carriers by the statute in the circumstances as they are found by the court to have existed; and, if that inquiry results in such a finding, then, also, in awarding the proper process for compulsion. The court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is

given power simply to award its process if it judicially approves the order of the commission. If it does not find it to have been warranted by law, its power and duty are at an end.

In this case the record indicates that the complaint was made by parties residing at Ionia. After setting forth the facts upon which it was based, it summarizes the grounds thereof by alleging that the respondent was by its practice violating the second, third, and fourth sections of the act, and prayed that the respondent should be ordered to discontinue free cartage of freight for the merchants of Grand Rapids, or to render like service to the merchants of Ionia, or for other appropriate relief. The commission, after finding the facts, and giving its reasons for its conclusion, held that it followed therefrom that the defendant was guilty of violating the long and short haul clause of the fourth section, and that consignees at Ionia were overcharged to the extent indicated. The complaint was sustained on that ground, and the commission declared its purpose to order accordingly, without passing on the other points. The inhibition of the long and short haul clause is against the charging "any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance," etc. The offense is made to consist in charging the greater compensation for the shorter distance, and this is what the commission concluded the respondent had done. It would seem that the due order for the correction of such offending would be to require the carrier to desist from charging the merchants of Ionia the greater compensation, and to fix a rate to correspond with its Grand Rapids rate, or accord some equivalent advantage to them, such as free cartage. Such correction would result in advancing the interests of the public at Ionia, and in leaving the public at Grand Rapids in the enjoyment of the facilities which have been afforded them by a practice which the commission rightly declares was perfectly lawful in itself. The effect of such an order might be somewhat disadvantageous to the competing railroad there, which is also one of its competitors at Grand Rapids, but it would furnish no lawful ground of complaint to such competitor. Instead of doing this, the commission made an order which raises the compensation which the public at Grand Rapids must pay for the service they have enjoyed, and the benefit of their loss does not come to any other portion of the general public, but falls into the hands of the competing railroads, by crowding their rival out. It seems to me the commission could not have sufficiently considered the results of their order. If they did, I am at a loss to understand how they could reconcile it with the spirit and policy of the law. If, as is claimed, (and I think it must be conceded, properly,) we cannot look back of the proceedings of the commission to inquire into the motive of the parties who set them in motion, we are yet bound to recognize the obvious consequences, and give their consideration due weight, in determining whether as matter of law the order we are asked to enforce was such as was warranted by the assumed facts. I cannot but think

that the express language of the long and short haul clause, the well-known general purpose of the act, and the argument drawn from results incongruous with that purpose, all concur to repel the approval of the order of the commission upon the ground assumed by it in its opinion. However, if the facts as they are here found to exist are such as to have warranted the order, probably the conclusions of the commission as to matters of law are not material.

But I am also of the opinion that there was nothing in the facts which justified the conclusion that any provision of the statute had been violated. Having, in the closing paragraph of the first section, indicated the general purpose, the act proceeds in sections 2, 3, 4, and 5 to lay down certain rules by which that object is to be attained. By the second section it prohibits all kinds of discrimination in the imposition of charges upon different persons for the like service rendered under similar conditions. By the third it prohibits all undue preference by the carrier to any person or locality or kind of traffic, or the subjecting of any person or locality to any undue or unreasonable disadvantage, and then proceeds to require the carrier to afford reasonable and equal facilities to connecting lines for the interchange of traffic, without discrimination of rates between such connecting lines. The fourth section prohibits the charging a greater rate for transportation, under similar conditions, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance. The fifth prohibits the pooling of freights between competing carriers. Subsequent sections contain subordinate regulations designed to facilitate the operation of the provisions of the sections above enumerated, especially the second, third, and fourth.

What is there in these provisions which, justly interpreted, renders the respondent's course of business, otherwise lawful, obnoxious to the prohibitory order of the commission? Surely there is nothing in it which contravenes its general purpose. But it is attempted by argument to show that this course of business is in conflict with some of the provisions which are designed to accomplish that purpose. The argument appears to me to rest upon unsubstantial grounds which have been swept away by the rulings of the commission itself upon constructions of the law which have been acquiesced in as just and reasonable. When it was held that it was consistent with the spirit of the law for the common carrier to group stations which were 75 or 100 miles apart, and charge a common rate to each, the strict construction of the act was abandoned for what was thought to be a more rational one. And when it was further conceded that, for reasons founded on public necessity or convenience, the carrier might carry freight beyond its terminal station, and deliver it to its patrons along spur tracks and belt lines, another broad construction was adopted in the genuine spirit of the law. The differing conditions and circumstances in large cities and small villages are rightly held to justify it. The facts in the present case illustrate this. The average distance from the station at Ionia to the merchants there is short, the place being

small. The distance at Grand Rapids is five times as great, and the business ten times as large. These differing circumstances and conditions are of a local character, and do not pertain to the transportation by the carrier. If they are not in terms those mentioned in the statute, they are at least relied upon in construction as elements to be taken into account in determining what is a reasonable discrimination. With these concessions in view, it is difficult to be very seriously impressed by the suggestion that one object of the law was to prevent the blighting effect upon smaller towns by the discrimination which had been given to larger ones, if by discrimination is meant the giving the facilities above mentioned. If that was an abuse, the law has passed it by. But it was not an abuse. It is absurd to say that a common carrier is bound to supply to every little hamlet the same advantages for the transmission and reception of freight that it does to large cities. The similar circumstances and conditions to which the statute refers are those which are found in the different localities to be served as well as those which pertain to the transportation. Whether the dissimilarity arises from one cause or the other, if it affects the service, it is within the language and the reason of the statute.

It is found by the commission that similar cartage is practiced by other common carriers at exceptional stations in Michigan, and is more or less extensively practiced by companies in other states at exceptional stations. By "exceptional" it is presumed to be understood that the conditions are similar to those at Grand Rapids, or otherwise the fact is irrelevant. Thus it happens that at one place, where the public necessity or convenience requires it, it is met by the projection of branches and belt lines beyond the terminal station of transportation at that locality, and from them delivering freight to their customers, and at another by rendering substantially the same service by cartage, at another by lighterage, a "business in which railroads are not usually employed." The only difference is in the means employed by the carrier, using that term in its strict sense, to accomplish the same end. But of what real significance is that? It is the service, the actual benefit given, which makes such discrimination as there is, and not the particular instrumentality by which it is effected. It is transportation, and that by a common carrier, in the one case as much as the other. So far as the public are concerned, the particular way in which the thing is done is matter of indifference, and no possible reason is perceived why that may not be left to be determined by the economy of the carrier. To say that it must be done on rails, and by steam, instead of on wagons, and by horse power, is purely arbitrary. The law is leveled at the carrier as such, and only at the railroad company in its character of a carrier. Conceding it to be permissible to build belt lines and spur tracks to reach many customers, and thereby obtain more business, it is yet said that this is so because it is a part of railroad business, and the means of delivery is by railroad; that cartage is not usual railroad business; that it is as foreign to ordinary freight business as it would be to do the packing for

shippers free of cost. This does not appear to me to state the situation correctly. Packing for the shippers is not only never done, but it is not transportation, or delivery or reception of goods. The cartage of goods, though not usual, is sometimes resorted to as a substitute for delivery on rails, and is generally resorted to when it is the most convenient method in the circumstances. And the suggestion also appears to me to be at fault in assuming that the statute makes any distinction between carrying wholly by rail and partly by rail and partly by other means, with any purpose to make the latter, when equivalent to the former, unlawful. I cannot think that any language in the act, or any postulate of reason, can be invoked upon which to say to the common carrier that the transportation which it may fairly do by the usual methods it employs it shall not do by any method not usually adopted, even though it is a perfectly lawful method for a common carrier, and is more economical for it in the special circumstances, and equally convenient to the public. The rate schedules of the carrier ordinarily, and probably almost universally, and the bills of lading issued thereon, in terms contemplate the station of the carrier as the locality to which the freight is consigned as the terminus of transportation, and the place of delivery. If we are to regard a service beyond that at one locality as per se a discrimination against a locality which does not receive it, it must be upon some principle; and, if there be such a principle, it must be equally efficacious to defeat the discrimination however produced. Calculation is made to show that it costs two cents per hundred to render the delivery service at Grand Rapids. How much it costs carriers to deliver freight by side tracks does not appear, but it must cost something, even if the track is laid for them; and of that the customer gets the benefit. It can make no difference in the principle how many get that benefit. Whether one or all, it is the same discrimination as to the public at Ionia. It would be allowable, it is said, for the respondent to extend branches through the city, and accommodate the public by delivery to them on those lines. If the situation were so fortunate that all or the great majority could be thus accomodated, it would not make the practice more objectionable.

It is charged that the schedule rates are violated. What do those rates mean? In strictness, as already pointed out, they mean transportation from and to the stations named. In fact they mean that, together with the terminal facilities which are afforded by the carrier. The contract of transportation is entered into with those in view. These incidental facilities furnished at the locality of the station in one form or another are enjoyed by the consignees of a very large proportion of the freight traffic of the country. There is no violation of the schedule of rates in this practice, for the schedule is not, in the general business of the public, construed in so strict a way as the suggestion implies.

It is said that the defraying the expense of cartage delivery is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee, and that this latter would be a violation of the long and short haul

clause if the reduction were made at Grand Rapids and not at Ionia. This argument proves too much, and cannot be sound. It would overturn much wholesome doctrine which is already well settled. By the same reasoning, any advantage of any value given by the terminal facilities of the carrier to customers at one place is exactly equivalent to a reduction to the same extent as that value from the freight charge to that place, and is an unlawful discrimination against others in that group. The fault in the argument is, I think, in assuming the false premise that a carrier may not do more at one place than he does at another for the same price,—a proposition that is refuted in every day's transactions in the carriage of freight. In this case it is shown that freight is carried by Ionia, 34 miles, to Grand Rapids, and nothing is charged for the carriage for that distance. It costs the carrier something to do this. It would cost the Grand Rapids merchant some money to bring the goods from the place where the Ionia merchant takes his. Is it permissible to say that by the amount of that cost, either to the carrier or the Grand Rapids merchant, the rate common to both places is lessened to the Grand Rapids merchant, and the Ionia merchant is discriminated against?

It is also said that because the respondent has grouped Grand Rapids and Ionia together it conclusively admits that, so far as transportation from the east to the warehouse of the company at the two places is concerned, it is under substantially similar circumstances and conditions. I do not understand the admission to be as stated. The warehouse at Grand Rapids is not in fact the terminus of transportation which the respondent had in mind when it made the grouping, nor does the fact that places are grouped make it necessary to assume that they shall all have the same accommodations. It might as well be said that, having regard to the long and short haul clause, such grouping is a conclusive admission that the distance from the east to Grand Rapids is not greater than that to Ionia, whereas nobody supposes that to be admitted. So far as there is any admission, it is only that the distances are nearly the same,—practically the same in the large view of the subject. It seems to me that we are not to allow our vision to be suddenly and capriciously narrowed, but should continue to see the subject on the same wide field in all its relations.

Tied to this erroneous assumption is another proposition, which, standing by itself, may be quite true, namely, that any benefit in relation to the shipment of goods, having a definite money value, conferred gratis by the carrier upon one shipper which is not conferred upon another where the service is admittedly under similar conditions, is an undue reduction in the price of carriage to the former, and therefore illegal. But this proposition, and the conclusion, as applied to such facts as we have in the present case, depend upon the assumption that there is any money value conferred gratis. If the incidents of delivery at the terminus, whether by the usage there it be by one means or another, are included in the contract and price for carriage, the costs of those incidents cannot be scaled off and carried back upon the whole price in order to re-

duce the price of the mere carriage between station houses. Nor do the similar conditions exist if one place is out of all proportion with another, and the station at the small place is located close to the local business, and at the large one it is a long distance off. The exact dissimilarity is not overcome until this disadvantage at the larger place is measurably reduced. It is impossible to make the adjustment nicely. If it be said that free cartage, as it is erroneously called, more than makes up for the inequality of conditions, and that to the extent of the excess it is a gratuity, one answer is that the excess thus afforded is not greater than the deficit or disadvantage which would exist without it. It is the mere oscillation of the pendulum swinging within lawful limits. Pertinent to this is the suggestion that it would, of course, not be a discrimination that could be complained of that the company puts its station at one town nearer the business center than at another, and, if free cartage could be said to properly make up for the longer distance of respondent's station from the business center of Grand Rapids, and in this respect to put the Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would seem to be unobjectionable, because justified by the dissimilar circumstances. But it is asked, can this be said? And the argument in support of a negative answer is that, if the defendant's station at Grand Rapids were moved into the business center, the shippers would still have to pay for the cartage. It may be that it would be a less price, but still they would have to pay. The equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. The proposition admits that the practice would be unobjectionable, because justified by the dissimilar circumstances, if only the disadvantage were overcome; but the gravamen of the mischief consists, it is urged, in the remedy being overdone. But, as the overdoing is not greater than the mischief overcome, and the result is not injurious to the public, but beneficial, rather, I can see no reason for condemning the practice as a whole.

And even if the argument above quoted were sound, it would not justify the order made by the commission, which not only forbids the alleged mischief, but the remedy to the public for an acknowledged disadvantage. Upon the theory suggested, the real unlawfulness of the practice is in the excess referred to, and the order should have been appropriate to its correction, and stopped there, instead of utterly depriving the public of a remedy "justified by the dissimilar circumstances." But, as already said, the court can make no new order. The order of the commission stands or falls as made. The theory last mentioned, and the argument in its support, proceed upon too nice distinctions. Such close balancing is impracticable, and is not attempted in the administration of the statute generally.

In answer to the claim that on account of its greatly larger size and business Grand Rapids is entitled to greater facilities than a

small place, it is said that, in so far as the greater amount of business enables the railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places. The dissimilarity of conditions which is thus admitted to be legitimate ground for different rates of cartage prices at the two places, consists primarily in the greater amount of business at Grand Rapids, and consequentially in the fact that therefore it can be more cheaply done. But the cartage is parcel only of the whole transportation. It is done to augment the bulk of that business. And no reason is perceived why the discrimination which would justify a larger cartage for the same money would not justify a larger service in the whole transportation, the business being so much larger as to make it an object on ordinary business principles for the carrier to render that service in order to gain the profits accruing from its greater volume. The public at Grand Rapids are entitled to enjoy the corresponding advantage which results from the aggregation of their business, and, if that aggregation justifies their superior accommodation on business principles, there is nothing in the interstate commerce law, fairly interpreted, which prevents their enjoyment of it. The breeding of artificial distinctions in this law is, in my opinion, very objectionable, and very likely to impair its utility to the public, who are the parties most likely to suffer on every occasion, when, losing sight of its main object, the commission or the courts listen to the ingenious weaving of unsubstantial fabrics among the branches of the statute by interested parties.

In this opinion the result is reached upon considerations which do not depend upon any supposed right of the respondent to be protected in the privilege of putting itself upon a footing of equality in competition for the business at Grand Rapids. The commission has, in many instances, recognized such a right, and incidentally, at least, sought to protect it. The circuit courts in the fifth and ninth circuits have held that the competition of other roads might produce such dissimilarity in conditions as the statute recognizes in permitting the rendition of greater service for the same compensation. To what extent this may be carried it has not been deemed necessary here to say. For the reasons given, and with great respect to the commission, I cannot bring myself to the conclusion that their order is right, and I feel bound to withhold my assent from it. My conviction is that it would establish a precedent, the principle of which, carried to its logical conclusion, would reach far into existing usages, and be extremely injurious to the interests of the public in many localities, without any corresponding advantages to the public anywhere else.

AMERICAN BOX MACH. CO. v. CROSMAN et al.

(Circuit Court, D. Massachusetts. September 7, 1892.)

No. 2,758.

1. EQUITY PLEADING—BILL WITH DOUBLE ASPECT—PARTIES.
Where a bill sets out a contract relating to certain patents, and asks specific performance thereof against several parties, but also contains expressions looking to relief as in a suit for infringement, it cannot be sustained as a bill with a double aspect, because the determination of who are proper parties must be made from different standpoints in the two kinds of bills.

2. SAME—CONSTRUCTION OF BILL—ELECTION BY RESPONDENTS.
A bill which looks towards double relief, but which is not sustainable as a bill with a double aspect, cannot be dismissed on that ground when defendants fail to make the objection; but it is nevertheless the duty of the court to see that the litigation is put in proper form to be disposed of understandingly, and, where respondents have apparently accepted the bill as one for specific performance, the court will treat it in that light, as respondents are entitled to make such election.

3. EQUITY JURISDICTION—REMEDY AT LAW—SPECIFIC PERFORMANCE.
A court of equity has jurisdiction of a bill to enforce a written contract whereby defendants have covenanted not to manufacture and sell any machines infringing certain patents claimed by complainants, and under which they are making and selling machines, since the continuance of such violation would tend to diminish complainants' profits in the business, for which mere damages, recoverable at law, would not be an adequate remedy.

4. SAME—PARTIES—INJUNCTION.
In such case the fact that one of the parties to the contract is a special or limited partner in a firm which is engaged in using the infringing machines is no objection to making him a defendant, or enjoining him from continuing to violate the contract in connection with the partnership, although his partners were not parties to the contract, and cannot, therefore, be made parties to the suit, and although they will be embarrassed by an injunction against him.

In Equity. Bill for the specific performance of a contract. Decree for complainant.

The contract in question in this case was executed January 23, 1888, and is as follows: "This agreement, made and entered into by and between the American Box Machine Company, of Amsterdam, New York, party of the first part, and George A. Crosman, John C. Metcalf, and John B. Rollins, all of Lynn, Massachusetts, and George W. Glazier, of Salem, Massachusetts, parties of the second part, and the Lynn Box Machine Company, of Lynn, Massachusetts, party of the third part, witnesseth: Whereas, party of the first part is the owner of certain letters patent of the United States for box-covering machinery, among them letters patent dated July 26, 1881, granted to Gordon Monro, numbered 244,919, and letters patent dated May 27, 1884, granted to Horace Inman, numbered 299,225; and whereas, the parties of the second part heretofore made or sold or used box-covering machines which party of the first part claimed to be infringements upon the said letters patent; and whereas, party of the first part, on or about —— brought suit against Crosman and Metcalf, and also another suit against said Rollins and Glazier, for alleged infringement upon said patent No. 244,919, and also, on or about the —— day of ——, another suit against said parties of the second part conjointly, for alleged infringement of said patent No. 299,225; and whereas, the parties of the second part, in June last, organized themselves into a corporation under the laws of the state of New Hampshire, entitled the 'Lynn Box Machine Company,' which has succeeded to their business

as manufacturers of paper-box machinery; and whereas, said party of the third part, by assignment, is the owner and holder of certain letters patent of the United States granted to said George W. Glazier, both dated April 5, 1887, and numbered, respectively, 360,582 and 360,583; and whereas, the parties hereto are desirous of settling all questions of difference between them: Now, therefore, the parties hereto covenant—agree—each with the other as follows: First. Decrees shall be entered in each of said suits according to the prayer of the bill therein. The counsel for the defendants therein shall consent thereto, either orally in open court, or in writing, as party of the first part may elect. Second. All costs and accounting in each of said suits is hereby waived. Third. In the event of breach of this agreement by party of the first part in such manner as to materially affect the rights of parties of the second and third parts, or of the trustees herein provided for, then said decrees in each of said cases are to be vacated at the election of the defendants in said cases, and the same shall proceed for judicial determination. Fourth. A trust shall be forthwith created, and a trustee, who shall be approved by party of the first part, shall acquire title to said patents of party of the third part; and said trustee shall forthwith, upon his assuming said trust, give and grant to the party of the first part an exclusive license to make, use, and sell throughout the United States, and until the 27th day of May, 1901, to which date this agreement shall remain in force, the inventions described and claimed in said letters patent as assigned to him; and the party of the first part shall have the right to institute or defend suits or proceedings, as it may elect, in the name of the said trustee, the expense thereof to be borne by party of the first part. Upon the creation of said trust, and the acceptance thereof by said trustee, the parties of the second and the third parts shall forthwith cease to carry on the business of making, using, or selling box-making machinery covered by said patents, or other patents now owned by the party of the first part, except as hereinafter provided. Fifth. The said trustee shall be constituted, by party of the first part, its agent irrevocable, during the continuance of this agreement, to sell all machinery made or controlled by party of the first part in any wise applicable to the manufacture of paper boxes, with a commission for selling of fifteen per cent. on the gross selling price. The selling power of said trustee may be delegated by him to other persons, to be approved by party of the first part, or, if not, then such trustee to be responsible personally for the unauthorized acts of said agents. All machines sold shall be billed in the name of party of the first part, and all business shall be transacted by said trustee and by his salesman in the name of party of the first part, and upon the same terms as party of the first part gives to its customers. Sixth. Said trustee shall have the exclusive right to make, or cause to be made, the single-strip machines for 'topping' and 'covering' that embody the inventions, or substantial parts thereof, described in the said patents owned by party of the third part, and shall receive therefor, from party of the first part, the sum of forty ($40) dollars for each of said machines, which shall be constructed in good and substantial manner, as are made by party of the third part, and may embody in said machines, at the same cost of manufacture, any of the improvements described in letters patent owned or controlled by party of the first part, provided said added parts do not constitute a 'double-strip' machine. The said sum—forty dollars—shall be paid to said trustee for the machines of the size and style theretofore sold by party of the third part for one hundred dollars, and for the machines of the size and style theretofore sold by it for one hundred and twenty-five dollars an additional cost price shall be allowed, equal to the additional expense incurred in making the same, and the selling price of said last-named machines may, if desired by party of the first part, be advanced at least sufficiently to cover such additional cost; and, if, at any time thereafter, the said trustee or persons associated with him make further supposed improvements, they shall be submitted to the party of the first part, and, if approved by it, then an allowance shall be made, and added to the cost price of said machine, equal to the excess of costs, if any, required to make the machines with such improvements. If the said improvements are not approved by party of the first part, then the said trustee shall have the right to embody said supposed improve-

ments in said machines at the original price, to wit, forty dollars, ($40,) and sell the same in the market as and for the price that the original machines are sold. If, at any subsequent time, the party of the first part shall decide to approve and adopt the said improvements, then it shall allow actual cost of making said improvements in addition to the forty dollars, ($40,) above stated. There shall also be allowed to the said trustee the sum of twenty-five dollars on each machine, of whatever kind, which shall embody any of the inventions licensed as aforesaid by said trustee to party of the first part, or any material and substantial part thereof, whether said machines shall have been sold by party of the first part or by said trustee; and, if said machine shall have been leased by party of the first part, then twenty-five per cent. of the rental thereof shall be paid, when received, to said trustee, until the sum of twenty-five dollars per machine shall have been so paid. Said trustee shall be paid the further sum of fifteen dollars ($15) on each topping or covering machine made and sold by him, said fifteen dollars to be in lieu of all other selling commissions whatsoever. Seventh. The selling price of the single-strip covering machines of the size and style heretofore sold by party of the third part for one hundred dollars, hereafter to be made by said trustee, and also the single-strip machines made by party of the first part, shall be one hundred and fifty dollars ($150) each; and the price at which the topping machines made by said trustee shall be sold shall be one hundred and fifty dollars, ($150.) The said prices shall be cash prices, without variation, division, or allowance, or commissions to purchasers or others, except such variation as to terms of payment as may be from time to time agreed upon by the party of the first part and by said trustee, in writing, which terms shall be the same as given by the party of the first part to his customers for machines for a similar purpose. The topping machines made by the party of the first part shall not be sold for a sum less than one hundred and fifty dollars, ($150,) upon terms of payment the same as above stated. Eighth. If the party of the first part shall reduce the price of its double-strip machines, which are now sold at three hundred dollars, ($300,) then the price of the single-strip machine made by said trustee shall be reduced one-half the amount of such reduction, the manufacturing cost, royalty, and commissions to remain unchanged. Ninth. All orders from purchasers furnished by said trustee shall be filled by the party of the first part, unless there is reasonable ground to question the ability of the purchaser to pay for the same, and then the order shall be filled, provided good and sufficient sureties are furnished for said payments. Tenth. The party of the first part agrees to advertise, in its catalogue and otherwise, the said machines made by said trustee, and put the same upon the market in substantially the same manner, and with the same advantage, as it does the machines of a similar character made by it. Eleventh. Regarding the machines, both covering and topping, heretofore sold by parties of the second or third parts, it is agreed as follows: (a) No interference shall be made by the party of the first part with the free use of the machines which are now in the shop lately owned by said Crossman, in Lynn, Massachusetts, and by him sold to one Theodore Pinkham, and no claim for damages or royalty made therefor. (b) A full list of all machines sold by said parties of the second and third parts for covering or topping boxes shall be forthwith furnished to party of the first part, which shall state those not already delivered. (c) No claim shall be made by party of the first part against any purchaser of machines which have been delivered, but not paid for. (d) No claim shall be made against any purchaser of such delivered machines against whom no bill has been filed. (e) Party of the first part will hold the parties of the second part harmless for all liabilities to purchasers by reason of sales of said machines made prior to the formation of the party of the third part. (f) The said trustee shall forthwith notify all purchasers, stated in subdivisions c and d of the clause, that the machines bought by them have been licensed by the party of the first part. Twelfth. Statements shall be exchanged, and settlements made for the preceding statement, on the first days of January, April, July, and October of each year, or within seven days thereafter, for all machines sold and paid for, and each of said parties shall keep books of account of all the transactions embraced in this agreement, which shall at all reasonable times be open to the in-

spection of either of said parties or their duly-authorized agents. Thirteenth. Upon the termination of this agreement, party of the first part shall reassign to said trustee, or his successor, all rights conveyed to it under the license from said trustee hereinbefore provided. Fourteenth. The said trustee shall have the right to collect for all sales of machinery made by him or his salesmen under this agreement. And whereas, the parties of the second part believe that the single-strip machine made by them can be perfected and modified so as to constitute a double-strip machine superior to the double-strip machines now made by party of the first part, it is therefore agreed that said trustee may experiment and construct machines embodying such improvements to the end stated, and may place them, not exceeding three at any one time, in such box shops as he may choose for practical test, notifying party of the first part in writing where same have been so placed, all of which, however, shall be done by the said trustee in the name of the party of the first part; and party of the first part shall have the right to adopt or reject said improvements upon reasonable trial, and, if rejected by party of the first part, the expense of such improvements shall be sustained by said trustee, and he shall forthwith close the manufacture of all such rejected parts, and shall retake the said machines into his custody. If, however, the party of the first part shall adopt such improvements, then the questions of costs of manufacture, royalty, commissions, and selling price shall be determined by subsequent agreement."

After setting out the contract, the bill avers that, in and by the said agreement, the defendants Crosman, Metcalf, Rollins, and Glazier, and the Lynn Box Machine Company "agree that upon the creation of the trust provided for in the fourth clause, and the acceptance thereof by the said trustee, they should forthwith cease to carry on the business of making, using, or selling box-making machines covered by said patents, or other patents" owned by complainant "except as thereinafter provided;" that the defendant Kilham was in February, 1888, appointed trustee; that he accepted the trust, and entered upon the performance thereof, and that in violation of said agreement the defendants have jointly and severally, the first four as directors of the Lynn Box Machine Company, with the consent of Kilham, carried on the business of making, using, and selling box-making machines of the same kind and character, in principle and mode of operation, as the machines made and sold by the defendants Crosman, Metcalf, Rollins, and Glazier before the commencement of the suits above mentioned, and the making, using, and selling of which were decreed in said suits to be infringements of the patents involved therein, and which they were enjoined from making, using, or selling; and the defendant Kilham, in violation of the agreement and his obligation as trustee, has not only consented to make, use, and sell, but has actively promoted and encouraged the same. The answer admits the foregoing allegation contained in the nineteenth clause of the complaint, except that part in which it is alleged that the defendants have jointly or severally violated their agreement with, or duty to, the complainant. In other words, the defendants admit the facts alleged in the bill, but deny that they constitute a violation of the agreement.

The bill further alleges that the defendants Crosman, Metcalf, Glazier, and Rollins and the Lynn Company have continued to carry on the business of making and selling box-making machinery covered by the Monro single-strip patent and the Inman topping-machine patent in defiance of complainant's rights under the contract, and are aided in doing so by the defendant Kilham. The bill further shows that the defendants have infringed the Monro double-strip patent by making, using, and selling box-covering machines, employing therein the invention patented by that patent, and threaten to continue such infringement; that the defendants falsely pretend to the public that they are licensed by the complainant to make and sell machines embodying the invention patented by the double-strip patent, and that the public have been deceived thereby, and have bought machines from the defendants, the making, use, and sale of which was not authorized by the complainant, and was in violation of its rights, and that the complainant has been greatly damaged thereby; that the inventions patented in complainant's said patents are capable of conjoint as well as separate use in the same machine, and they have been

so used by the defendants; that the defendants' acts have caused great damage to the complainant; that the defendants' continued violation of said agreement will cause the public to disregard the complainant's rights, and especially the complainant's rights to the invention patented by the double-strip patent.

The circular letter of May 25th, referred to in the opinion as being found in the catalogue of the Lynn Box Machine Company, was as follows:

"Amsterdam, N. Y., May 25, 1888.

"To Paper Box Manufacturers: You are hereby informed that all litigation by the American Box Machine Company, of Amsterdam, N. Y., (Horace Inman, vice president and manager,) against the Lynn Box Machine Company of Lynn, Mass., and purchasers of the so-called 'Lynn Box-Covering and Topping Machines,' has been settled by the Lynn Box Machine Company paying to the American Box Machine Company an agreed cash consideration. Hereafter the Lynn topping and covering machines will be sold by the American Box Machine Company in connection with its machinery, and by D. A. Kilham, trustee, or his agent, of Lynn, Mass., who represents the interests of the American Box Machine Company, and who will sell the Lynn machines, and in connection therewith the machines of the American Box Machine Company. In all cases the machines will be billed to purchasers in the name of, and licensed by, the American Box Machine Company. For machines sold by said Kilham, trustee, or his agent, payment will be made to him at Lynn, Mass.

American Box Machine Co.
"H. Inman, Manager.
"John B. Rollins, President.
"D. A. Kilham, Trustee.

"Attest: B. Finlayson, Sec. Lynn Box Machine Co."

William A. Jenner, for complainant.
Thomas W. Clarke, for defendants.

PUTNAM, Circuit Judge. The prayer of the bill in this case asks expressly for a specific performance of the contract set out. It also contains some expressions looking to relief as on a bill for infringement of a patent. It is impossible to sustain the bill as one with a double aspect, because, in a bill for an infringement, the determination who are the necessary parties must be made from a different standpoint from that in a bill for specific enforcement of a contract. Other substantial reasons might be given, but it is sufficient to add that, for a bill with a double aspect, the title to relief must be precisely the same in each event, which seems not possible in the class of bills to which this at bar belongs. Story, Eq. Pl. § 254. Unless, therefore, the complainant confesses that this bill is strictly for an infringement, and has arranged parties accordingly, or that it is for a specific performance of a contract, and has arranged parties accordingly, it must be treated as multifarious, though, as the respondents have not made that point, it cannot be dismissed on that account. Nevertheless, the court of its own motion must see that the litigation is put in form to be disposed of understandingly.

The complainant cites the opinion of Judge Shipman in Magic Ruffle Co. v. Elm City Co., 13 Blatchf. 151, as though it justified a double remedy under this bill; but it seems Judge Shipman (page 156) declined to commit himself to that position, and his conclusion was that although the bill was so framed that it might, perhaps, have been considered either as for infringement or for

specific performance, yet, on the whole, it was to be held that the pleader made the alleged breach of agreement the basis of the action, and sought to recover damages for injury arising from a violation thereof. Thereupon Judge Shipman evidently worked out the case as though the bill was founded solely on the contract.

It is also apparent in the case at bar that the respondents accepted the bill as one for specific performance. This is particularly apparent from the method in which they meet the claim that they had not denied infringement, for they point out that the answer denies that respondents, "in violation of the covenant," had made use and sold, etc. So far as the bill is uncertain in this particular, or has a double sound, the respondents were entitled to elect the construction to be put upon it; and the court approves their election. It is only by treating the bill as respondents have treated it that the court can avoid the difficulties which appear in Hartell v. Tilghman, 99 U. S. 547, in White v. Rankin, 144 U. S. 628, 12 Sup. Ct. Rep. 768, and in the other cases therein cited.

This conclusion renders it easy to dispose of the relations to this case of Metcalf as a special partner in Frank & Duston. I see some difficulties in the way of his being made a party defendant to a bill for infringement, without joining his partners, also; but, on a bill for specific performance of a contract executed by Metcalf, I think he can be holden because he is a contractor, although it may embarrass the partnership with which he has allied himself. I think, also, that he cannot be permitted to avail himself of the profits of that partnership in violation of his own contract, and then excuse himself on the ground that his relations as a partner are inactive, dormant, silent, or limited.

It is sufficiently plain that a mere recovery of damages, which is the only remedy the common law affords, would not be an adequate remedy for the complainant in the case at bar, and therefore I must hold that there is jurisdiction in equity to furnish the relief which the complainant desires.

I do not consider it necessary to investigate the mass of evidence bearing on the proposition that the contract at bar was made with reference to a certain existing machine or machines; neither do I concur in the proposition of the complainant that, so far as the contract provided for a license to Kilham, as trustee, it covered only what was expressly claimed in the Glazier patent.

That the contract did not relate to specific machines appears from many expressions in it, apportioning the rights between the complainant and the respondents according to patents, and not according to existing structures. I find not a word in it which refers to the latter, while the sixth clause gives the trustee the right to make, or cause to be made, the single-strip machines, "that embody the inventions, or substantial parts thereof, described in the said patents," meaning the Glazier patents; and this was the only license given to the trustee, or any of the defendants,

under this contract. As to the other proposition, while the mere letter of what I have just cited touches only "the inventions, or substantial parts thereof," described in the Glazier patents, yet it seems a strained construction to deny that Kilham, as trustee, was licensed to make, or cause to be made, the machine as actually shown in the specifications and drawings attached to them. This is the practical interpretation given by the joint circular of May 25, 1888, found on the cover of complainant's Exhibit H, as at least so much as this was covered by the expression "Lynn covering machines," which that circular expressly allotted to Kilham, trustee, or his agent.

It is a simple principle, especially with reference to parties asking a specific performance of a contract by an equity court, that, when it has been varied in the execution of details by common understanding and mutual consent, the change will be insisted on by the court, either as a practical construction, illustrating the original intention of the contract, or as a supplemental agreement. But although, in the case at bar, it appears, and is claimed by the complainant, that the modifications of the respondents' machine complained of were adopted by it immediately after the contract was executed, and although I might, perhaps, find enough in the record, showing that the complainant had slept on its rights, to bar an account or assessment of damages, if the case came to that, yet I am not satisfied that the complainant was properly aware of the course of manufacture, knowingly waived its rights, or has intentionally given any construction to the agreement, except such as it properly bears on its face.

Subject to the possible effect of the above qualifications, it must be held that all parties to the contract agreed in the strongest terms to maintain in the complainant, not only the exclusive right to the peculiar machines described in any of the patents originally owned by it, but also any method of covering boxes with a plurality of strips simultaneously. The portion of the contract which provided that some of the defendants might experiment on the single-strip machine, with a view of converting it into a double-strip machine, on terms to be accepted by the complainant, make especially clear the extent to which that contract intended to go in this direction.

It is apparent, for reasons which are stated at length in the testimony of Inman, that no machine shown by the Glazier patents could be used for a simultaneous plurality of strips, without some adaptation for that purpose. It is also plain that the respondents' machine has been adapted, either intentionally or otherwise, so that now is is capable of the extended use; this coming apparently from the interposition of a circular guide, which operates as a double guide, in lieu of the finger, or single guide, shown in the specifications and drawings of the Glazier patent No. 360,582, and from the omission, in connection with the reversing the frame of the machine, of the weighted lever, m, and possibly in part from the addition of another roller, as shown in complainant's Exhibit A. It is not necessary, however, for the court to

go into these details. It is sufficient that it holds that no machine shown in the Glazier patents was capable of the use of a simultaneous plurality of strips without some change or adaptation, while the machine as sold is thus capable. Of course, respondents cannot be limited to a precise form of machine, so far as concerns mere mechanical details which are not injurious; but what may be allowed, or not allowed, in that direction, will be a matter for consideration when the terms of the final decree are settled.

Complainant's brief enters on a discussion of matters not charged in the bill, as, for example, a claim that the Lynn Box Machine Company be enjoined from making, selling, or using any box-making machinery covered by any of the patents. Indeed, so far as this is concerned, the nineteenth paragraph of the bill alleges that what this corporation has done was with "the consent of the defendant Kilham;" and, as he was authorized by the contract to appoint such selling agents as he saw fit, and was also to procure the manufacture of the single-strip machines by such persons as he deemed proper, subject to being personally responsible for agents not approved by the complainant, it is of no consequence whether his appointment was formal or informal, or by ratification or consent. The pith of the bill aims only at respondents' making, using, or selling a two-strip machine, and, when this call of the bill is met, nothing further remains to be answered for.

It is admitted by the complainant's brief that the Lynn Box Machine Company neither manufactured nor sold the offending machine. There is no proof of any complicity on its part, unless it be by what appears on page 2 of the catalogue of complainant's Exhibit H. There is nothing in the text of this page, and I have not been referred to anything in the proofs, which indicates that the machine there shown was adapted for two strips, or was offered as such, and the drawing is not sufficiently accurate to throw light on that point. Taken in connection with the joint circular of May 25, 1888, which appears in this catalogue, I am unable to see that it furnishes any ground of complaint. I have no doubt of the right of Kilham, trustee, or of his selling agent, Metcalf, or of any other person interested in selling the single-strip machine, to advertise it through the catalogues of the Lynn Box Machine Company, or of any other person or corporation, unless the advertisement is shown to contain some unauthorized feature; and such is not the case with this in question.

I do not find any claim of any act by Crosman, individually, or anything connecting him with this case except as director of the Lynn Box Machine Company, and I therefore think he must go out of the suit with that corporation. Rollins and Glazier are properly charged as the manufacturers, and Metcalf as the seller, of the offending machine, and therefore must be retained in the bill.

It also appears that Metcalf is a special partner in the limited partnership of Frank & Duston, and that this partnership has

been using the machine in question for covering boxes with two strips simultaneously. For reasons already stated, Metcalf must be charged with the acts of the partnership, so far as his obligations under the contract are concerned, but no account can be taken of profits as against him, in the absence of his copartners as defendants in this suit.

In Magic Ruffle Co. v. Elm City Co., supra, Judge Shipman ordered an account of profits; but in the case at bar the complainant has not proven specific facts sufficient to show that any of the respondents have made any profits on account of the features complained of in the machines which they sell; and, while it is very probable that unrestricted sale would eventually seriously impair the trade of the complainant, which fact is the basis of jurisdiction in this case, yet the proofs also lack specific evidence of actual damage already suffered. On the whole I do not find enough in the record to justify ordering an account or making a reference for the purpose of assessing damages.

Let there be a decree dismissing the bill as against Crosman and the Lynn Box Machine Company, with costs, but for the complainant, against the remaining respondents, for an injunction, with costs, and, further, against Metcalf from continuing in the partnership of Frank & Duston, so long as they are using the machines complained of; the terms of the decree to be settled in accordance with this opinion.

AMERICAN BOX MACH. CO. v. CROSMAN et al.

(Circuit Court, D. Massachusetts. October 6, 1893.)

No. 2,758.

COSTS—TAXATION—EQUITY.

Where a bill is sustained with costs against certain respondents, and dismissed with costs as against others, the latter are entitled, not only to have taxed the items special to their defense, but also to have apportioned in their favor the items which were of a joint character.

In Equity. Bill for specific performance of a contract. Appeal from the clerk's taxation of costs. Appeal allowed subject to correction.

W. A. Jenner, for complainant.
T. W. Clarke, for defendants.

PUTNAM, Circuit Judge. This is an appeal by respondents, Crosman and the Lynn Box Machine Company, from the clerk's taxation of costs. In this case the bill was sustained with costs against certain respondents, and dismissed as against the respondents above named, with costs in their favor. 57 Fed. Rep. 1021. The clerk's taxation gives complainant its entire costs without apportionment, disallowing only items which relate exclusively to the above-named respondents, and allows the latter such items as the clerk held to be special to their defense, but no portion of certain items which were of a joint character.

Theoretically, it would be correct to allow each party full costs, as was done in admiralty in Simpson v. Caulkins, Abb. Adm. 539; but the rule seemingly recognized in equity, as well as at law, appears to be that of an apportionment of all items not in their nature severable. This, however, if accepted, ought to be an apportionment of the entire case on each side, and not partial, limited to the costs of any one or more of the respondents. The rule may be found practically worked out in Heighington v. Grant, 1 Beav. 230, and in other cases cited in 1 Seton, Decrees, (4th Ed.) p. 129. Without, therefore, undertaking to decide which general rule of taxation is the proper one in equity, it is clear that the above-named respondents are at least entitled to have apportioned in their favor the joint items with reference to which they have appealed, and their appeal is allowed, proportions, nevertheless, to be corrected. As no appeal was taken by complainant, its objections to the allowance by the clerk of the whole of certain items, instead of a proportion, on the ground that all respondents united in their defense, need not be considered at length; but the rule seems to be that the judgment of the court dismissing the bill as to some operated as a severance.

Appeal allowed subject to correction of proportions.

THOMPSON v. SEARCY COUNTY.

SEARCY COUNTY v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

Nos. 245, 264.

1. COUNTIES—CONTRACTS—VALIDITY—EXCESSIVE PRICE—DAMAGES.
In a suit on county warrants issued pursuant to the orders of the county court, in compliance with the provisions of a valid contract for the erection of a courthouse, and for the precise amount which the county had agreed to pay, the county, in the absence of fraud in obtaining the contract, and of proof that the work was not done in compliance with the specifications, is not entitled to a deduction from the contract price, or to insist that the damages be assessed as upon a quantum meruit, merely because the courthouse when completed was worth only one-third of the contract price. Shirk v. Pulaski Co., 4 Dill. 209, 211, distinguished.

2. SAME—EXCEEDING APPROPRIATION—ARKANSAS STATUTE.
Under Mansf. Dig. Ark. § 1451, providing that no agent of any county shall make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended, a contract for the erection of a county courthouse for an agreed price of $29,000 is binding upon the county although only $2,200 had been previously appropriated therefor. Hardware Co. v. Erb, 17 S. W. Rep. 7, 54 Ark. 645, followed; Worthen v. Roots, 34 Ark. 356, distinguished.

3. SAME—ACTIONS ON COUNTY WARRANTS.
County warrants issued to pay for public works in Arkansas are not negotiable instruments, in the full sense of the law merchant, but are mere prima facie evidences of a valid claim, and the statute of limitations begins to run against them upon delivery. A suit can therefore be maintained on such warrants, whether an appropriation adequate to

pay them has been made or not. Wall v. County of Monroe, 103 U. S. 74, and Crudup v. Ramsey, 15 S. W. Rep. 453, 54 Ark. 168, followed.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS.
With respect to the interpretation of state statutes regulating the making of contracts by counties, the decisions of the state courts are binding upon the courts of the United States.

5. SAME—JURISDICTION—COUNTY WARRANTS PAYABLE TO A. B., OR BEARER—ACT MARCH 3, 1887.
A county warrant made payable "to A. B., or bearer," is legally equivalent to one made payable simply "to bearer," and, under Act March 3, 1887, (1 Supp. Rev. St. 611,) the assignee thereof may maintain an action thereon in a federal court, without reference to the citizenship of A. B., if the other requisite jurisdictional facts appear.

6. SAME—ARKANSAS STATUTE—CLAIMS AGAINST COUNTIES.
St. Ark. Feb. 27, 1879, requiring all persons having claims against a county to present them for allowance to the county court, does not deprive nonresident creditors of their right to sue the county in a federal court. Chicot County v. Sherwood, 13 Sup. Ct. Rep. 695, 148 U. S. 529, followed.

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

At Law. Action by William H. Thompson against Searcy county, Ark., to recover upon certain county warrants. The cause was tried without a jury, and judgment was given for plaintiff. Both parties bring error. Reversed on plaintiff's exceptions.

Statement by THAYER, District Judge:

This is a suit on county warrants aggregating $24,000, which were issued by Searcy county, Ark., during the years 1888, 1889, and 1890, for building a courthouse.

Under the constitution of the state of Arkansas, the justices of the peace of each county, or a majority of them, sit with the county judge for the purpose of levying county taxes, and making appropriations for county expenses, and, when thus sitting, the tribunal thus constituted is ordinarily termed the "Quorum Court;" but for the purpose of auditing claims against the county, entering into contracts in its behalf, and attending to all other matters relating to county affairs, the county judge sits alone, and constitutes the county court. Const. Ark. art. 7, §§ 28, 30; Worthen v. Badgett, 32 Ark. 496–522.

At a session of the quorum court of Searcy county, held in October, 1887, that body made an appropriation in the sum of $2,200 towards building a courthouse. At the January session, 1888, the county court of said county, in view of such appropriation, ordered the erection of a courthouse at the county seat, and appointed a commissioner of public buildings to draw plans and specifications for such a structure. Subsequently the plans devised by such commissioner were approved by the county court, and a contract was thereupon entered into on April 2, 1888, with McCabe & Greenhaw, for the erection of a courthouse in accordance with the plans of the commissioner, at a cost of $20,000, they being the lowest responsible bidders for the erection of the building. At various times thereafter during the erection of the building the quorum court made further appropriations for the construction of the courthouse, the whole of such appropriations, including the first, aggregating $11,400, and no more. At various times during the progress of the work the county court likewise ordered warrants to be drawn on the county treasurer in favor of the contractors, until the contract price was thus liquidated.

The case was tried in the circuit court, without a jury, and the trial judge made a special finding of the facts, embodying substantially the facts above stated. He further found "that said contract for building said courthouse was duly advertised, and that the proceedings prior to and including the letting of said contract, and giving bond by the contractors, were in accordance with the statute in such case made and provided, and that the work on said courthouse was done in accordance with the plans and specifications and terms of

said contract, excepting one change, which was made by order of said county court, held by said county judge, on the recommendation of said commissioner, at an additional price of $4,000, which was completed as agreed upon, and was accepted by said county court; that this made the sum total of the price of said work done by said contractors $33,100, for all of which county warrants were issued to said contractors, jointly or severally; that the warrants sued on amount to the sum total of $24,000; and that they are a part of the warrants issued to said contractors for building said courthouse." The circuit court further found "that at the time said courthouse was completed it was really worth no more than $11,000," and that of the warrants drawn on the treasurer the county had redeemed warrants to the amount of $5,900 before the present suit was brought. The trial court also found "that since 1886, and to the present time, there has been no money in the county treasury, and that during all this time the constitutional limit of county taxation had been levied and appropriated, and that none has been appropriated for building said courthouse, except as above stated."

As a conclusion of law the circuit court adjudged that the plaintiff below was entitled to recover 33⅓ per cent. of the face value of the warrants by him owned and held, and in accordance with that view it entered a judgment against the county in the sum of $8,000. Both parties to the suit have excepted to the action of the lower court, and have respectively sued out a writ of error.

U. M. Rose, H. M. Hill, W. E. Hemingway, and G. B. Rose, for plaintiff.

Eben W. Kimball, for defendant.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff below has assigned for error that the circuit court erroneously permitted the defendant county to produce evidence tending to show that the courthouse, for the building of which the warrants in suit were issued, was not worth more than $11,000 when completed. He further complains that the circuit court erred in declaring the law as follows:

"The plaintiff in this case is entitled to recover only the legal, ordinary, and customary price for building such a courthouse, estimating a dollar in county warrants at par with a dollar of lawful currency of the United States, and to be prorated upon the amount of warrants sued on."

And that it also erred in refusing to give the following declarations, which were asked by the plaintiff:

"(1) Though the courthouse, for the building of which the warrants sued on were issued, cost more than it was worth after it was built, yet, in the absence of fraud in procuring the contract under which said warrants were issued, or in procuring the issue of the same, the court should find in favor of the plaintiff for the full value of the warrants sued on.

"(2) This is not a suit that, in the absence of fraud, involves either the cost or the value of the courthouse for which the warrants sued on were issued; and, if the court finds that the contract for building the courthouse was legally let to the contractors as the lowest bidders, at a fixed price, that the work was done according to the contract, and that the warrants sued on were issued in payment of said work, then the court, in the absence of any proof of fraud on the part of said contractors, will find in favor of the plaintiff for the value of said warrants."

We are satisfied, by an inspection of the record, that the errors thus complained of are of such character as will necessitate a reversal of the case. The suit is founded upon warrants which were issued pursuant to orders of the county court, in compliance with the provisions of the contract for the erection of a courthouse, and for the precise amount which the county had agreed to pay for the erection of the building. Under these circumstances, the county is not entitled to a deduction from the contract price, or to insist that the damages shall be assessed as upon a quantum meruit, unless it can show, either that the work was not done in compliance with the specifications of the contract, or that the contractors were guilty of some fraud in procuring the contract to be entered into, on account of which the warrants were issued. But neither of the conditions last mentioned as entitling the county to a deduction from the contract price is disclosed by the record. It was expressly found by the trial judge that the work was done by the contractors "in accordance with the plans and specifications, excepting one change, which was made by order of the county court;" and there is no plea or finding which shows that the contractors were guilty of any fraud in obtaining the contract, except the statement that the courthouse when completed "was really worth no more than $11,000." In opposition to this finding it further appears, however, from the special verdict, that the contract for the building of the courthouse was entered into after sealed proposals for the erection of such a building had been solicited by public advertisement, in the manner provided by law, and that the contract was let to the lowest responsible bidder. The most that the record discloses is that the county, for some reason, agreed to pay more for the building than it was really worth when completed. It fails to show that the contractors by whom the work was done were guilty of any trick or artifice tantamount to a fraud, in obtaining such a contract, which entitles the county to a deduction from the contract price. There are indications contained in the record that the action of the circuit court, which is now under consideration, was induced by the decision in Shirk v. Pulaski Co., reported in 4 Dill. 209, 211, and an attempt is made to support the action of the trial court on the strength of that decision. It will be observed, however, that in Shirk v. Pulaski Co. the plea which was interposed by the county showed the following facts: that the warrants of the county had become greatly depreciated in value; that to make up for such depreciation, and to secure to certain county officers the full payment of their legal fees, by a sale of their warrants, the county court had issued warrants to such officers for five and ten times the amount of their respective demands. This practice seems to have been adopted in pursuance of an agreement between the board of supervisors and the various creditors of the county, and was no doubt a clear evasion of the laws of the state regulating the issuance of county warrants. The court held that warrants issued under such circumstances were voidable; but, as they had passed into the hands of innocent purchasers for value, the court further determined to

treat the holders of such warrants as the equitable assignees of the claims against the county, on account of which the warrants had been drawn, and to permit a recovery against the county to the amount of such claims, and no more.

Without impugning the decision in Shirk v. Pulaski Co., it is sufficient to say that we discover nothing in that case which tends to support the action of the circuit court in scaling the warrants that are involved in the case at bar. It was not alleged in the present case, neither was it proven, that, in pursuance of an unlawful arrangement between the county court and the contractors, a bid was made and accepted for the construction of the courthouse, at a price known to be three times in excess of its actual value, for the purpose of covering a known or possible depreciation in the value of the county warrants with which the claim of the contractors was to be paid. The record simply discloses that the county made a bad bargain, but it fails to show that the contractors are in any respect responsible for such a result. The action of the circuit court in admitting testimony as to the reasonable value of the courthouse, and in declaring that the plaintiff was only entitled to recover such reasonable value, and in refusing the two declarations of law asked by the plaintiff, was erroneous, and in consequence of such errors the case must be reversed.

We have next to consider some of the errors that have been assigned in support of the writ of error which is prosecuted by the defendant county. The most important of these assignments is the contention of counsel that the warrants sued upon should have been adjudged void; because the county court had no authority under the laws of Arkansas to enter into a contract for the erection of a courthouse at a cost of $29,000 at a time when the quorum court had only appropriated $2,200 toward the erection of such a building. It is not denied that it was the exclusive function of the county court, when held by the county judge, to enter into contracts for the erection of county buildings; but it is insisted that, under the laws of the state of Arkansas, it had no right to enter into a contract for the building of a courthouse at a cost exceeding the sum that had been appropriated by the quorum court for the erection of such a structure.

This contention on the part of the county seems to be mainly based on the decisions of the supreme court of Arkansas in Worthen v. Roots, 34 Ark. 356, 369, and Lawrence Co. v. Coffman, 36 Ark. 641, 646. We fail to find anything in Worthen v. Roots that is tantamount to an authoritative declaration that a county court can in no case enter into a contract in behalf of a county that will require an expenditure in excess of an appropriation that may at the time have been made by the quorum court. There is a dictum to that effect, however, in Lawrence Co. v. Coffman, but the question was not involved in that case, and for that reason the decision cannot be regarded as establishing the proposition that contracts cannot be made by a county court in excess of existing appropriations. On the other hand, in a later case, (Hardware Co.

v. Erb, 54 Ark. 645, 659, 17 S. W. Rep. 7,) the supreme court of that state had occasion to construe the statute on which the present contention in behalf of the county is based, and in so doing it appears to have overruled the views intimated in Lawrence Co. v. Coffman. The statute is as follows:

"No county court or agent of any county shall hereafter make any contract on behalf of the county, unless an appropriation has been previously made therefor, and is wholly or in part unexpended." Mansf. Dig. § 1451.

In speaking of the statute, and its proper interpretation, the court, in Hardware Co. v. Erb, which involved an appropriation for a county bridge, made use of the following language:

"It is the policy of the act to require the concurring judgment of the levying [quorum] court and of the county judge that a bridge should be built, before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment, and the county judge may afterwards signify his by letting the contract. * * * While we think that a contract cannot be made before there has been an appropriation for it, we do not think that, when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriates any sum for the work, that signifies their judgment that the work should be done, and the county judge may then proceed to contract for it without further consulting them; the only limitations upon his power being found in other directions."

The views thus expressed relative to the proper interpretation of the statute seem to be sound, in view of the fact that, under other provisions of the laws of Arkansas, the quorum court only has power to make appropriations "for the expenses of the county or district for the current year." Mansf. Dig. § 1448. If it was held that the county court could not enter into a contract involving an expenditure in excess of an existing annual appropriation, it might seriously embarrass the county in prosecuting necessary public works of such magnitude that they could only be paid for out of the revenues of the county for successive years. But, be this as it may, we think that the decision in Hardware Co. v. Erb is an authoritative exposition of the purpose of the statute in question, and, being a matter of local law, we are constrained to adopt the views therein expressed. It follows that no error was committed by the circuit court in refusing to hold that the warrants were void, because the contract for the erection of a courthouse at a cost of $29,000 was in violation of law.

It is further assigned that the circuit court erred in overruling a demurrer, which was interposed by the county, to the complaint on which the case was tried. The demurrer appears to have been mainly grounded on the fact that the warrants set out in the complaint directed the county treasurer to pay them "out of any money in the treasury appropriated for building a courthouse," and that the complaint did not aver that any appropriation had been made; hence it is argued that the complaint did not show that the warrants were due and payable, and for that reason did not state a cause of action. With reference to this contention it is to be observed that it has been held that warrants such as these issued in the state of Arkansas are not negotiable instruments in

the full sense of the law merchant, and that the rules applicable to negotiable paper are not strictly enforced with reference to such instruments. They are mere evidences of indebtedness issued by that branch of the county government whose function it is to audit and allow claims against the county, and, when thus issued, they are prima facie evidence that the claim is valid, and is likewise due and payable. Wall v. County of Monroe, 103 U. S. 74, 77; County of Ouachita v. Wolcott, 103 U. S. 559; Mayor v. Ray, 19 Wall. 468, 477.

It is also the settled law of Arkansas that warrants such as these may be barred by the statute of limitations, and that the statute of that state barring suits on written instruments, not under seal, after the lapse of five years, begins to run as against a county warrant upon its delivery to the person in whose favor it is drawn. Crudup v. Ramsey, 54 Ark. 168, 15 S. W. Rep. 458; Goldman v. Conway Co., 10 Fed. Rep. 888. And in the case of Crawford Co. v. Wilson, 7 Ark. 214, it was taken for granted that the holder of county warrants issued for building a courthouse could maintain an immediate suit thereon against the county, and reduce the audited demand to a judgment, although the particular fund on which the warrants were drawn was exhausted.

In view of these rulings we conclude that a suit could be maintained on the warrants as soon as they were delivered to the contractors, without reference to the question whether the fund against which they were drawn had or had not been depleted. It would be the height of injustice to hold that a suit could not be maintained on the warrants, for the purpose of reducing them to a judgment, until there was an appropriation adequate to pay them, and, at the same time, to hold that, without reference to an appropriation, the statute of limitations begins to run from the date of delivery. It is clear, we think, that no error was committed in overruling the first point of demurrer.

It is equally clear that the second point of the demurrer was untenable. The warrants in suit were made payable to "G. B. Greenhaw, or bearer." The suit thereon is brought by an assignee thereof, who is a citizen of Missouri, and it is contended that the suit was not within the jurisdiction of the circuit court, under that clause of the first section of the judiciary act of March 3, 1887, relating to suits by assignees of choses in action, because they were not made payable simply "to bearer." 1 Supp. Rev. St. U. S. pp. 611, 612. In other words, a distinction is attempted to be drawn between an instrument payable to a particular person "or bearer" and one that is payable simply "to bearer;" the argument being that the former class of instruments are not within the exception mentioned in the statute, as construed in Wilson v. Knox Co., 43 Fed. Rep. 481, while the latter class are. The statement of the point thus raised by the county is its own refutation. A warrant made payable "to A. B., or bearer," is for all practical purposes, and in legal effect, the equivalent of one made payable simply "to bearer;" and, under the judiciary act of March 3, 1887, an assignee may maintain an action in the national courts on a warrant

drawn in one form, as well as the other, if the other requisite jurisdictional facts appear.

Another assignment which is argued at some length by the county is to the effect that the circuit court erred in holding that a suit could be maintained on these warrants in the United States circuit court, notwithstanding the provision of a statute of Arkansas approved on February 27, 1879, which repealed all previous acts authorizing counties of the state to be sued, and required all persons having demands against a county to present them for allowance to the county court. Mansf. Dig. p. 350, and notes. This proposition is met and overcome by a recent decision of the supreme court of the United States in Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. Rep. 695, wherein it is held that the statute in question is not adequate to deprive nonresident creditors of a county of their right to sue the county in the national courts, when the amount is sufficient to invoke their jurisdiction.

We have thus reviewed all of the important errors assigned by the county, and find them to be without merit, wherefore the action of the circuit court must be affirmed, with respect to all of those rulings as to which the county has excepted; but for errors prejudicial to the plaintiff, as heretofore indicated, the judgment of the circuit court is reversed, and the cause is remanded, with directions to grant a new trial.

NORTHERN PAC. R. CO. v. BEHLING.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 276.

1. MASTER AND SERVANT—NEGLIGENCE OF COEMPLOYE—STATUTORY LIABILITY OF RAILROAD COMPANIES.
   Under Gen. Laws Minn. 1887, c. 13, a railroad company is liable for injuries to an employe caused by negligence of a coemploye.

2. SAME—NEGLIGENCE—QUESTION FOR JURY.
   A section foreman in charge of a hand car was informed by the crew that a train was approaching from behind, but he ordered the men to go on "pumping" until he told them to stop. He delayed giving the order until the train was so close that the car could not be removed from the track in the accustomed deliberate and safe manner, and in the haste and excitement of getting it out of the way one of the crew stumbled and lost his hold, by which the car was precipitated upon another of the crew. *Held*, in an action by the latter against the railroad company, that the question whether the injury was due to negligence of the foreman was for the jury, and the court properly refused to direct a verdict for defendant. Coyne v. Railway Co., 10 Sup. Ct. Rep. 382, 133 U. S. 370, distinguished.

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

At Law. Action by Henry Behling against the Northern Pacific Railroad Company for damages for personal injury. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

John H. Mitchell, Jr., and Tilden R. Selmes, for plaintiff in error.
F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. The defendant in error was a section hand in the employ of the plaintiff in error, the crew consisting of four men and a foreman. On the 27th of September, 1889, while the crew, under the direction of the foreman, was operating a hand car on the track going to their place of work, a freight train was seen approaching from the rear, and rapidly gaining on the hand car. The attention of the foreman was called to this fact, and the suggestion made that the hand car be stopped and removed from the track, to which he replied: "Never mind. You keep on pumping until I tell you to stop." He delayed giving the order to stop until the train was dangerously near the hand car, when he ordered the men to stop pumping, applied the brakes, and said, "Now get her off the track as quick as the devil will let you." When this order was given, the train was so close to the hand car that there was not time to remove the latter from the track in the accustomed orderly, deliberate, and safe manner, and in the extraordinary haste, exertion, and excitement incident to its removal from the track in time to prevent a collision one of the crew stumbled, and lost his hold upon the hand car, by which it was precipitated upon and injured the defendant in error.

No exceptions are taken to the charge of the court. It is assigned for error that the negligence complained of is the negligence of a fellow servant; but, under the provisions of the Minnesota statute, that fact constitutes no defense. Gen. Laws 1887, c. 13; Slette v. Railway Co., (Minn.) 55 N. W. Rep. 137; Steffenson v. Railway Co., 45 Minn. 355, 47 N. W. Rep. 1068.

The only other error relied upon in argument is that the court erred in refusing to give a peremptory instruction to the jury to find a verdict for the defendant. Whether the facts proved constituted negligence, and, if so, whether the defendant in error was injured as a result of such negligence, were questions of fact for the jury to decide. The plaintiff's testimony tended to support his contention on both of these issues. As we said in the case of Railroad Co. v. Conger, 5 C. C. A. 410, 56 Fed. Rep. 20:

"It was for the jury to say whether and how far the evidence was to be believed. If by giving credit to the plaintiff's evidence, and discrediting the counter evidence, the plaintiff's case was made out, the court should not have withdrawn the case from the jury."

The case of Coyne v. Railway Co., 133 U. S. 370, 10 Sup. Ct. Rep. 382, is relied upon by the plaintiff in error, but is not in point. In that case the court say that "the injury to the plaintiff was not caused by any negligence on the part of McCormick," the foreman. In this case the jury found the foreman was guilty of negligence in not giving a timely order for the removal of the hand

car from the track, and that the injury to the plaintiff resulted from that act of negligence. In the Coyne Case the court said, "It does not appear that the approaching freight train was so near as to render it unsafe for McCormick to start the construction train," and it was, therefore, held that an order to hasten the loading of the car was not a negligent act; but in the case at bar the jury found that the foreman was guilty of negligence, not in giving, but in delaying to give, the order for the removal of the hand car from the track until there was imminent danger that it would be run into by the train before it could be removed. The serious consequences of such a collision were barely averted by unusual and extraordinary exertion on the part of the crew. The jury have found that this dangerous situation was brought about by the negligence of the foreman, and that as a result of such negligence the plaintiff sustained the injury complained of.

The judgment of the court below is affirmed.

BUCHANAN et al. v. GOODWIN et al.

(Circuit Court, D. Indiana. September 22, 1893.)

No. 8,774.

PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—STRAW STACKER.

Letters patent No. 467,476, issued January 19, 1892, for the combination with a threshing machine of a pneumatic straw elevator and stacker, consisting of a fan, a trunk through which the straw is discharged, and various devices by which these parts are adapted to perform their work, cover a useful and valuable invention, and are entitled to a liberal construction.

In Equity. Suit by James Buchanan and the Indiana Manufacturing Company against Thomas L. Goodwin and Andrew J. Hoffman for infringement of a patent. Decree for complainants.

Chester Bradford, for complainants.

A. L. Mason, for defendants.

BAKER, District Judge. This is a bill in equity asking for an injunction and accounting on account of the alleged infringement of letters patent of the United States No. 467,476, issued to James Buchanan, January 19, 1892, on pneumatic straw elevators and stackers. The defendants have admitted the character in which the complainants sue, and their title to the letters patent in suit, to be as stated in their bill of complaint. Evidence showing infringment and the character and value of the invention has been taken by the complainants, but no evidence was taken on behalf of the defendants. The cause was heard on the evidence taken on behalf of complainants, and was argued by their counsel, no evidence or argument having been submitted on behalf of the defendants. The character of the invention is well stated in the testimony of Mr. Oscar W. Bond, complainants' expert. It consists, speaking in general terms, in the combination, with a threshing machine, of a pneumatic straw elevator, consisting

of a fan, a trunk through which the straw is discharged, and various devices by which these parts are adapted to properly perform the work of taking the straw from the threshing machine, and conveying the same to, and depositing it upon, a stack. So far as shown, the complainant Buchanan is the first inventor of a machine by means of which straw can be successfully taken from a threshing machine, and conveyed to, and deposited upon, a stack. Under a familiar rule he is entitled to a liberal construction of his patent. Parker v. Hulme, 1 Fish. Pat. Cas. 44; Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. Rep. 299; Drill Co. v. Simpson, 29 Fed. Rep. 292; Parker v. Haworth, 4 McLean, 370; Sloat v. Patton, 1 Fish. Pat. Cas. 154. The evidence on behalf of the complainants is clear and satisfactory touching the utility and value of the apparatus, and the infringement of the 1st, 6th, 7th, and 9th claims of complainants' patent by the defendants is shown. The remaining claims of the patent are not in issue. It follows that complainants are entitled to the usual decree for an accounting and an injunction, and it is so ordered.

[END OF CASES IN VOL. 57.]

INDEX.

ABATEMENT AND REVIVAL.

Objections to jurisdiction—Waiver.

On an application by the receiver of a railroad for a rule to show cause why possession of certain real property should not be surrendered to him, where the parties and the subject-matter are within the jurisdiction, and respondent voluntarily answers, asserting a right to the premises, and submitting his claim for adjudication, he thereby waives his objection to the form of the proceeding.—Ex parte Davidson, (C. C.) 57 F. 883.

Accident.

Accounting.

ACKNOWLEDGMENT.

Before whom taken.

1. Act Va. Oct. 1785, (12 Hen. St. 154,) required conveyances of lands made by persons not resident in Virginia to be acknowledged "before any court of law," and "certified by such court * * * in the manner such acts are usually authenticated by them." *Held* that, by the laws of Pennsylvania in force in May, 1788, (1 Laws 1810, p. 142,) three justices were necessary to constitute the court of common pleas for the county of Philadelphia, and an acknowledgment of a Virginia deed under the said act of 1785, before two of them only, was invalid.—Loree v. Abner, (C. C. A.) 57 F. 159.

Foreign acknowledgment — Presumption.

2 Act Va. Oct. 1785, (12 Hen. St. 154,) required conveyances of lands made by persons not resident in Virginia to be acknowledged "before any court of law," and "certified by such court * * * in the manner such acts are usually authenticated by them." Where a Virginia deed bore a certificate of acknowledgment signed by two justices of a Pennsylvania court, accompanied by the certificate of a prothonotary that the signers of the first certificate were in fact such justices, and entitled to full credit as such, the fact that the prothonotary's certificate was under his seal as such was sufficient to raise a presumption that the certification was "in the manner such acts are usually authenticated by them," as required by the Virginia statute.—Loree v. Abner, (C. C. A.) 57 F. 159.

Acquiescence.

ACTION.

Civil or criminal proceedings — Action for penalty.

A suit by the United States under the contract labor act of February 26, 1885, (23 Stat. 332, c. 164,) although brought to recover a penalty, is a civil suit, and a deposition is admissible in evidence therein against defendant.—Moller v. United States, (C. C. A.) 57 F. 490.

Adequate Remedy at Law.

ADMIRALTY.

Jurisdiction—Abatement.

1. Where a vessel libeled for violation of the revenue laws is released upon a bond of doubtful legality, the United States cannot maintain a second libel for other violations of the revenue laws, committed during the same period as those for which the first libel was filed, without dismissing the first proceeding.—United States v. The Haytian Republic, (D. C.) 57 F. 508.

2. A seizure of a vessel for violations of the revenue laws, and her release on bond, may be pleaded in abatement of a subsequent

ney secured an attachment which was subsequently dissolved because the attorney's affidavit did not state his source of information. *Held*, that the insufficiency of such an affidavit was not clearly enough established by the language of the statute to render the attorney liable for negligence.—Ahlhauser v. Butler, (C. C.) 57 F. 121.

2. The attachment was made in New York city, and there were but two decisions (both in other judicial departments of the state) clearly holding such affidavits insufficient. One decision in another department, one in the same department, which had been affirmed by the court of last resort, and several in other states having similar statutes, held them to be sufficient. *Held*, that its insufficiency was not clearly enough established to render the attorney liable for negligence.—Ahlhauser v. Butler, (C. C.) 57 F. 121.

Compensation.

3. Where the amount of a judgment for the price of property sold by plaintiff to defendant is paid into a court of equity for distribution, plaintiff's attorneys are entitled to receive therefrom the money due them for services rendered to plaintiff in other suits growing out of such purchase, where they were rendered with the expectation that they would be paid for out of the proceeds of such judgment. 51 F. 693, affirmed.—Blair v. Harrison, (C. C. A.) 57 F. 257.

Lien.

4. An assignment by the libelant in an admiralty case, who has reasonable assurance that he is entitled to recover a certain amount, of a definite sum to his counsel for professional services, to be paid out of any recovery that might be had, is sufficiently certain, and on sufficient consideration, to support a lien on the proceeds. Kendall v. U. S., 7 Wall. 113, distinguished.—Greenhalgh v. The Alice Strong, (D. C.) 57 F. 249.

5. The lien of such an assignment has priority over the claim of a judgment creditor in a state court, who subsequently files his intervening petition in admiralty, after the court has decided that libelant is entitled to recover some amount on his libel.—Greenhalgh v. The Alice Strong, (D. C.) 57 F. 249.

Attorney's Fees.

Provision for, see "Negotiable Instruments," 1.

AUCTION AND AUCTIONEER.

Liabilities of auctioneer.

An auctioneer who sells goods obtained by fraud, with notice thereof, is liable to account to the persons from whom the goods were fraudulently obtained.—Morrow Shoe Manuf'g Co. v. New England Shoe Co., (C. C. A.) 57 F. 685.

BAIL.

In criminal cases—Pending extradition proceedings.

In international extradition proceedings, the accused cannot be admitted to bail during a continuance of a hearing to obtain further testimony concerning his probable guilt, as neither act of August 12, 1848, (9 Stat. 302,) relating to extradition, nor the amendatory acts, provide for bail pending a hearing.—In re Carrier, (D. C.) 57 F. 578.

Bankruptcy.

See "Assignment for Benefit of Creditors;" "Insolvency."

BANKS AND BANKING.

See "Pledge."

National bank—Taxation.

1. Rev. St. § 5219, prohibits an adverse discrimination by a local government in the valuation of national bank stock for assessment, as compared with the assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money.—Puget Sound Nat. Bank v. King County, (C. C.) 57 F. 433.

—— Authority of president and cashier.

2. In an action by the receiver of an insolvent national bank against a correspondent of the bank to recover money deposited by the bank with its correspondent, the evidence showed that the directors of the bank left it to the president to negotiate loans, and to make such contracts as to repayment and security as were lawful and usual. *Held*, that the evidence was sufficient to establish the president's authority to pledge the deposit with the correspondent as security for loans made by the latter.—Bell v. Hanover Nat. Bank, (C. C.) 57 F. 821.

—— Right to set off claims owing to and from banks.

3. In an action at law by the receiver of a national bank on a note, the maker may plead as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the liens of the United States and general creditors attached. Yardley v. Clothier, 49 F. 337, followed.—Adams v. Spokane Drug Co., (C. C.) 57 F. 888.

—— Power of comptroller to appoint receiver.

4. The power vested in the comptroller of the currency by Act June 30, 1876, (19 Stat. 63,) authorizing him, whenever he becomes satisfied of the insolvency of a national bank, to appoint a receiver, is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court.—Washington Nat. Bank v. Eckels, (C. C.) 57 F. 870.

5. The right to put a national bank in voluntary liquidation, given to stockholders by Rev. St. § 5220, does not affect the right of the comptroller to appoint a receiver under the act of June 30, 1876.—Washington Nat. Bank v. Eckels, (C. C.) 57 F. 870.

6. Nor does the provision of the act of 1876, that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, limit the power of the comptroller to take action before the bank ceases to do a banking business.—Washington Nat. Bank v. Eckels, (C. C.) 57 F. 870.

National bank—Prosecution for making false entries.

7. Rev. St. § 5209, provides that every president or other officer or agent of a national banking association, who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association, or to deceive any officer of the association, or any agent appointed to examine its affairs, and every person who, with like intent, aids or abets any such officer or agent in the violation of this section, shall be imprisoned, etc. *Held*, that an allegation, in an indictment under this section, that defendant "did make a certain false entry in a certain report of the said association," will not be construed to mean that the entry was made after the report was completed, and was in fact an alteration.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

8. Rev. St. § 5209, provides that every president or other officer or agent of a national banking association, who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association, or to deceive any officer of the association, or any agent appointed to examine its affairs, and every person who, with like intent, aids or abets any such officer or agent in the violation of this section, shall be imprisoned, etc. *Held* that, under this section, it is an indictable offense to make a false entry in a report to the comptroller of the currency, or to aid and abet the making of such entry.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

9. For the purposes of this section, and of an indictment drawn under it, the preparation and completion of the report; the making of the false entry therein; its verification, attestation, and delivery to the comptroller,—may be considered as simultaneous, and there is consequently no repugnance in failing to allege that any or all of these things occurred in consecutive order.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

10. Though the counts in an indictment, under this section, for aiding and abetting the cashier in making such false entries, describe defendant as "being then and there a director" of the bank in question, it cannot be held that they charge him with aiding and abetting in his official capacity.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

11. Counts in such indictment which charge defendant with procuring and counseling the false entry before the fact are valid, for such acts are covered by the clause of the section extending the penalty to any one who "abets" an officer or agent in the acts prohibited.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

12. It is sufficient if the indictment allege the substance of the reports in question, without setting them out in full, for whether they are such reports as the law requires can be determined by the court from the allegations that they were made in response to the comptroller's order, and those touching their attestation, verification, and other like matters.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

13. Where the entry whose tenor is set forth contains the words, "See schedule," it is not a valid objection to the indictment that these words are not explained, for it is only necessary to set out the context, when it is presumptively a part of it.—United States v. French, (C. C.) 57 F. 382; Same v. Work, Id. 391.

14. The omission from the indictment of the dollar marks which appeared at the head of the columns in the report, whose tenor is therein set out, and in which defendant is charged with making false entries, is immaterial.—United States v. French, (C. C.) 57 F. 382.

Benevolent Societies.

Mutual benefit insurance, see "Insurance," 6–8.

Best and Secondary Evidence.

See "Evidence," 3, 4.

Bill.

Of exceptions, see "Exceptions, Bill of."

Bills and Notes.

See "Negotiable Instruments."

Bona Fide Purchasers.

See "Negotiable Instruments," 3; "Sale," 11; "Vendor and Purchaser," 3.
Of bonds, see "Municipal Corporations," 5–9.

Bonds.

Authority of county to issue, see "Counties," 3.
Liabilities on appeal bond, see "Appeal," 19.
Liability of municipalities, see "Municipal Corporations," 3, 6.
Of guardian, see "Guardian and Ward."

Burden of Proof.

See "Customs Duties," 18; "Negotiable Instruments," 4.

Burglary.

Breaking into post office with intent to steal, see "Post Office."

Cancellation.

Of deed, see "Equity," 3, 4.

CARRIERS.

See, also, "Railroad Companies;" "Shipping."
Exemplary damages for ejecting passenger, see "Damages," 2.

6. Congress having appropriated funds for the enforcement of the Geary act, a district judge should take judicial cognizance that there are funds for the enforcement of any or all of the sections of such act, and should order the deportation of a Chinaman who has not procured certificates of residence, as required by section 6, although the attorney general has informed such judge "that there are no funds to execute the Geary law, so far as the same provides for the deportation of Chinamen who have not obtained certificates of residence."—United States v. Chum Shang Yuen, (D. C.) 57 F. 588.

Commissioners' decision—Right of appeal.

7. The right of appeal to a district court, given by Act Sept. 13, 1888, § 13, (25 Stat. 476,) to a Chinese person adjudged by a United States commissioner to be unlawfully in the United States, is not taken away by the "Geary Act" of May 5, 1892, § 3, (27 Stat. 25.)—United States v. Wong Dep Ken, (D. C.) 57 F. 203.

Circuit Court.

See "Courts," 2, 3.

Citizenship.

As affecting jurisdiction, see "Courts," 4–6.

City.

See "Municipal Corporations."

Collateral Security.

See "Pledge."

COLLISION.

Between steamer and sail.

1. The steamer C., on a course S. by E. on the open sea, sighted the schooner M., sailing on a course N. by W. ½ W. On behalf of the steamer, her second officer testified that the schooner was sighted at 4:20 A. M., two miles distant, without lights; that no change of course by the steamer seemed necessary; that when next noticed, 10 minutes later, about two steamer lengths from the C., the schooner suddenly altered her course to N. E., across the steamer's bows, whereupon the C. put her helm hard a-port, turning about 20 degrees, and reversed her engines at full speed. Testimony on behalf of the schooner was very full, to the effect that both her lights were in good order and burning; that the steamer's white light was first seen about half a point on the starboard bow; that both colored lights were seen at a distance of two miles; that the schooner's course was then changed to N. N. W., so as to show only the starboard light; that the steamer from this time was sheering about, showing each colored light alternately; that the schooner's mate, becoming alarmed, summoned the captain on deck, and at the distance of one-quarter of a mile fired a shotgun, whereupon the steamer suddenly changed her course to port, and the vessels collided. The port bow of the steamer struck the port quarter of the schooner at an angle of five points. *Held*, that the preponderance of evidence showed the steamer alone was in fault.—Quebec Steamship Co. v. The Minnie Smith, (C. C. A.) 57 F. 251.

Between sailing vessels.

2. Two schooners, the T. and the G., collided at night in Vineyard sound, and the T. was sunk. On conflicting evidence, the court found that the vessels approached on nearly opposite courses, the T. heading W., the G. about E. ½ N.; that the G. had the wind aft of the beam, and it was her duty to avoid the T., and the duty of the latter to hold her course; that the G. altered her course from half a point to a point to N., to avoid the T., but, as the wind freshened, the latter also gradually changed from W. to W. by N., thus thwarting the effect of the change made by the G. to avoid her; that the G., after her change of course, might have observed that the green light of the T. did not broaden off as it should have done, and so might have known that she was not sailing away from the T. *Held*, that both vessels were in fault,—the T. for not holding her course, as she was bound to do; the G. for failing to watch the effect of her own change of helm, and continuing that change on seeing that she was not avoiding the T.—Higgins v. The Gypsum Prince, (D. C.) 57 F. 859.

Injury to tow from swells caused by steamer.

3. A lighter in tow alongside a tug dumped her deck load in the East river, and brought suit for damages against the steamer Pilgrim, alleging that the swells of the steamer caused the accident. It appeared by the evidence that the Pilgrim was not moving at a dangerous rate of speed at the time, nor did she pass unusually close to the lighter; that the tow met the swells head-on, and that no one on these boats anticipated danger on seeing the swells approach; that the heeling of the lighter onto her beam ends was one continuous movement, she never righting at all after the first swell struck her; and that she was a vessel cut down from a sharp, deep brig. *Held*, that it was not shown that the accident was due to the swells of the Pilgrim, and the libel should be dismissed.—Manhattan Lighterage Co. v. The Pilgrim, (D. C.) 57 F. 670.

Fog.

4. A steamer coming up the bay of New York ran into and sank a pilot boat which was crossing her course nearly at right angles from port to starboard. The evidence indicated that the steamer was seen from the pilot boat at the distance of some 1,000 to 1,300 feet; that the pilot boat was not seen on the ship till she was within 100 yards. The ordinary lookout men were not stationed, the mate alone being on watch, and the rate of the steamer's progress was some seven knots. *Held*, that the steamship was solely in fault for the collision, both for not having an adequate lookout in thick fog, and for speed in fog in that locality.—Beebe v. The Orizaba, (D. C.) 57 F. 247.

COSTS.

See, also, "Admiralty," 10–12.

COUNTIES.

Enforcement of claims against, see "Courts," 10.

Estoppel by recital in bond, see "Municipal Corporations," 7.

was made.—Jones v. Shapera, (C. C. A.) 57 F. 457.

—— Enforcement of claims against county.

10. St. Ark. Feb. 27, 1879, requiring all persons having claims against a county to present them for allowance to the county court, does not deprive nonresident creditors of their right to sue the county in a federal court. Chicot County v. Sherwood, 13 S. Ct. 695, 148 U. S. 529, followed.—Thompson v. Searcy County, (C. C. A.) 57 F. 1030; Searcy County v. Thompson, Id.

—— Comity between circuit courts in patent cases.

11. In a suit for infringement of a patent, where it appears that the courts of other circuits have already sustained the validity of the patent as against all the defenses now made save that of anticipation by reason of certain patents not before in evidence, and have also found that defendants infringed, the court will accept those decisions, and examine only the anticipation alleged.—National Folding Box & Paper Co. v. Phoenix Paper Co., (C. C.) 57 F. 223.

—— Following practice and decisions of state courts.

12. The control of the relation of master and servant is reserved to the states, and federal courts, when administering state law upon this subject, should follow the decisions of the state courts. Kerlin v. Railroad Co., 50 F. 185, followed.—Becker v. Baltimore & O. R. Co., (C. C.) 57 F. 188.

13. The question of the liability of a telegraph company for a failure to promptly deliver a message is one of general law, as to which, in the absence of statutory provisions, the decisions of the state courts are not controlling upon the federal courts. Railroad Co. v. Baugh, 13 S. Ct. 914, applied.—Western Union Tel. Co. v. Wood, (C. C. A.) 57 F. 471.

14. The fact that Rev. St. § 857, provides that the fees of court officers shall be recovered in like manner as the fees of officers in the state courts, will not make applicable to the federal courts sitting in New Orleans a special state statute applying only to the parish of Orleans, and which establishes a practice different from the general law of the state.—Aiken v. Smith, (C. C. A.) 57 F. 423.

15. In actions at law in the federal courts the rules and law of evidence generally of the state within which such courts are held prevail.—Hinds v. Keith, (C. C. A.) 57 F. 10.

16. In the absence of special provisions in the insolvency laws of a state, a federal court is not bound to follow the state courts as to the right of a creditor holding collateral security to a dividend on the full amount of his debt.—Tod v. Kentucky Union Land Co., (C. C.) 57 F. 47.

17. With respect to the interpretation of state statutes regulating the making of contracts by counties, the decisions of the state courts are binding upon the courts of the United States.—Thompson v. Searcy County, (C. C. A.) 57 F. 1030; Searcy County v. Thompson, Id.

Federal courts—Venue.

18. A resident of Kentucky, who is temporarily in Chicago in charge of an exhibit at the World's Columbian Exposition, is an "inhabitant" of Kentucky, and not of Illinois, within the meaning of Act March 3, 1887, c. 373, § 1, (24 Stat. 552,) as corrected by Act Aug. 13, 1888, c. 866, (25 Stat. 434,) which provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant. Shaw v. Mining Co., 12 S. Ct. 935, 145 U. S. 444, followed. U. S. v. Southern Pac. R. Co., 49 F. 297, distinguished.—Bicycle Stepladder Co. v. Gordon, (C. C.) 57 F. 529.

In Indian territory — Imprisonment in state penitentiary.

19. The United States court in the Indian Territory has no power to order that a sentence of imprisonment for one year shall be executed in a state penitentiary, as imprisonment in such an institution is limited by Rev. St. U. S. § 5541, to sentences for a period longer than one year. In re Mills, 10 S. Ct. 762, 135 U. S. 263, followed.—In re Bonner, (C. C.) 57 F. 184.

Conflicting state and federal jurisdiction.

20. Where a suit is pending in a federal court for the appointment of a receiver and the foreclosure of a railroad mortgage, the court will take jurisdiction, without regard to the citizenship of the parties, of another bill filed by lien claimants, since their right to enforce their liens in the state court will be cut off when the federal court takes possession of the property; and their suit may be regarded as in substance an ancillary bill.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

21. Where a state and a federal court have concurrent jurisdiction of a controversy, the court which first takes control of the subject-matter and of the parties cannot be ousted of its jurisdiction by subsequent proceedings instituted in the other court. Riggs v. Johnson Co., 6 Wall. 166, followed.—Central Trust Co. v. South Atlantic & O. R. Co., (C. C.) 57 F. 3; Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co., Id.

22. When a state court has lawfully appointed a receiver of a corporation, and such receivership still exists, a federal court should not take jurisdiction of a suit by other complainants for the appointment of a receiver.—Central Trust Co. v. South Atlantic & O. R. Co., (C. C.) 57 F. 3; Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co., Id.

23. A Virginia circuit judge appointed a receiver of a certain corporation, who took peaceable possession of the property, and conducted the business until the evening of the same day, when he was dispossessed by an armed mob led by deposed officials and employes of the corporation. Thereafter, at the suit of the same complainants, a court of appeals judge appointed a receiver, but this decree was appealed from, partly on the ground that one receiver had already been appointed, and was reversed. *Held*, that the receivership under the state circuit judge's appointment was unaf-

Cross Bill.

See "Equity," 8.

Custodia Legis.

Property in, see "Courts," 24.

Custom and Usage.

Effect of custom, see "Demurrage."

CUSTOMS DUTIES.

Jurisdiction of circuit court of appeals, see "Appeal," 15.

Classification.

1. Screens imported during the year 1888, which were composed of paper, as their component material of chief value, and of wood and metal, which were used on the floors of dwelling houses, or other places, to intercept heat, light, or moving air, or to conceal portions of rooms or objects, and which were then known in trade and commerce of this country as "paper screens," were not dutiable at the rate of 40 per cent. ad valorem, as screens, under the provision for "all other mats not exclusively of vegetable material, screens, hassocks, and rugs," contained in (paragraph 378, Tariff Ind., New) Schedule K (entitled "Wools and Woolens") of the tariff act of March 3, 1883, (22 Stat. 510,) but were dutiable at the rate of 15 per cent. ad valorem, under the provision for "Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act," contained in (paragraph 388, Tariff Ind., New) Schedule M (entitled "Books, Papers, etc.,") of the same tariff act, (22 Stat. 510.)—Magone v. American Trading Co., (C. C. A.) 57 F. 394.

—— Manufactures of cotton.

2. Cloths composed of cotton, bleached, ornamented with dots, spots, sprigs, or other figures of cotton that were made in the cloth, in a loom, simultaneously with the manufacture of the cloth, by means of bobbins, which operated such times, while the shuttle was weaving the cloth, as the pattern required the production of such figures, and commonly known as "Dotted Swisses" and "Figured Swisses," or "Swiss Spots" and "Swiss Sprigs," are not dutiable at the rate of 60 per cent. ad valorem, as embroideries or as articles embroidered, under the provision for embroideries or articles embroidered contained in paragraph 373 (Schedule J) of the tariff act of October 1, 1890, (26 Stat. 594,) nor, though containing exceeding 100 threads, and not exceeding 150 threads, to the square inch, counting the warp and filling, and valued at over 10 cents per square yard, are they dutiable at the rate of 40 per cent. ad valorem, as cotton cloths, bleached, containing such number of threads so counting, and valued at so much per square yard, under the provision for such cotton cloths contained in paragraph 346 (Schedule I) of the same tariff act, (26 Stat. 591,) but are dutiable at the rate of 40 per cent. ad valorem as manufactures of cotton not specially provided for, under the provision for such manufactures contained in paragraph 355 (Schedule I) of the same tariff act, (26 Stat. 593.)—In re Haager, (C. C.) 57 F. 192.

—— Alcohol.

3. So-called "absolute alcohol," manufactured in Germany, showing 198 degrees of proof, being equivalent to 99.5 per cent. of anhydrous alcohol, imported on the orders and for the laboratory use of certain colleges, and sold by the importers at an advance on the cost price of about 20 per cent., *held* duty free as a scientific preparation imported in good faith for the use of institutions incorporated for educational and scientific purposes, not intended for sale, under paragraph 677 of the free list of the tariff act of October 1, 1890, and not dutiable as alcohol at $2.50 per proof gallon, under paragraphs 329 and 333 of Schedule H of the tariff act of October 1, 1890.—In re Kny, (C. C.) 57 F. 190.

—— Handkerchiefs.

4. Hemmed or hemstitched handkerchiefs, which are not also embroidered, are dutiable under paragraph 349 of the tariff act of 1890, as "handkerchiefs—composed of cotton or other vegetable fiber," and not under paragraph 373, as "hemstitched and embroidered handkerchiefs." Rice v. U. S., 53 F. 910, followed.—Wilson v. United States, (C. C. A.) 57 F. 199.

—— Wafers.

5. Sugar wafers which are made by biscuit makers of flour, sugar, milk, and eggs, flavored with vanilla, and are used exclusively as articles of table food, are not dutiable at the rate of 20 per centum ad valorem as nonenumerated manufactured articles, under the provision for such articles contained in section 4 of the tariff act of October 1, 1890, (26 Stat. 613,) but are free of duty, as "wafers unmedicated," under the provision for such wafers contained in paragraph 750 (free list) of the same tariff act, (26 Stat. 610.)—In re Duncan, (C. C.) 57 F. 197.

Action to recover duties paid.

6. Under the customs administrative act of June 10, 1890, § 13, which provides for an appeal to the board of general appraisers if the importer is aggrieved by valuation of the import, and section 25, which declares that no action shall be against the collector in any case in which the importer is entitled to appeal under the provisions of the act, the remedy by appeal from an appraisement is exclusive, and an action cannot be maintained against the collector to recover alleged excess of duties paid on a valuation advanced by an appraiser over the invoice value of imported merchandise.—Loeb v. Hendricks, (C. C.) 57 F. 568.

—— Province of court and jury.

7. In the construction of tariff laws the ordinary meaning of a phrase in common speech is a question of law for the court; the commercial meaning is a question of fact for the jury.—Vom Cleff v. Magone, (C. C.) 57 F. 198.

Review by circuit court.

8. The customs administrative act of June 10, 1890, (26 Stat. 131,) confers no jurisdiction upon circuit courts of the United States, on the application of a dissatisfied collector of customs, to review and reverse a decision of a board of general appraisers, involving neither the classification of imported merchandise, nor the rate of duty leviable thereon, but only the value of the paper florin of Austria-Hungary, the currency in which such merchandise was invoiced. Passavant v. U. S., 13 S. Ct. 572, 148 U. S. 214, applied.—**In re** Klingenberg, (C. C.) 57 F. 195.

Violation of laws.

9. Acts of congress declaring forfeitures of vessels and cargoes for violation of the revenue laws are not to be construed with the strictness applicable to penal laws, but rather are to be so construed as to accomplish the purpose for which they were intended; for, in the technical sense, they are not penal, but rather remedial,—intended to effect a public good and to prevent frauds. Ten Cases of Opium, Deady, 70, followed. The Cargo ex Lady Essex, 39 F. 765, distinguished.—United States v. The Coquitlam, (D. C.) 57 F. 706.

10. An illegal unlading within the limits of the United States, and before arrival at any port within such limits, is a violation of Rev. St. § 2867, but an illegal unlading after arrival at such port should be prosecuted under section 2872. The Active, Deady, 165, followed.—United States v. The Coquitlam, (D. C.) 57 F. 706.

11. When a vessel comes within four leagues of the shore of the United States, and makes a transfer of merchandise with another vessel there, without authority from the revenue officers, it should be held to have "arrived" there, and be treated as a vessel "bound" to the United States, within the meaning of Rev. St. §§ 2867, 2868, providing for the forfeiture of the cargo and vessel in such case.—United States v. The Coquitlam, (D. C.) 57 F. 706.

12. A steamer with supplies for a sealing fleet sailed from Victoria, B. C., and, by preconcerted arrangement, met vessels of the fleet at Tonki bay and Port Etches, in the waters of the United States, within four leagues of the shore, and there transferred to them part of her cargo, and received sealskins from them, in violation of the revenue laws. She was then seized and found to be without any manifest of her cargo, as required by Rev. St. §§ 2806, 2807, 2809. *Held*, that under these sections the part of her original cargo still on board, and the sealskins received, were subject to forfeiture.—United States v. The Coquitlam, (D. C.) 57 F. 706.

13. Where a cargo is seized for want of a manifest thereof, the master cannot prevent a forfeiture by thereafter making out a manifest, and tendering it to the officers making the seizure.—United States v. The Coquitlam, (D. C.) 57 F. 706.

14. Where a vessel bound from a foreign port to a port of the United States receives cargo on the high seas, and brings it into the United States, such cargo must be regarded as brought from a foreign port, and is forfeitable under Rev. St. §§ 2806, 2807, 2809, if there is no manifest thereof.—United States v. The Coquitlam, (D. C.) 57 F. 706.

15. A Canadian steamer laden with supplies for sealing vessels in the North Pacific ocean and Behring sea arrived in the waters of the United States about 30 miles from St. Paul on Kadiak island, which is a port of entry. She did not report to the United States revenue officer there, but went on through United States waters to Tonki bay, where she exchanged merchandise with sealing vessels, and then proceeded to Port Etches, where she anchored in the inner harbor. *Held*, that the steamer was liable to forfeiture under Rev. St. § 3109, which requires the master of any foreign vessel arriving in United States waters from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, to report to the collector at the nearest port to the place of entry to such waters, and obtain a permit before proceeding further inland for the purpose of lading or unlading cargo.—United States v. The Coquitlam, (D. C.) 57 F. 706.

—— Evidence.

16. When the clearance of a vessel, as shown by her papers, is questioned as being intentionally misleading or fraudulent, the port or harbor for which she is actually bound may be proved by the course she sails, the landings she makes, and other facts connected with the voyage.—United States v. The Coquitlam, (D. C.) 57 F. 706.

17. If, for the purpose of exchanging cargo, vessels rendezvous at a place within four leagues of the shore, and one of them then tows the others beyond the four-league line, where the exchange is made, then the continued, concerted, necessary action for the effectuation of that purpose, including the towing out, should probably be considered as a part of the actual exchange, being a part of the res gestae of the offense which the statute was intended to prevent.—United States v. The Coquitlam, (D. C.) 57 F. 706.

—— Burden of proof.

18. Where probable cause is shown for the seizure of a vessel and cargo for violation of the revenue laws, the burden of proof to establish the innocence of the property is placed on the claimant by Rev. St. § 909.—United States v. The Coquitlam, (D. C.) 57 F. 706.

DAMAGES.

For breach of warranty, see "Sale," 6–8.
For deceit, see "Deceit," 2, 3.
For infringement, see "Patents for Inventions," 67, 68.
For negligence in sending telegrams, see "Telegraph Companies," 2.
Proof, see "Death by Wrongful Act," 3.

Exemplary damages.

1. The damages in an action for libel being not only compensatory, but, where malice or gross negligence is found, also exemplary, the court will not set aside a verdict of $2,500 in favor of the plaintiff, a girl of 16, for

a libel published in a newspaper charging her with having eloped with a married man.—Cooper v. Sun Printing & Publishing Ass'n, (C. C.) 57 F. 566.

2. A railroad company is not liable for exemplary damages on account of the malice, wantonness, or oppression of its conductor in ejecting a passenger from a train. Railroad Co. v. Prentice, 13 S. Ct. 261, 147 U. S. 101, followed.—Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, (C. C. A.) 57 F. 822.

Measure of damages for breach of contract.

3. The measure of damages for breach of a contract assigning a right to purchase state lands, which have been acquired under Act Tex. July 14, 1879, is the difference between the price agreed upon by the parties and the market price of the right at the time of the breach.—Russ v. Telfener, (C. C.) 57 F. 973.

Excessive damages.

4. In an action to recover damages for erecting and maintaining an embankment across a living stream, thereby throwing back the waters on plaintiff's land, where the embankment has been maintained for 18 years, and the recovery is limited by the statute to the last 6 years, the jury should award nothing for the damage caused during the first 12 years, and a verdict is excessive which apparently includes the entire damage.—Smith v. Philadelphia & R. R. Co., (C. C.) 57 F. 903.

Instructions.

5. In an action against a railroad company for the ejection of plaintiff from its train by the conductor thereof, an error in instructing the jury that a railroad company is liable for exemplary damages on account of the malice, wantonness, or oppression of its conductor in ejecting a passenger from a train is not cured by the statement that, in the opinion of the judge, the conductor was not malicious, wanton, or oppressive in his conduct, since the judge's opinion on the facts is not binding on the jury.—Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, (C. C. A.) 57 F. 822.

DEATH BY WRONGFUL ACT.

Who may sue.

1. A widower is not a beneficiary under Gen. St. Kan. 1889, par. 4518, giving a right of action for death by wrongful act, and providing that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, and there can be no recovery for losses he may have sustained by the wrongful death of his wife.—Western Union Tel. Co. v. McGill, (C. C. A.) 57 F. 699.

2. The surviving husband of deceased is not included in "the next of kin," as used in Gen. St. Kan. 1889, par. 4519, providing that an action for death by wrongful act, when there is no personal representative or widow, may be brought by the next of kin.—Western Union Tel. Co. v. McGill, (C. C. A.) 57 F. 699.

Proof of damages.

3. In an action by the mother of the deceased as administratrix, the proof showed that she had no other children, and was dependent on him; that at the time of his death he was 21 years old, in perfect health, earning $75 a month, of which he gave her $30; and that prior to this employment he had given her $25 a month. *Held* sufficient proof of pecuniary damage.—Southern Pac. Co. v. Lafferty, (C. C. A.) 57 F. 536.

DECEIT.

When action lies.

1. Concealment by the owner of a business enterprise of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale is actionable, when the purchaser has no opportunity of discovering the decline, and has agreed to buy on the faith of representations as to the prior rate of profit, having told the seller that he would not buy if there had been a decline.—Loewer v. Harris, (C. C. A.) 57 F. 368.

Damages.

2. The profits which the purchaser of a business enterprise would have made out of the transfer thereof to a corporation to be organized for the purpose of taking it are too uncertain to be recoverable by the purchaser in an action for fraudulent representations, inducing the purchase, although a syndicate had promised to underwrite the capital of the corporation, thereby, in effect, promising to subscribe all the capital not contributed by others, but had not entered into any definite or obligatory contract with the purchaser.—Loewer v. Harris, (C. C. A.) 57 F. 368.

3. In an action for false representations made to the purchaser of a business enterprise, the charges of accountants employed by him to examine the books, and the fees of solicitors employed to organize a corporation to take over the business, must be specially alleged.—Loewer v. Harris, (C. C. A.) 57 F. 368.

DEED.

Delivery.

The possession of a duly-executed deed by the grantee, and the finding among the papers of the deceased grantor of a promissory note made by the grantee for the purchase price, together with an unexecuted mortgage to the grantor for the purchase price, create a presumption that the deed was duly delivered to the grantee; and the words, "Don't record your deed till you see me. I will bring up the mortgage with me,"—in a letter from the grantor to the grantee, contain an implied admission that the grantee had a right to record the deed.—Mills v. Mills, (C. C.) 57 F. 873.

Delivery.

Of deed, see "Deed."
Transfer of note, see "Negotiable Instruments," 2.

DEMURRAGE.

Effect of custom.

In a charter party the words "to discharge with customary dispatch, * * * cargo to be * * * discharged according to the custom of the port," do not include a custom whereby all cargoes of fruit are sold at auction by one firm, not more than one cargo being sold in one day, and no cargo being discharged until it has been thus sold, since such custom manifestly has its origin in the sale, and not in the discharging, of cargoes; and for demurrage caused by such a custom the cargo is liable.—Milburn v. Thirty-five Thousand Boxes of Oranges and Lemons, (C. C. A.) 57 F. 236.

Demurrer.

DEPOSITION.

When commission granted—Examination of experts.

1. In a suit for infringing a patent, a commission to examine witnesses abroad should be granted in the case of a contest involving the chemistry of coloring compounds, when it is asserted by the moving party, and denied by the opposing party, that the art is so little practiced here that the best expert testimony can only be obtained by such a commission.—Holliday & Sons v. Schultzeberge, (C. C.) 57 F. 660.

Method of taking.

2. A deposition taken down stenographically, in questions and answers, and not reduced to writing in the presence of the witness, nor read over to or by him, is not properly taken, under Rev. St. §§ 863, 864, and is not admissible in evidence against the objections of either party.—Moller v. United States, (C. C. A.) 57 F. 490.

Dissolution.

Due Process of Law.

Duties.

ELECTIONS AND VOTERS.

Indictment for obstructing officers—Alleging scienter.

An indictment for obstructing United States officers in the discharge of their duties, by ejecting them from the polls where an election for a member of congress is being held, is fatally defective, when it does not charge a scienter.—United States v. Taylor, (C. C.) 57 F. 391.

EMINENT DOMAIN.

The power.

1. In Ohio a second appropriation of lands formerly appropriated to a public use cannot be made when the second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use from the full enjoyment thereof.—Lake Erie & W. R. Co. v. Board Com'rs Seneca County, (C. C.) 57 F. 945.

2. County commissioners in Ohio have no power, under the statutes authorizing them, under certain conditions, to appropriate lands for public drains, to construct a large ditch for a long distance upon a railroad right of way so as to prevent the railroad company from constructing a side or double track, or from using the ground for other purposes essential to the full enjoyment of its corporate powers.—Lake Erie & W. R. Co. v. Board Com'rs Seneca County, (C. C.) 57 F. 945.

EQUITY.

Jurisdiction—Adequate remedy at law.

1. A court of equity has jurisdiction of a bill to enforce a written contract whereby defendants have covenanted not to manufacture and sell any machines infringing certain patents claimed by complainants, and under which they are making and selling machines, since the continuance of such violation would tend to diminish complainants' profits in the business, for which mere damages, recoverable at law, would not be an adequate remedy.—American Box Mach. Co. v. Crosman, (C. C.) 57 F. 1021.

—— Avoiding multiplicity of suits.

2. A railroad company, whose guaranty appears indorsed upon several hundred bonds issued by another company, having been placed there illegally and fraudulently, may maintain a bill in equity against the holders thereof to cancel the guaranty, on the ground of preventing a multiplicity of suits, although it might have a good defense at law to each of the bonds.—Louisville, N. A. & C. Ry. Co. v. Ohio Val. Improvement & Contract Co., (C. C.) 57 F. 42.

Cancellation of deed.

3. A deed made by an attorney in fact of an Indian woman, who, though illiterate and unable to converse in English, is yet possessed of a good understanding, will not be set aside on the ground that she was imposed upon, when the sale was to the promoters of a town-site company for a price largely in excess of the

8. An insurance company which has paid a loss caused by the stranding of a lighter by the negligence of the tug in charge, and which libeled the tug for the loss, after taking an assignment of the claim of the insured, is not estopped to allege negligence on the part of the tug because of a statement in a receipt given by the assured that, at the time of loss, the lighter was in charge of the tug, nor because of a protest by the master of the tug, among the proofs of loss, stating that the stranding was due solely to the extraordinary and irresistible force of the flood tide, and ought not to be attributed to any default in navigation.—In re Harris, (C. C. A.) 57 F. 243.

4. In foreclosure proceedings a receiver was appointed. The president of a bank in which the receiver kept his deposits, having been authorized by him to sell certain receiver's certificates, made the sale after his authority had been revoked, and caused the amount realized to be credited to the receiver on the books of the bank, and on the receiver's pass book. The receiver did not repudiate the sale, but, on the contrary, drew checks against the deposits, and reported the transactions to the court, which, in the foreclosure decree, recognized the validity of the certificates, and directed that the sale should be made subject thereto. *Held*, that the receiver was estopped to question the validity of the certificates, as against an innocent purchaser.—Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co., (C. C. A.) 57 F. 25.

5. The consent of the heir and sole devisee of an estate that the administrator should purchase the property, and his acceptance and retention of a promissory note made by the administrator in payment of the purchase price, is a complete ratification of the transaction, and its validity cannot be questioned, if the purchase price was adequate, and the sale not procured by unfair means.—Mills v. Mills, (C. C.) 57 F. 873.

6. Where a sale of land is negotiated by one who, without specific authority, assumes to act for the owner, and obtains from him a deed to the purchaser, and receives the purchase money, and immediately after completing the transaction informs the grantor of the sale and the terms, and the grantor fails to disavow the sale or make any protest until after receiving and expending the purchase money and great enhancement in the value of the land by reason of improvements by the purchaser and his vendees, such grantor will not be permitted to claim that the deed was fraudulently obtained by false representations by such agent in pursuance of a conspiracy between him and the purchaser.—Hatch v. Ferguson, (C. C.) 57 F. 972.

EVIDENCE.

Judicial notice.

1. The federal courts may properly take judicial notice of the statutes of the various states which were in force prior to the adoption of the constitution of the United States.—Loree v. Abner, (C. C. A.) 57 F. 159.

2. The court will take judicial notice that the lands surrounding Seattle harbor have for years been selected and known as the site of a city, and are hence exempt from settlement under the homestead and exemption laws.—Ex parte Davidson, (C. C.) 57 F. 883.

Best and secondary.

3. Where the issue is as to the real ownership of railway stock, any error committed in permitting plaintiff to give orally the names of all the original subscribers, and to show that subscriptions made in the name of certain persons were in fact made for and paid by others, is cured when defendants themselves produce the subscription book.—McCracken v. Robison, (C. C. A.) 57 F. 375.

4. In an action on a defaulting postmaster's bond, a question put to the defaulter's successor in office whether he had received orders to make demands on the defaulter is not objectionable on the ground that the written orders are the best evidence of their contents, since the question does not concern the contents.—Alexander v. United States, (C. C. A.) 57 F. 828.

Hearsay.

5. On trial of an action against a marshal and his sureties for damages for illegal seizure of goods claimed by plaintiff, evidence of a witness engaged in business at another locality than the attachment debtor, but within the same county, that witness "knew of" the debtor "engaging in the mercantile business at" such other place, "that he heard from numerous parties that" the debtor "was selling out at less than cost, and that it was generally believed in the community that" the debtor "was in embarrassed circumstances," was inadmissible as hearsay.—Hinds v. Keith, (C. C. A.) 57 F. 10.

6. On trial of an action against a marshal and his sureties for damages for illegal seizure of goods claimed by plaintiff, a question, "Was it not generally understood there in the community that he [the debtor] was selling goods at cost, and less than cost?" is objectionable, because seeking to prove by notoriety a fact in which the public had no interest.—Hinds v. Keith, (C. C. A.) 57 F. 10.

7. In an action for breach of warranty in the sale of a chain, evidence of statements by agents of the purchaser's vendee, made to the purchaser, that a new chain must be furnished, is hearsay, and inadmissible.—Sutherland v. Round, (C. C. A.) 57 F. 467.

Opinion evidence.

8. On trial of an action against a marshal and his sureties for damages for illegal seizure of goods claimed by plaintiff, the question, "From your experience as a merchant, would you or not say an ordinarily prudent business man would form a partnership with another to go into his business without inquiring as to his mercantile business, and examining his books?" was objectionable, as calling for an opinion in-

volving a conclusion which, if material, was an inference to be drawn by the jury from circumstances which might be proven.—Hinds v. Keith, (C. C. A.) 57 F. 10.

Documents.

9. An action by the United States upon a defaulting postmaster's bond, brought in a district court of the territory of Idaho, is not within the meaning of Rev. Laws Idaho, § 4209, (St. 1887,) requiring plaintiffs to furnish the items of accounts sued upon; and the United States may refuse such items, and thereafter introduce in evidence copies of the account current and the money-order account of the defaulter.—Alexander v. United States, (C. C. A.) 57 F. 828.

Parol evidence.

10. In an action between undisclosed principals on a written contract made by their agents, parol evidence that the undisclosed principals were the real parties in interest does not vary or contradict the writing, and is admissible.—Darrow v. H. R. Horne Produce Co., (C. C.) 57 F. 463.

Weight and conclusiveness.

11. The court will not set aside a verdict based upon conflicting evidence of experts as to the capacity of a machine, especially when the evidence of the defeated party's experts was weakened by manifest exaggerations and inconsistencies.—Hercules Iron Works v. Dodsworth, (C. C.) 57 F. 556.

EXCEPTIONS, BILL OF.

Amendment and correction.

1. The omission of counsel to note exceptions to an original bill of exceptions is not such an extraordinary circumstance as will warrant the court below in amending the bill long after it has been allowed and signed, and long after the term of the trial has passed, and the parties have been dismissed from court.—Sutherland v. Round, (C. C. A.) 57 F. 467.

2. The omission of counsel preparing the bill was a waiver of the exceptions, and the court below was powerless to amend.—Sutherland v. Round, (C. C. A.) 57 F. 467.

EXECUTORS AND ADMINISTRATORS.

Appointment.

A widow, shortly after her husband's death, removed from Illinois to California, taking with her a policy of insurance on her husband's life, and there took out letters of administration, and sued on the policy. In the mean time an administrator had been appointed in Illinois, and had there sued on the policy. *Held*, that the pendency of the Illinois suit was no bar to the California suit, for the policy was assets of the estate in the latter state, and the issuance of the letters of administration was legal. Insurance Co. v. Woodworth, 4 S. Ct. 364, 111 U. S. 138, followed.—Smith v. New York Life Ins. Co., (C. C.) 57 F. 133.

Exemplary Damages.

See "Damages," 1, 2.

Express Trusts.

See "Trusts," 1.

Extradition.

Bail pending extradition, see "Bail."

Factors and Brokers.

Exacting license from broker, interference with interstate commerce, see "Constitutional Law," 3.

Federal Courts.

See "Courts," 1–18.

Fellow Servant.

See "Master and Servant," 6–14.

FISHERIES.

Compact between Maryland and Virginia.

1. Section 7 of the compact between Maryland and Virginia, entered into March 28, 1785, provided that the citizens of each state, respectively, should have full property in the shores of the Potomac river adjoining their lands, and that the right of fishing in the river should be common to the citizens of both states; provided that it be not exercised by the citizens of one state to the disturbance of the fisheries on the shores of the other. Section 8 provided that all laws which might be necessary for the preservation of fish, or for the performance of quarantine in the river Potomac, or for preserving the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, should be made with the mutual consent and approbation of both states. *Held*, that said sections did not grant a common right of fishery, including the catching and taking of oysters, in Pocomoke river, to the citizens of Maryland, or a right to joint legislation for the protection of fish in such river to that state. Hendricks v. Com., 75 Va. 934, criticised.—Ex parte Marsh, (C. C.) 57 F. 719.

2. Even if a common right of fisheries in Pocomoke river had been granted by the compact, such right would not have extended to Pocomoke sound, as a part of such river, since the river and sound have always been considered distinct bodies of water.—Ex parte Marsh, (C. C.) 57 F. 719.

Foreclosure.

Of mortgage, effect, see "Mortgages," 5.

Foreign Judgment.

See "Judgment," 9.

Former Jeopardy.

See "Criminal Law," 2–4.

France.

Treaties with, see "Trade-Marks and Trade-Names," 4.

FRAUD.

See, also, "Deceit;" "Fraudulent Conveyances."

Liability of auctioneer, sale of goods obtained by fraud, see "Auction and Auctioneer."

Pleading and proof.

In an action to recover on a contract for the construction of a railroad, evidence as to alleged false representations, which are not averred in the pleadings, should be excluded.—McCracken v. Robison, (C. C. A.) 57 F. 375.

Frauds, Statute of.

Oral trust, see "Trusts," 2.

FRAUDULENT CONVEYANCES.

Burden of proof, see "Sheriffs and Constables."

What constitutes.

1. A husband, being indebted to his wife, who was about to institute proceedings against him for divorce, gave to a third person a bill of sale of all his property, worth nearly $12,000, of which $10,000 was practically in money, in payment of a debt of $3,400. *Held*, that the conveyance was void, as being made with intent to defraud his wife of her claim.—Smith v. New York Life Ins. Co., (C. C.) 57 F. 133.

2. The fact that the bill of sale was ambiguous, so as to make it doubtful whether $5,000 in money belonging to the seller was intended to be conveyed, would not prevent the instrument from being invalid when it clearly appeared from parol evidence that it was the intention of the parties to include the $5,000.—Smith v. New York Life Ins. Co., (C. C.) 57 F. 133.

3. The fact that the debtor sold goods cheaper generally than other merchants in the same place did, and sold some particular articles at cost, or below cost, was not of itself such a suspicious circumstance as, if known to the plaintiff, ought to have put him on inquiry, or which, if followed up, would necessarily or naturally have led to knowledge of the debtor's fraudulent intent.—Hinds v. Keith, (C. C. A.) 57 F. 10.

Action by administrator of debtor—Disregard of conveyances.

4. A suit on a life insurance policy by the administratrix, the widow of the insured, cannot be defeated on the ground that the deceased, before his death, had assigned the policy to a third person, it appearing that such assignment was made to defraud his creditors, of whom the plaintiff was one; for Civil Code Cal. § 3439, makes all transfers of property with intent to defraud any creditor void as to all creditors; and Code Civil Proc. § 1589, makes it the duty of an administrator, when there is a deficiency of assets, to sue for all property conveyed by the decedent for the purpose of defrauding his creditors.—Smith v. New York Life Ins. Co., (C. C.) 57 F. 133.

Evidence.

5. On trial of an action against a marshal and his sureties for damages for illegal seizure of goods claimed by plaintiff by purchase from the attachment debtor, it is error to permit plaintiff to testify that he acted in good faith and honesty in making the purchase from the debtor, and had no purpose to aid him in defrauding his creditors.—Hinds v. Keith, (C. C. A.) 57 F. 10.

6. Defendant lent $20,000 on a stock of goods stored in a warehouse. Before making the loan he examined the goods, which were in the original cases, from which the names and marks had just been scraped off. The loan was made to a corporation, concerning which he made no inquiries at the time, though he was informed that it was being pressed by its creditors. The goods had been fraudulently obtained by the corporation. *Held*, that evidence of these facts threw on defendant the burden of proving that the loan was made in good faith. Bunn, District Judge, dissenting.—Morrow Shoe Manuf'g Co. v. New England Shoe Co., (C. C. A.) 57 F. 685.

GUARANTY.

Scope.

A land company guarantied indefinitely a semiannual dividend of 2½ per cent. on the preferred stock of a railway company. Thereafter both companies became insolvent. *Held*, that the holders of such stock, in the absence of evidence showing the value of such security to be greater or less than par, were entitled to prove claims against the guarantor to the amount of the par of their stock.—Tod v. Kentucky Union Land Co., (C. C.) 57 F. 47.

GUARDIAN AND WARD.

Necessity of giving bond.

The Washington statute requiring bonds from all guardians (Code 1881, §§ 1604, 1612, 1617, 1618) is mandatory, and, until such bond is given, no person is competent to act as guardian or to receive service of summons for the minors, even though appointed by a will which expressly dispenses with a bond.—Hatch v. Ferguson, (C. C.) 57 F. 966.

HABEAS CORPUS.

Remedy by writ of error.

1. On habeas corpus, the petitioner sought his release on the sole ground that the United States court in the Indian Territory had erred in directing a sentence of imprisonment for one year to be executed in a state penitentiary, but made no complaint as to the jurisdiction of that court over the offense or over the person, nor as to the legality of the proceedings which resulted in the verdict. *Held*, that as the erroneous direction could have been corrected in

gard to alleged anticipations not referred to in the suit, since under the issues all anticipatory inventions might have been shown in defense. 50 F. 193, affirmed.—David Bradley Manuf'g Co. v. Eagle Manuf'g Co., (C. C. A.) 57 F. 980; Moline Plow Co. v. Same, Id. 992.

8. Where, pending a final decree in a suit for infringement of a patent, a second suit was begun, taking testimony in the second suit as to the validity of the patent is not a waiver of the bar of the final decree in the former suit where such testimony was taken before said final decree was rendered, since until rendition of the final decree the proceedings in the first suit were no bar.—David Bradley Manuf'g Co. v. Eagle Manuf'g Co., (C. C. A.) 57 F. 980; Moline Plow Co. v. Same, Id. 992.

Foreign judgment.

9. In the foreclosure of a mortgage on a railroad situated partly in two states, a court of one state cannot merge into its judgment the lien on the property in the other state, and, while it may act upon the person of defendant, so as to compel it to make conveyances or releases, yet, if it has not done so, its mere judgment is not a bar to a suit in the other state, between the same parties, to foreclose the same mortgage. Farmers' Loan & Trust Co. v. Postal Tel. Co., 11 A. 184, 55 Conn. 334, approved. Muller v. Dows, 94 U. S. 444, distinguished.—Lynde v. Columbus, C. & I. C. Ry. Co., (C. C.) 57 F. 993.

Equitable relief.

10. It would be no ground for enjoining collection of a judgment that the court refused to allow the defendant to show that the instrument sued on was obtained by fraud, since such ruling would be mere error, to be remedied by application for new trial or by appeal.—Edmanson v. Best, (C. C. A.) 57 F. 531.

11. A bill to restrain the collection of a judgment at law will not be treated as a petition for a new trial where the bill is not framed on that theory, and shows no ground for a new trial which complainant could not have presented as a defense to the action.—Edmanson v. Best, (C. C. A.) 57 F. 531.

Judicial Notice.

See "Evidence," 1, 2.

Jurisdiction.

See "Courts;" "Equity," 1, 2.
In admiralty, see "Admiralty," 1, 2.
On appeal, see "Appeal," 1, 2.
Waiver of objections, see "Abatement and Revival."

Jurisdictional Amount.

See "Removal of Causes," 6.

Jury.

Misconduct of jurors, see "New Trial."
Province, see "Customs Duties," 7; "Trial," 1.

Laches.

See "Equity," 5.

Landlord and Tenant.

Liability of lessor for negligence, see "Railroad Companies," 4–10.

LIBEL AND SLANDER.

Exemplary damages, see "Damages," 1.

Slander of title.

1. Where, in an action for slander of title under the Louisiana law, defendant sets up title in himself under a tax deed, plaintiff is entitled to prove, without specially pleading the same, that the taxes for which the sale was made were in fact paid prior to the tax sale.—Land Trust of Indianapolis v. Hoffman, (C. C. A.) 57 F. 333.

2. Where, in an action for slander of title under the Louisiana law, defendant admits the slander, and sets up title in himself, the suit thereby becomes a petitory action, in which the burden of proof is thrown on defendant to establish his title.—Land Trust of Indianapolis v. Hoffman, (C. C. A.) 57 F. 333.

License.

Of peddlers, see "Hawkers and Peddlers."

Liens.

See "Maritime Liens;" "Mechanics' Liens."
Of attorney, see "Attorney and Client," 4, 5.
Of mortgage, see "Mortgages," 3.
Of vendor, see "Vendor and Purchaser," 2.

LIMITATION OF ACTIONS.

Action to avoid tax title, see "Taxation."
—— to enforce lien, see "Mechanics' Liens," 4.
On county warrants, see "Counties," 4.

Running of statute—Accrual of cause of action.

1. The statute of limitations does not begin to run in bar of an action to enforce the personal liability of stockholders until judgment has been given against the corporation, and execution thereon has been returned unsatisfied.—Bank of North America v. Rindge, (C. C.) 57 F. 279.

Pleading.

2. In an action at law in a federal court in New Jersey for the maintenance of a nuisance, a plea of the state statute limiting actions for nuisance to a period of six years is good, it being necessary to plead the statute in order to limit the recovery to that time.—Whitenack v. Philadelphia & R. R. Co., (C. C.) 57 F. 901.

Local Prejudice.

See "Removal of Causes," 1, 2.

MARITIME LIENS.

Under contract with wrongful possessor.

1. Where one obtained possession of boats without the owner's consent or authority, and

fective design, it appearing that the company had no watchman or track walker at this bridge at night, and there being evidence that deceased was aware of the fact, it was error to refuse a charge that if he knew this he assumed the risk of being injured by reason thereof.—Texas & P. Ry. Co. v. Minnick, (C. C. A.) 57 F. 362.

19. A collision caused by the running away of an engine from defendant's yard, which resulted from the failure of the company to take proper precautions, was not one of the risks incident to the employment of a brakeman on one of defendant's trains.—Southern Pac. Co. v. Lafferty, (C. C. A.) 57 F. 536.

MECHANICS' LIENS.

Who may claim.

1. The fact that the money obtained on a draft given by a railroad company to its principal contractor for construction of its road was used by him to pay for labor and material will not create a labor or material man's lien on the railroad in favor of the holder of the draft.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

Lien of railroad contractor.

2. Acts Tenn. 1877, c. 72, p. 92, providing that no railroad company shall have power to execute any mortgage or other lien which shall be valid as against judgments for work done or timbers furnished, applies only when the work and materials are furnished in such manner that the railroad company would be liable to pay the contractor or material man for them, and not when they are furnished to a principal contractor in his individual capacity, without establishing a lien in the manner prescribed by the Tennessee statute of March 29, 1883; and if, in the latter case, judgments are nevertheless fraudulently obtained against the company, the statute will not prevent a court of equity from disregarding them.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

3. Under Act Tenn. March 29, 1883, relating to railroad contractors' liens, the contractor must deal directly with the company in order to secure a lien for work and material; or, if a subcontractor, he must serve notice on the railroad company of the principal contractor's failure to pay him, in which case the lien is limited to the amount due the principal contractor by the company, at the time of such service of notice, on account of the work on which the subcontractor was engaged.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

Enforcement.

4. Code Ala. § 3041, providing that all mechanics' liens arising under that chapter shall be deemed lost unless suit thereon is commenced within six months after the maturity of the entire indebtedness secured thereby, refers only to a suit against the owners; and a lien is not lost, where such suit is brought in time, by a failure to make certain incumbrancers parties thereto until more than six months, and the only effect of this omission is to leave open the question of priority between the two liens, for section 3030 declares that all persons interested in the matter in controversy "may" be made parties, "but such as are not made parties shall not be bound by the judgment or proceeding therein."—De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co., (C. C. A.) 57 F. 111.

Merger.

Modification of contracts, see "Contracts."

MINES AND MINING.

Conveyances.

After 1.67 acres of the territory within the exterior lines of location of the K. lode mining claim had been awarded to the S. claim by a judgment of the state court, the owners of the S. claim purchased the K. claim, and in the contract to purchase, the deed, and an agreement to pay royalty for ores extracted, the parties described the K. claim as survey No. 4,746, and referred to the exterior lines of the location, and to such lines extended vertically downward, as including the subject-matter of the contract. *Held*, that the deed and contracts included the 1.67 acres as part of the K. lode mining claim.—Mollie Gibson Consolidated Min. & Mill. Co. v. Thatcher, (C. C. A.) 57 F. 865.

MORTGAGES.

Deed absolute in form.

1. A deed of a portion of a debtor's realty, and a bill of sale of a portion of his personalty, to the presidents of certain banks, taken with a defeasance back, showing that they were given as collateral security for notes, constitutes a mortgage on the properties, and the fact that the defeasance was on a separate paper is immaterial.—Dubuque Nat. Bank v. Weed, (C. C.) 57 F. 513.

Equitable mortgage.

2. Two railroads, owned by companies A. and B., were constructed to form one line, and as a common enterprise, the stock of each being controlled by the same parties. Company B. agreed with the contractor who built its road to pay him in mortgage bonds at a fixed rate per mile. The bonds actually delivered to him were, however, issued by company A., but company B. gave a mortgage on its road to secure them. *Held*, that the persons acquiring these bonds had an equitable mortgage on the road, such as would entitle them to contest a fraudulent judgment giving to subcontractors fictitious liens thereon.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

Lien.

3. Under the acts of congress granting to Minnesota lands in aid of railways and the acts of the legislature of Minnesota granting such lands to railway companies, mortgages of the property of the grantee companies with "the lands appertaining to the roads" do not include lands erroneously conveyed to such

dome of the boiler or "the steam space of the boiler"—to a gas pipe connected directly with the boiler, and is not infringed by connecting the gas pipe to the steam pump, although by this connection the principle of operation may be the same. 49 F. 738, reversed.—Brown v. Stilwell & Bierce Manuf'g Co., (C. C. A.) 57 F. 731.

25. Letters patent No. 312,316, issued February 17, 1885, to Josiah Barrett, for an improvement in lifting jacks, and which are restricted both in the specifications and claims by the use of the words "in a lifting jack," and the additional term "a lifting bar," cannot be extended so as to cover an adaptation of such jack to the production of a horizontal circular motion, for the purpose of unscrewing oil-well tools.—Duff Manuf'g Co. v. Forgie, (C. C.) 57 F. 748.

26. In letters patent Nos. 455,993 and 455,994, issued to said Barrett on subsequent applications, he states that his inventions relate "to the same general class of jacks as are set forth" in his preceding patent, No. 312,316, and have "practically the same object in view;" but elsewhere in the specifications he states that his invention "includes any device embodying its principle, whether the power is exerted in a vertical, horizontal, or other line." In No. 455,994 there is express reference to a contemplated "curvilinear" movement. In the claims of both patents the broad generic expression "in a jack" is used. *Held*, that these claims are broad enough to cover an adaptation of such jack to the production of a horizontal, curvilinear motion for the purpose of unscrewing oil-well tools.—Duff Manuf'g Co. v. Forgie, (C. C.) 57 F. 748.

27. Letters patent No. 467,476, issued January 19, 1892, for the combination with a threshing machine of a pneumatic straw elevator and stacker, consisting of a fan, a trunk through which the straw is discharged, and various devices by which these parts are adapted to perform their work, cover a useful and valuable invention, and are entitled to a liberal construction.—Buchanan v. Goodwin, (C. C.) 57 F. 1039.

Duration of right.

28. The word "patented," as used in Rev. St. § 4887, providing that every patent for an invention which has been previously patented in a foreign country shall be limited to expire with the foreign patent, refers to the date of the actual issuance of the foreign patent, although the same is antedated, as in England, to the day the application was filed.—American Bell Tel. Co. v. Cushman, (C. C.) 57 F. 842; Same v. Hubbard, Id.

29. Under Rev. St. § 4887, providing that if a patent, when granted, covers an invention which had been previously covered by a foreign patent, it expires with the foreign patent, it is immaterial that, after its issue, the domestic patent is pared down to cover only one method of practicing the invention, or restricted to a single claim.—Accumulator Co. v. Julien Electric Co., (C. C.) 57 F. 605.

30. Rev. St. § 4887, is not rendered inapplicable by the fact that the domestic patent was applied for before the foreign one was issued.—Accumulator Co. v. Julien Electric Co., (C. C.) 57 F. 605.

31. Though the domestic patent claim the product, and the foreign patent claim the process, still, where the process makes the product, and the product can be made only by the process, the product and the process constitute one discovery, and the patents are for the same invention.—Accumulator Co. v. Julien Electric Co., (C. C.) 57 F. 605.

32. The right to obtain an extended term of the foreign patent on application within a time limited, not conferred till after the issuance of the patent, and not availed of by actual application within such time, does not constitute such a potential term in the foreign patent as to prolong the domestic patent through or into such extended term. Consolidated Roller-Mill Co. v. Walker, 43 F. 575, 580, distinguished.—Accumulator Co. v. Julien Electric Co., (C. C.) 57 F. 605.

33. Letters patent No. 252,002, issued to Camille A. Faure, on January 3, 1882, for an improvement in secondary or storage batteries, are for the same invention as Spanish letters patent granted to the said Faure on June 27, 1881, for the term of 10 years, and said United States letters patent expired on June 27, 1891, with the expiration of said Spanish letters patent.—Accumulator Co. v. Julien Electric Co., (C. C.) 57 F. 605.

Interference.

34. In a proceeding for relief under Rev. St. § 4918, the court cannot, upon the question of interference, go beyond the claims, and consider the two patents as a whole.—Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co., (C. C.) 57 F. 601.

What constitutes infringement.

35. Letters patent No. 329,805, issued November 5, 1885, to William Boscawen, for an improvement in chairs, consisting of a sliding supplemental foot, which may be used as a bracket to support the seat, is not infringed by a device which substitutes the feet of a chair for its secondary frame feet, and for which letters patent No. 416,324 were issued to William G. Cross, December 3, 1889. 52 F. 295, affirmed.—Waite v. Robinson, (C. C. A.) 57 F. 489.

36. Letters patent Nos. 313,224 and 317,828, issued, respectively, March 3, 1885, and May 12, 1885, to Ottman Mergenthaler, for "improvements in machines for producing printing bars," consisting in part of a combination of a series of independent matrices representing characters, holders or magazines for said matrices, finger keys representing the respective characters, intermediate mechanism to assemble the matrices, and a casting machine to co-operate with the assembled matrices, are for inventions of unusual merit, and, in view of the prior art, entitled to liberal construction, and are infringed by the Rogers machine, which, while in some respects an improvement, operates on the same principle, contains the same general features, and produces substantially the same results.—Mergenthaler Linotype Co. v. Press Pub. Co., (C. C.) 57 F. 502.

37. The inventor of a new patentable improvement upon an old patented device is not entitled to use the old device. Blake v. Rob-

article in this country. 50 F. 73, affirmed.—Dickerson v. Matheson, (C. C. A.) 57 F. 524.

49. A firm in Germany, having the right, under European and American patents, to sell a patented coloring matter in Europe and the United States, was accustomed to sell with restrictions against exportation to the United States. A London firm, which knew of this restriction, sent an order to the London agents of the German firm for a quantity of the goods "strong for export." *Held*, that there was no notice of an intention to export to the United States in the absence of evidence that such was the trade meaning of the words. 50 F. 73, affirmed.—Dickerson v. Matheson, (C. C. A.) 57 F. 524.

Action for infringement—Injunction.

50. On motion for a preliminary injunction, where a patent is set up as an anticipation which, on its face, antedates the patent in suit, complainant may show that his invention was actually made prior to the date of the anticipating patent.—Norton v. Eagle Automatic Can Co., (C. C.) 57 F. 929.

51. When a patent has been sustained by prior adjudications in the same circuit, on motion for a preliminary injunction in a subsequent suit against other parties, the only question open is that of infringement, and consideration of other questions will be postponed until the final hearing, unless new evidence is presented, which is so conclusive that if presented in the former case it would have probably led to a different conclusion.—Norton v. Eagle Automatic Can Co., (C. C.) 57 F. 929.

52. On a motion for a preliminary injunction the circuit courts will follow decisions in other circuits adjudging certain devices to be infringements of a patent, especially when the parties are substantially the same.—American Bell Tel. Co. v. Cushman, (C. C.) 57 F. 842; Same v. Hubbard, Id.

53. The production of additional ex parte evidence attacking the validity of a patent is not a sufficient reason for denying an injunction when the patent has been sustained by the supreme court and by various circuit courts after exhaustive litigation, as in the case of the Bell telephone patent, No. 186,787.—American Bell Tel. Co. v. Cushman, (C. C.) 57 F. 842; Same v. Hubbard, Id.

54. Where a patent has been fully adjudicated and held valid by the court of last resort, and the respondent, though aware of this fact, builds and puts in operation infringing machines at large expense, and enters into large contracts for operating the same, relying upon the opinions of his experts, as opposed to the decision of the court, that said machines are not an infringement, he cannot avert a preliminary injunction on the ground of hardship; it being clear to the court that, under the prior adjudications, his machines are an infringement.—Norton v. Eagle Automatic Can Co., (C. C.) 57 F. 929.

55. On a motion for a preliminary injunction in a suit for infringing the Edison patent for incandescent electric lamps, defendants claimed that they were mere users, who installed plants prior to the decision establishing the validity of the patent, and were misled by the obscurity of the patent, and the conflict of foreign decisions, into investing large sums of money in their plants, and asked that complainants be compelled to supply lamps on reasonable terms, on the ground that otherwise defendants' plants would be rendered valueless. The business of defendants was the furnishing of incandescent electric lighting to consumers. *Held*, that the equities of defendants were not superior to those of the patentees, who had engaged in a similar business relying on the patent, and had strenuously attempted to enforce their rights by suit, and ultimately succeeded, and that a preliminary injunction should issue, especially in view of the fact that defendants had failed to show that they could not obtain incandescent lamps which did not infringe the patent. — Edison Electric Light Co. v. Mt. Morris Electric Light Co., (C. C.) 57 F. 642; Same v. United Electric Light & Power Co., Id.

56. On a motion for a preliminary injunction against the infringement of letters patent No. 223,898, issued January 27, 1880, to Thomas A. Edison, for an improved electric lamp, there were proofs of an alleged anticipation by Henry Goebel in 1854, and subsequently. *Held*, that these were insufficient to overcome the effect of the adjudications sustaining the patent. The injunction should issue. Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 F. 496, disapproved.—Edison Electric Light Co. v. Electric Manuf'g Co., (C. C.) 57 F. 616.

57. Where a patent has been sustained after protracted and expensive litigation, the right of the owner to a preliminary injunction against a new infringer can be defeated only by a new defense, which is sustained by such convincing proof as to raise a presumption that it would have defeated the patent, if produced at the original trial, and every reasonable doubt should be resolved against the new defense. Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 F. 496, disapproved.—Edison Electric Light Co. v. Electric Manuf'g Co., (C. C.) 57 F. 616.

58. A decision of the supreme court of the United States, sustaining a patent, must be regarded as conclusive, upon a motion for preliminary injunction.—American Bell Tel. Co. v. McKeesport Tel. Co., (C. C.) 57 F. 661.

59. Letters patent No. 308,981 and No. 308,982, issued December 9, 1884, to Frank L. Palmer, are for improvements for stitching comfortables by machinery. Owing to the commercial advantages given by these patents, complainants, who owned them, were enabled to practically command the entire business of this country in this kind of quilts. The validity of the patents had never been denied, except by one other party who, after suit brought for infringement, compromised the same, and has ever since paid a royalty. *Held*, that on an application for preliminary injunction, where infringement was plain, the patents would be presumed to be valid, and the injunction granted, unless defendants gave a sufficient bond to secure any damages decreed against them.—Palmer v. Mills, (C. C.) 57 F. 221.

—— Defenses.

60. Where the defense to a suit for infringement is purely technical in character, a

PATENTS ENUMERATED.

Original.

Payment.

Of note, see "Negotiable Instruments," 5.

Penitentiary.

Power of federal court in Indian Territory, see "Courts," 19.

Personal Injuries.

See "Carriers;" "Master and Servant;" "Negligence;" "Railroad Companies."

PILOTS.

Manslaughter, conflict of state and federal jurisdiction, see "Criminal Law," 1.

Liabilities.

1. A pilot is not liable for damage to the vessel in his charge unless caused by his failure to use ordinary diligence, i. e. the degree of skill commonly possessed by others in the same employment.—Wilson v. Charleston Pilots' Ass'n, (D. C.) 57 F. 227.

2. A pilot engaged to take a schooner under tow to sea is liable for any damage resulting to the schooner from his negligently taking his place upon the tug instead of on the schooner, although he does so at the request of the master of the schooner.—Wilson v. Charleston Pilots' Ass'n, (D. C.) 57 F. 227.

3. A pilot engaged to take a schooner to sea from the harbor of Charleston, S. C., stationed himself on the tug, and ordered the schooner to follow the tug closely. On reaching the Swash channel the tug headed S. E., (the wind being S. W., and the current from south to north,) thereby properly proceeding down the channel S. E. by E. ⅜ E., and on the south side thereof. The schooner had raised her mainsail and jibs by order of the pilot, but now, without orders, raised her foresail, and bore off to the north side of the channel, where she grounded. The wind was fair enough to take the schooner out by her sails alone. *Held*, that the pilot was not liable.—Wilson v. Charleston Pilots' Ass'n, (D. C.) 57 F. 227.

PLEADING.

See, also, "Creditors' Bill," 2; "Equity," 6–10; "Quieting Title."

Allegation of res judicata, see "Judgment," 4, 5.
In admiralty, see "Admiralty," 6, 7.
Pleading and proof, see "Fraud."
Plea in abatement, waiver by removal of cause, see "Removal of Causes," 10.

Complaint.

1. In an action to enforce the personal liability of a stockholder an allegation that plaintiff "is informed and believes" that defendant is a stockholder is insufficient. The fact of defendant's ownership of stock should be directly charged either upon information and belief or otherwise.—Bank of North America v. Rindge, (C. C.) 57 F. 279.

Demurrer.

2. Whether the charter and by-laws of a defendant corporation prevent it from contracting except under seal will not be considered upon demurrer to a complaint, where by the complaint it does not appear but that defendant might contract by parol.—Darrow v. H. R. Horne Produce Co., (C. C.) 57 F. 463.

3. A general demurrer which is filed to several pleas must be overruled if any one of the pleas is good.—Whitenack v. Philadelphia & R. R. Co., (C. C.) 57 F. 901.

Verification.

4. Under the South Carolina practice, requiring a pleading to show what facts are stated on personal knowledge, and what on information and belief, and also requiring the verification thereto to state that the facts set out in the pleading are true, except as to such facts as are stated on information and belief, and that as to these the party believes them to be true, if a complaint shows distinctly what allegations are on information and belief, and what from personal knowledge, a verification stating that the complaint is true, of plaintiff's own knowledge, except as to those matters stated on information and belief, and as to these he believes it to be true, is sufficient.—Robinson v. Gregg, (C. C.) 57 F. 186.

Pleading and proof.

5. Rev. St. Tex. art. 1265, requires that where a suit shall be instituted by an assignee or indorsee of a written instrument the indorsement shall be regarded as fully proved, unless defendant deny in his plea that the same is genuine, and file therewith an affidavit stating that he believes, or has reason to believe, that such indorsement is forged. *Held*, that in a suit upon a note alleged to have been made by J. and "J. & Brother," and indorsed in the same manner, when the answer admitted the signing and indorsement as laid, and defendant failed to file an affidavit as required, an offer by defendant to prove that the note had been originally indorsed "J. & Brandon" was properly excluded.—Jones v. Shapera, (C. C. A.) 57 F. 457.

tice of a prohibition against exporting to the United States, but the attention of the firm was not called thereto until a day or two later. *Held*, that notice to the clerk was notice to the firm, and, having accepted the goods with notice, the firm was bound by the restriction. 50 F. 73, affirmed.—Dickerson v. Matheson, (C. C. A.) 57 F. 524.

Action by undisclosed principal.

6. An undisclosed principal may sue upon a written contract made by his agent with the agent of another, in their own names, as against the latter's undisclosed principal, where the contract itself does not contain recitals or description inconsistent with the existence of the relation of principal and agent. Humble v. Hunter, 12 Q. B. 310; Schmaltz v. Avery, 16 Q. B. 655, distinguished.—Darrow v. H. R. Horne Produce Co., (C. C.) 57 F. 463.

PRINCIPAL AND SURETY.

Discharge and release of surety.

1. A contract provided for a payment of 85 per cent. of the total cost of the completed work when it was, in the opinion of the party of the first part, half completed; such percentage to be estimated by the engineer of said party, but not to exceed $7,480. The party of the first part, relying on the fraudulent representations of the party of the second part that the work was half completed, made a payment of $10,046.68. *Held*, that this discharged the sureties on the bond of the party of the second part.—Board Com'rs Morgan County v. Branham, (C. C.) 57 F. 179.

Application of moneys recovered from principal.

2. Sums recovered from a defaulting postmaster through the agency of his sureties, and paid over to the United States, should be credited upon the general account of the defaulter, and not upon the liability of the sureties.—Alexander v. United States, (C. C. A.) 57 F. 828.

Remedies against sureties.

3. Sureties on a supersedeas bond are not entitled to have a suit thereon stayed until attached lands of the principal are sold, and such security exhausted.—Davis v. Patrick, (C. C. A.) 57 F. 909.

PUBLIC LANDS.

See, also, "Mines and Mining."
Title to submerged lands, see "Navigable Waters."

Homestead entry on railroad grant.

1. Under Act July 27, 1866, (14 Stat. 292,) granting lands to the Southern Pacific Railway Company, public land without the primary limits, but within the indemnity limits of the grant, was not open for homestead entry after an order was issued from the general land office directing the withdrawal of such lands from entry. Buttz v. Railroad Co., 7 S. Ct. 100, 119 U. S. 72, followed. Railroad Co. v. Tilley, 41 F. 729, overruled.—Southern Pac. R. Co. v. Araiza, (C. C.) 57 F. 98.

2. A homesteader who has made an entry on public land without the primary limits, but within the indemnity limits of the grant to the Southern Pacific Railway Company, receiving a patent therefor against the opposition of the company, is subject to have his title decreed to be held in trust for said company, when it appears that the lands within the indemnity limits will not make up to the company the loss of lands within the primary limits.—Southern Pac. R. Co. v. Araiza, (C. C.) 57 F. 98.

Grants to railroad.

3. Act July 2, 1864, (13 Stat. 365,) which authorized the construction of the Northern Pacific Railroad from Lake Superior westerly to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, Or., granted lands in aid of the construction on each side of "said railroad line." *Held*, that the grant extended to the branch road, as well as to the main trunk line.—United States v. Oregon & C. R. Co., (C. C.) 57 F. 890.

4. The grant of land to the Northern Pacific Railroad conveyed a present title, subject to the right of the United States to re-enter on failure of the railroad to comply with conditions subsequent, and made the land so conveyed "granted" land, within the operation of the subsequent grant to the Oregon & California Railroad, which also reserved "granted" land.—United States v. Oregon & C. R. Co., (C. C.) 57 F. 890.

5. The grant of lands to the Oregon & California Railroad did not gain a priority over the grant to the Northern Pacific Railroad, either by the fact that the Oregon & California Railroad, filed its map of definite location, constructed a portion of its road, and received patents for the land, before the maps of the line of the Northern Pacific Railroad, showing the conflict of grants, were filed, or by the fact that no portion of the Northern Pacific was finally constructed on the line of such maps.—United States v. Oregon & C. R. Co., (C. C.) 57 F. 890.

6. The grant of Act Cong. July 2, 1864, to the Northern Pacific Railroad was of "every alternate section of public land, not reserved, sold, granted * * * at the time the line of road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that the reservation of "granted" lands was not made in contemplation of a subsequent grant of the same lands to the Oregon & California Railroad.—United States v. Oregon & C. R. Co., (C. C.) 57 F. 890.

7. Act Cong. March 3, 1875, giving railroad companies right of way through public lands, and the right to take land for stations and side tracks, does not limit such rights to surveyed lands.—Ex parte Davidson, (C. C.) 57 F. 883.

8. Where a railroad company appropriates land under Act Cong. March 3, 1875, giving to railroad companies a right of way through public lands, and a right to take a certain amount of land for station purposes, the land so appropriated is withdrawn from the public domain, and cannot be settled on, though the rail-

to land is demurrable, which fails to allege affirmatively either that plaintiff is in possession, or that both complainant and defendant are out of possession.—Southern Pac. R. Co. v. Goodrich, (C. C.) 57 F. 879; Same v. Malcolm, Id.; Same v. Norton, Id.; Same v. Green, Id.

RAILROAD COMPANIES.

See, also, "Carriers;" "Master and Servant."

Actions against, see "Venue in Civil Cases."
Bonds in aid of, see "Municipal Corporations," 3, 4.
Fixing freight rates, due process of law, see "Constitutional Law," 1.
Grants to railroads, see "Public Lands," 3–14.
Liability for obstructing water course, see "Waters and Water Courses," 1.
Lien of railroad contractor, see "Mechanics' Liens," 2, 3.
Proceedings against railroad commissioners, see "States and State Officers," 2–4.
Railroad aid bonds, see "Municipal Corporations," 8.

Municipal aid.

1. Act Kan. March 3, 1877, § 2, (1 Gen. St. Kan. 1889, pp. 456, 457,) empowered counties to issue bonds to aid in the construction of narrow-gauge railways to the amount of $4,000 per mile, and to exchange them for second mortgage bonds of such railways. Section 3 provides that the act should not be construed to repeal or change any then existing law authorizing counties to issue bonds in aid of railroads. Prior to the passage of this act, counties were empowered to issue bonds in aid of railways irrespective of the gauge, but could not make such issue in exchange for second mortgage bonds. *Held*, that the act of 1877 did not take away the pre-existing power of counties to issue bonds in aid of railways. — Board Com'rs Kingman County v. Cornell University, (C. C. A.) 57 F. 149.

Right of way.

2. Persons who convey a right of way in Tennessee directly to a railroad company are entitled to a lien for the purchase price prior to that of the mortgage bonds of the company.—Central Trust Co. v. Bridges, (C. C. A.) 57 F. 753; McBee v. Central Trust Co., Id.

Receivers.

3. Defendant company leased the railroad of petitioner, covenanting to pay as rent 32 per cent. of the gross earnings, and operated it for several years. The lease provided that a breach by defendant of any covenant should be cause of forfeiture, at the option of petitioner. On July 25, 1893, defendant being insolvent, receivers of its property were appointed. When they took possession, there was due petitioner more than $300,000 of rent. On August 8, 1893, on a petition showing the importance to petitioner of prompt payment of the stipulated rent, to enable it to pay its obligations, it asked that the receivers be ordered to perform all the obligations of the lease; that they pay the rent then due; that, if without money therefor, they issue receivers' certificates for rent due or to become due; and that such certificates be decreed a lien on the property of defendant prior to defendant's outstanding mortgages. No application was made to have a forfeiture of the lease, for covenants broken, declared. *Held*, that the receivers did not, by taking possession under the order of court, become bound to pay the stipulated rental; that their retention of possession did not show an election on their part to accept the lease; and that as they had paid to petitioner more than the net earnings of the leased property for the period during which they had held it, though less than the stipulated rent, the court would not instruct them to make further payments. — Park v. New York, L. E. & W. R. Co., (C. C.) 57 F. 799.

Negligence—Liability of lessor.

4. A lease by a railway company of its line without authority of law is void, and the lessor continues liable for all the negligence of the lessee, the latter being treated as the lessor's agent operating the railway.—Arrowsmith v. Nashville & D. R. Co., (C. C.) 57 F. 165.

5. The N. & D. R. Co. leased its line, in good condition, to the L. & N. R. Co., by authority of Code Tenn. 1858, §§ 1122, 1123, permitting such leases, and providing that a lessee should hold a road so leased subject to the same liabilities as when it was in the hands of the lessor. The lease was silent as to liability for future negligence by the lessee. By permission of the lessee a mail crane was placed near the track, and thereafter a railway mail clerk, traveling under a contract between the United States and the lessee, was struck and injured by the crane, either because it stood too near the track, or because the lessee had allowed the track to get out of repair. *Held*, that there was no cause of action for such injury against the lessor.—Arrowsmith v. Nashville & D. R. Co., (C. C.) 57 F. 165.

6. Where a railway company leases its line by authority of law, and there is no exemption of the lessor from future liability either by express terms of the statute or by the terms of the lease, it is nevertheless not liable for injuries to a passenger traveling under contract with the lessee, when such injuries are caused wholly by the lessee's negligence in operating the road. Railroad Co. v. Brown, 17 Wall. 445, distinguished.—Arrowsmith v. Nashville & D. R. Co., (C. C.) 57 F. 165.

—— Accidents to trains.

7. A railroad company which had the right to run its trains into a certain town over the tracks of another company, then in the hands of receivers, duly notified the yard master of the latter at that place that an extra train would arrive about 10 A. M. on a certain day. The yard master communicated this intelligence to the foremen of the several switching engines, but the foreman of one engine neglected to notify his engineer; and the latter, while looking backward at the cars in his charge, ran his engine into the extra, thereby killing a passenger. *Held*, that the receivers were liable for the death, and this notwithstanding the fact that the extra was so late that, under the rules of the yard, the switch engine had a right to occupy the tracks, for the want of notice prevented the keeping of a proper lookout.—Eddy v. Letcher, (C. C. A.) 57 F. 115.

Negligence—Accidents at crossings

8. In an action for injuries received at a railroad crossing, plaintiff offered testimony that he stopped and listened; and defendant, that the whistle was blown and the bell rung; and the court instructed the jury to decide the issue of fact from the testimony. *Held*, that the failure of the court to charge that contributory negligence of plaintiff is a matter of defense, which defendant must show by a preponderance of evidence, was not reversible error.—Whilton v. Richmond & D. R. Co., (C. C.) 57 F. 551.

9. Gen. St. S. C. § 1529, relating to cases of personal injury by collision at a railroad crossing by a failure to give the required signals, is in derogation of the common law, and, being strictly construed, does not apply where horses are frightened by a train at a crossing, and the person injured is thrown from a vehicle, but not so as to come in collision with the train.—Whilton v. Richmond & D. R. Co., (C. C.) 57 F. 551.

—— Injuries to persons on track.

10. Plaintiff, an adult, while walking for his own convenience, in defendant's private railroad yard, to avoid an approaching train, stepped on an adjoining track, whence any object approaching from the rear could be seen for at least 1,000 feet. He failed to look behind him, and, after proceeding about 300 feet, was struck by an engine, the bell of which was not ringing, as required by a city ordinance. Walking upon the tracks in the yard by strangers was forbidden by statute, but persons did so daily without interference. *Held*, that plaintiff was guilty of contributory negligence.—Missouri Pac. Ry. Co. v. Moseley, (C. C. A.) 57 F. 921.

RECEIVERS.

Of corporation, appointment, see "Corporations," 23.
Of national banks, see "Banks and Banking," 4–6.
Of railroad, see "Railroad Companies," 3.

Unauthorized sale of receiver's certificates—Rights of purchasers.

1. In foreclosure proceedings a receiver was appointed. The president of a bank in which the receiver kept his deposits, having been authorized by him to sell certain receiver's certificates, made the sale after his authority had been revoked, and caused the amount realized to be credited to the receiver on the books of the bank, and on the receiver's pass book. The receiver did not repudiate the sale, but, on the contrary, drew checks against the deposits, and reported the transactions to the court, which, in the foreclosure decree, recognized the validity of the certificates, and directed that the sale should be made subject thereto. *Held* that, the deposits representing the proceeds having been placed in the bank, by the president, in the form of checks, drafts, etc., on other banks, which were in fact duly honored by them, the deposits must be held to have come into the receiver's hands, within the rule which makes the receipt of the proceeds by the receiver a condition precedent to the validity of the certificates, although the bank was never in a condition to pay over any considerable proportion of the deposits to the receiver.—Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co., (C. C. A.) 57 F. 25.

2. The fact that the receiver, on afterwards learning that the bank was insolvent, demanded and received from the bank and from the president, personally, certain collateral securities, to protect his deposits, was not a repudiation of the sale, but rather a fresh ratification, and acceptance of the deposits as the proceeds of the sale.—Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co., (C. C. A.) 57 F. 25.

To what property entitled—Receiver of foreign corporation.

3. On June 19, 1893, a receiver of a foreign corporation was appointed in the circuit court for the western district of Pennsylvania. Under the order, the corporation on the same day executed to the receiver an assignment of its property in New York city, including the property in controversy, which was taken possession of by an agent of the receiver. On June 29, 1893, the sheriff of New York county seized the property in controversy under an attachment issued by a state court in an action against the foreign corporation. In an action against the corporation in the circuit court for the southern district of New York, that court appointed the Pennsylvania receiver the receiver of the property of the defendant within its jurisdiction. As receiver appointed by the New York circuit court, he applied to that court for a summary order to the sheriff to surrender the seized property. *Held*, that the assignment executed pursuant to the decree of the Pennsylvania circuit court passed the title to the property to the receiver as an officer of that court, and not as an officer of the New York circuit court, and that in his capacity of receiver, appointed by the New York court, he was not entitled to possession of the property, and the order asked should not be granted.—Cole v. Oil-Well Supply Co., (C. C.) 57 F. 534.

REFERENCE.

Objections and exceptions to report.

1. Exceptions to a master's report, which distinctly point out the findings of fact and conclusions of law excepted to, are sufficient to present such findings and conclusions for review, where the evidence accompanies the report, though such exceptions may be inartistically drawn. Story v. Livingston, 13 Pet. 359, followed.—Central Trust Co. v. Wabash, St. L. & P. Ry. Co., (C. C.) 57 F. 441.

2. If upon facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions may be disregarded or overruled, and judgment awarded upon the undisputed findings of fact.—Central Trust Co. v. Wabash, St. L. & P. Ry. Co., (C. C.) 57 F. 441.

Regulation of Commerce.

See "Carriers," 1–9; "Constitutional Law," 2–4.

Rehearing.

Reissue.

Release and Discharge.

Remedy at Law.

REMOVAL OF CAUSES.

Local prejudice.

1. Under Act March 3, 1887, § 2, (24 Stat. 553,) one of several defendants may remove a cause to a federal court on the ground of local prejudice, whether there is a separable controversy as to such defendant or not, and, where there is no separable controversy, the cause will not be remanded as to the other defendants.—Haire v. Rome R. Co., (C. C.) 57 F. 321.

2. Under the corrected judiciary act of March 3, 1887, (24 Stat. 552,) a suit cannot be removed from a state to a federal court on the ground of local prejudice, when plaintiffs are not all citizens of the state in which the suit is brought, and are yet jointly interested in the cause of action against the nonresident defendant who applies for removal. Young v. Parker, 10 S. Ct. 75, 132 U. S. 267, followed. —Gann v. Northeastern R. Co., (C. C.) 57 F. 417.

Separable controversy.

3. For the purpose of determining whether a controversy is separable so as to give one of several joint defendants the right of removal to a federal court, the allegations of the plaintiff's pleadings must be taken as true, and such defendants, on a joint cause of action in tort, cannot, by filing separate defenses, tendering distinct issues, render the suit separable for the purpose of removal.—Arrowsmith v. Nashville & D. R. Co., (C. C.) 57 F. 165.

4. An action against a construction company, whose employes negligently managed the train which caused plaintiff's injury, wherein the owner of the engine and cars composing said train and the owner of the tracks where the injury was done are joined as defendants, does not contain any separable controversy as to the parties so joined, giving them the right to a remand under Act March 3, 1887, § 2, (24 Stat. 553,) after removal to a federal court by the construction company on the ground of local prejudice.—Haire v. Rome R. Co., (C. C.) 57 F. 321.

Joinder of party to defeat removal.

5. In a petition for removal of a cause to a federal court a prima facie case requiring the state court to order the removal is made out by an averment that plaintiff originally sued the petitioning defendant alone, and on removal of that suit to a federal court voluntarily dismissed it, and at once brought this action in a state court upon the same cause of action, joining as a defendant a citizen of his own state, against whom no cause of action existed, merely for the purpose of defeating petitioner's right of removal. — Arrowsmith v. Nashville & D. R. Co.. (C. C.) 57 F. 165.

Jurisdictional amount.

6. Where in an action for wrongful death the complaint lays the damages "in the sum of —— thousand dollars; wherefore plaintiff demands judgment for —— thousand dollars," this must be construed as a suit for $1,000 damages, and defendant cannot secure a removal of the cause to a federal court on the ground of diverse citizenship, by alleging in the petition for removal that the matter in dispute exceeds $2,000.—Yarde v. Baltimore & O. R. Co., (C. C.) 57 F. 913.

Remand by federal court.

7. Where the petition for removal of a cause avers that one party, a corporation, is a citizen of a certain state, instead of averring that it is organized under the laws of the state, a motion to remand should be granted, although plaintiff has appeared in the federal court, and demurred generally to the defendant's answer.—Frisbie v. Chesapeake & O. Ry. Co., (C. C.) 57 F. 1.

Procedure after removal.

8. Where a state court persists in holding a cause for trial after it has been duly removed to a federal court, the defendant does not, by participating in such trial, waive his rights in the federal court. Insurance Co. v. Dunn, 19 Wall. 214, followed.—McMullen v. Northern Pac. R. Co., (C. C.) 57 F. 16.

9. In a cause removed to a federal circuit court from a state court which had refused to order the removal, plaintiff, after refusing to recognize the jurisdiction of the federal court, although he had due notice of its order docketing the cause, will not be heard in opposition to a motion to dismiss the cause because it has been pending three stated terms without prosecution.—McMullen v. Northern Pac. R. Co., (C. C.) 57 F. 16.

Effect — Waiver of pleas in abatement.

10. While the filing of a petition for removal to the federal court is not such an appearance in the state court as will waive the petitioner's exception to its jurisdiction if the attempt to remove is unsuccessful, yet the actual removal of the cause to the federal court subjects the petitioner to the jurisdiction of that court, and is a waiver of pleas that the suit is not for the recovery of real property, the possession thereof, or for a trespass thereto, or that petitioners are not resident freeholders or householders in the county where the suit is brought, but of another county, which pleas are by the state statute pleas in abatement.—Hinds v. Keith, (C. C. A.) 57 F. 10.

Repeal.

Representations.

Res Judicata.

See "Judgment," 1-8.

Right of Way.

See "Eminent Domain;" "Railroad Companies," 2.

Riparian Rights.

Injunction against polluting stream, see "Nuisance," 2.

Risks of Employment.

See "Master and Servant," 15-19.

Rivers.

See "Navigable Waters."

SALE.

See, also, "Fraudulent Conveyances."
By auctioneer of goods fraudulently obtained, see "Auction and Auctioneer."
Of receiver's certificate, rights of purchaser, see "Receivers," 1, 2.

Warranty.

1. Defendant, in Spokane Falls, telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." *Held*, that plaintiffs warranted the eggs to be strictly fresh at Omaha, and was not liable for deterioration naturally resulting during transportation.—English v. Spokane Com. Co., (C. C. A.) 57 F. 451.

2. Plaintiffs shipped potatoes from Omaha to defendant at Spokane, with an implied warranty of their quality when shipped. When they arrived, defendant, at its own request, was allowed to inspect them before acceptance. *Held*, that the inspection was not a waiver of the warranty.—English v. Spokane Com. Co., (C. C. A.) 57 F. 451.

3. Defendant, on finding potatoes shipped to him were damaged, could return them, and rely on the warranty under which they were shipped, or keep them, and dispose of them in good faith, and hold plaintiffs responsible for his damages.—English v. Spokane Com. Co., (C. C. A.) 57 F. 451.

4. An ice machine was furnished under a written contract with a guaranty to produce 25 tons of ice daily. The buyer operated the same from June until September, when he notified the seller that it did not fulfill the contract, and was not accepted, and requested its removal. The seller declined the request, claiming that the machine was a full compliance with the contract, and had been accepted in July. The purchaser continued to use the machine through the fall and during the entire ice season of the two following years. *Held* an acceptance of the machine.—Hercules Iron Works v. Dodsworth, (C. C.) 57 F. 556.

—— Implied warranty.

5. Defendant, in Spokane Falls, telegraphed plaintiffs, in Omaha, inquiring the price of five car loads of "good potatoes," and, after some disagreement as to price, the sale was made, and the potatoes shipped to defendant. *Held*, that plaintiffs gave an implied warranty that the potatoes were of good, merchantable quality when shipped.—English v. Spokane Com. Co., (C. C. A.) 57 F. 451.

—— Damages for breach.

6. Where cotton is sold by sample, with warranty of quality, and an inferior quality is delivered, which necessitates a reselling and a purchase of other cotton to replace it, the buyer may recover as damages the cost of such reselling and replacing. Toulmin, District Judge, dissenting, on the ground that such damages are special, and can only be recovered when specially pleaded.—Hudmon v. Cuyas, (C. C. A.) 57 F. 355.

7. In an action for breach of warranty in the sale of a chain, evidence of damage to the business of a vendee of the original purchaser, incurred by the loss of trade by reason of the breaking of the chain, is inadmissible where the petition claims damages for the cost of substituting a new chain for the old one only, and the testimony fails to show that the original purchaser was liable for consequential damages, or that defendants were informed in selling the chain that such purchaser had contracted to incur such liability.—Sutherland v. Round, (C. C. A.) 57 F. 467.

8. Where potatoes shipped under a warranty were damaged, the profits the consignee would have made on a resale are not recoverable as damages.—English v. Spokane Com. Co., (C. C. A.) 57 F. 451.

Buyer's rights and remedies.

9. Where a purchaser accepts an ice machine sold, which fails to fulfill a guaranty to produce 25 tons a day, the buyer's only remedy in an action for the price is to recoup any sums required to cure defects in the parts specified in the contract, and the difference in value between a machine of the capacity of the one in controversy and a 25-ton machine.—Hercules Iron Works v. Dodsworth, (C. C.) 57 F. 556.

—— Submission to arbitration.

10. In an action for breach of contract in failing to deliver certain cotton of a prescribed quality, a plea is demurrable which alleges that the sale was made on condition that all differences as to grade and quality should be settled by arbitration in Liverpool, but which fails to allege that such arbitration was a condition precedent to bringing suit.—Hudmon v. Cuyas, (C. C. A.) 57 F. 355.

Bona fide purchasers.

11. Defendants knew that a merchant from whom they obtained goods was selling large quantities of goods at auction for less than he could have bought them, and that he had secretly stored $50,000 worth of goods in a loft remote from his store. One defendant gave a false account of the transaction, and the other

withstand without serious injury to her passengers the violent thunderstorms which are of frequent occurrence in that locality.—In re Myers Excursion & Navigation Co., (D. C.) 57 F. 240.

Limitation of liability.

8. Where the unseaworthy condition of an excursion barge would be shown by a proper examination, her owners are charged with knowledge thereof, and any injury to passengers resulting therefrom is not without the "privity or knowledge" of the owners so as to entitle them to the benefit of the limited liability acts of the United States.—In re Myers Excursion & Navigation Co., (D. C.) 57 F. 240.

9. A barge without motive power, which is used for transporting excursion parties on New York harbor and adjacent waters, is within the limited liability acts of the United States.—In re Myers Excursion & Navigation Co., (D. C.) 57 F. 240.

10. A barge without motive power, which is used for carrying excursion parties about New York harbor and adjacent waters, may be surrendered by her owners, under the limited liability acts of the United States, without the surrender of the tug towing the barge at the time of the loss, though the tug belongs to the same owners.—In re Myers Excursion & Navigation Co., (D. C.) 57 F. 240.

11. In a proceeding for limitation of liability, where a bond is taken for the appraised value of the vessel, pursuant to admiralty rule 54, it is proper for the court to require that such bond shall include a stipulation for interest from the date thereof.—In re Harris, (C. C. A.) 57 F. 243.

Slander of Title.

See "Libel and Slander."

SPECIFIC PERFORMANCE.

Compelling transfer of invention by employe, see "Patents for Inventions," 1.

Adequate remedy at law.

1. Mandamus in a state court to enforce the conveyance of real property as to which a clear legal right is asserted, is not such an adequate remedy at law as to bar the equitable jurisdiction of a federal court. Smith v. Bourbon Co., 8 S. Ct. 1043, 127 U. S. 105, distinguished.—Provisional Municipality of Pensacola v. Lehman, (C. C. A.) 57 F. 324.

Contracts enforceable.

2. The city of Pensacola, becoming insolvent, sold and attempted to convey its public parks to private persons, having no legal authority to do so. It received the price, and recognized the ownership of certain purchasers, but subsequently resumed possession of the property. Act Fla. June 2, 1887, (§ 1, c. 3744,) authorized the city to convey to the holders the public property theretofore sold for valuable consideration, whenever it should be shown to the commissioners that the city sold and received value therefor, and it should appear equitable to them to make such conveyance. *Held*, that purchasers to whom the board refused to make conveyances were entitled to equitable relief.—Provisional Municipality of Pensacola v. Lehman, (C. C. A.) 57 F. 324.

3. The failure of the purchasers to build upon and improve the lots in question raises no equity in favor of the municipality.—Provisional Municipality of Pensacola v. Lehman, (C. C. A.) 57 F. 324.

4. The words, "and it shall appear equitable to said board," refer only to existing, well-defined equities, and do not vest an arbitrary discretion in the municipality. Supervisors v. U. S., 4 Wall. 435, followed.—Provisional Municipality of Pensacola v. Lehman, (C. C. A.) 57 F. 324.

5. Act Fla. June 2, 1887, (St. c. 3774,) empowered the city of Pensacola to convey certain public property theretofore sold, and attempted to be conveyed, whenever it should be shown to the satisfaction of the commissioners that the city sold and received value therefor, and it should appear equitable to the commissioners to make such conveyance. *Held* that, even if the act were only permissive, equity would require the city to return the purchase money, or convey the premises, to purchasers for a valuable consideration.—Provisional Municipality of Pensacola v. Lehman, (C. C. A.) 57 F. 324.

STATES AND STATE OFFICERS.

Compact between Maryland and Virginia, see "Fisheries."

Compact between Maryland and Virginia—Jurisdiction of offenses.

1 Section 10 of the compact of 1785 between Maryland and Virginia, which stipulated that offenses committed by citizens of Maryland within the limits of Virginia, on that part of Chesapeake bay where the line of division between Smith's point and Watkins' point was doubtful, should be tried in a court of Maryland, lost its force and effect by the Black-Jenkins award of January 16, 1877, which established such line with precision, so that a Virginia court is now competent to try such offenses.—Ex parte Marsh, (C. C.) 57 F. 719.

What are suits against state—Proceedings against railroad commissioners.

2. A proceeding by receivers of a railroad against state railroad commissioners for relief against alleged unjust and unreasonable rates for freight transportation, established by such commissioners, is not a proceeding against the state, within Const. U. S. Amend. 11, inhibiting the exercise of jurisdiction by federal courts in suits brought against one of the United States by citizens of another state.—Clyde v. Richmond & D. R. Co., (C. C.) 57 F. 436; Huidekoper v. Duncan, Id.

3. As such a proceeding presents no question of penalties, the fact that the act authorizing the commissioners to fix rates requires actions to recover penalties for disregarding them to be brought in the name of the state, and for its benefit, does not make the state in any sense

a party or privy to the record.—Clyde v. Richmond & D. R. Co., (C. C.) 57 F. 436; Huidekoper v. Duncan, Id.

4. That the state, under the operation of the "dispensary act," approved December 24, 1892, has a material interest in such a proceeding, as a large, and perhaps the only, shipper of liquors, does not make it a party to the proceedings, so as to preclude the federal court from exercising jurisdiction.—Clyde v. Richmond & D. R. Co., (C. C.) 57 F. 436; Huidekoper v. Duncan, Id.

Statute of Limitations.

See "Limitation of Actions."

STATUTES.

Construction.

1. In Civil Code Cal. § 5, declaring that the provisions of the Code, "so far as they are substantially the same as existing statutes or the common law, must be construed as a continuation thereof, and not as new enactments," the common law referred to is the existing common law, not the law formerly prevailing, which had been abrogated by statute.—The Louis Olsen, (C. C. A.) 57 F. 845; Olsen v. Haritwen, Id.

2. A court cannot recur to the views of individual members of congress in debate for the purpose of aiding in the construction of a doubtful act, but it may recur to the history of the times when the act was passed, and the general state of public, judicial, and legislative opinion at that time.—United States v. Oregon & C. R. Co., (C. C.) 57 F. 426.

Operation and effect.

3. The constitution of California provides that no law shall be amended by reference to its title, but all amended laws shall be re-enacted and published at length as amended. Code Civil Proc. Cal. § 813, was amended and re-enacted by an act in which the whole Code was revised, and which repealed all laws inconsistent with itself. *Held*, that a subdivision of section 813 which was set forth unchanged in the amendatory act was not so re-enacted as to make it a later statute than one on the same subject previously existing, so as impliedly to repeal such other statute.—The Louis Olsen, (C. C. A.) 57 F. 845; Olsen v. Haritwen, Id.

4. Act Cal. April 13, 1850, adopted the common law of England, by which a master had no lien on his ship for wages. Civil Prac. Act Cal. 1851, § 317, made all vessels liable to liens "for services rendered on board," thereby giving the master such lien, and this provision is re-enacted in Code Civil Proc. Cal. § 813; but Civil Code Cal. § 3055, provides that the master shall have a general lien for advances, etc., but no lien for his wages; and Pol. Code Cal. § 4480, provides that the Codes must be construed as though all had been passed at the same moment and were part of the same statute. *Held*, that Civil Code, § 3055, could not be regarded as a mere declaration of the common-law rule, but was a positive enactment; that the common-law rule adopted in 1850, and the provision of the act of 1851 creating the lien, were not in pari materia, so that, on their incorporation and re-enactment in the Codes, Code Civil Proc. § 813, could prevail, as a re-enactment of the latest expression of the legislative will; but that Civil Code, § 3055, contained the first positive expression of the will of the legislature concerning the master's lien, and, in denying him such lien, constituted an exception to the general rule expressed in Code Civil Proc. § 813, effect being thus given to both provisions. 52 F. 652, reversed.—The Louis Olsen, (C. C. A.) 57 F. 845; Olsen v. Haritwen, Id.

STATUTES CONSTRUED.

UNITED STATES

CONSTITUTION.

STATUTES AT LARGE.

Stipulations.

See "Practice in Civil Cases."

SUBROGATION.

To rights of vendor—Lien.

Deeds of trust by two grantors and their wives, representing themselves as one family, and claiming but one homestead, were made to secure a loan, a portion of which was used to pay off vendors' liens on a specific part of the lands. Subsequently the widow of one of the grantors claimed a right of homestead in such part under Const. Tex. 1876, art. 16, § 50. *Held*, that the mortgagee was subrogated to the right of the holders of the vendors' liens as to such specific part, and on foreclosure was entitled to sell the whole tract, except the two homesteads, and, if sufficient was not realized to satisfy the mortgage debt, then to sell the homestead claimed by the widow, to satisfy so much of the decree as should not exceed the sum used to pay off such vendors' liens. McCormick, Circuit Judge, dissenting. Pridgen v. Warn, 15 S. W. 550, 79 Tex. 588, followed.—Ivory v. Kennedy, (C. C. A.) 57 F. 340.

Supplies.

Lien for, see "Maritime Liens," 3, 4.

Surveys.

Of public lands, see "Public Lands," 15.

TAXATION.

Limitation of action to avoid tax title.

The Louisiana statute, requiring actions to invalidate any title acquired by tax sale to be brought within three years, (Laws La. 1874, Act 105, § 5,) does not apply as against a landowner whose possession has never been interrupted.—Land Trust of Indianapolis v. Hoffman, (C. C. A.) 57 F. 333.

Taxation of Costs.

See "Costs," 3–5.

TELEGRAPH COMPANIES.

Liability for negligence—Who may sue.

1. A person to whom a telegraphic message is directed cannot recover against the company for failure to deliver the same, when he is no party to the contract under which it is sent, and when the company is not informed, either by the terms of the message or otherwise, that the contract is for his benefit.—Western Union Tel. Co. v. Wood, (C. C. A.) 57 F. 471.

—— Damages.

2. Damages cannot be recovered from a telegraph company for mental suffering resulting from simple negligence in the prompt delivery of a message announcing the dangerous illness of a relative, as such damages are too uncertain and speculative.—Western Union Tel. Co. v. Wood, (C. C. A.) 57 F. 471.

Territorial Courts.

See "Courts," 19.

Title.

Slander of, see "Libel and Slander."

Torts.

TOWAGE.

Compensation—Vessel in distress.

1. The steamer A. having unsuccessfully tried to render salvage services to the steamer G., afterwards, at the request of the owner of the G., again went to assist the G., which was not then in peril, the sea having become quite calm, and the wind having moderated, and, after towing the G. about three-quarters of a mile, noticing the approach of a sister steamer of the G., belonging to the same owner, the towing steamer cast off, and rendered no further service. No claim for service was then made, but, a difficulty having arisen between the owners of the two vessels about a year thereafter, the owner of the A. claimed $500 for salvage. *Held* that, while the claim did not commend itself as a fair one, the owner of the A. was entitled to be paid for towage service, the amount of which, if the parties failed to agree in regard thereto, should be ascertained by a reference.—Atlantic Coast Steamboat Co. v. The Golden Gate, (D. C.) 57 F. 661.

Liability of tug for negligence.

2. The contract of towage does not subject a tug to the liability of a common carrier, as she only undertakes to exercise ordinary care and skill.—Lane v The A. R. Robinson, (D. C.) 57 F. 667.

3. Proof of a loss suffered by a tow does not raise a presumption of negligence on the part of the tug. The Webb, 14 Wall. 406, followed.—Lane v. The A. R. Robinson, (D. C.) 57 F. 667.

4. It is negligence for a tug towing a vessel on a long hawser to attempt to take her through the draw of a river bridge on a course diagonal to the draw.—Booye v. L'Engle, (D. C.) 57 F. 306.

5. It is negligence for a tug to tow a vessel through the draw of a river bridge with a hawser of 35 fathoms or more.—Booye v. L'Engle, (D. C.) 57 F. 306.

6. A schooner towed by a tug collided with the piers of a railroad bridge, through the draw of which the tug was taking her, on a dark night. On the previous day the master of the tug, in a conversation with the master of the schooner, had agreed that it was dangerous to tow through a draw at night, and for that reason had waited overnight before starting on the voyage, in order to avoid passing after dark another bridge, which lay near the beginning of the voyage. Many experts also testified that towing through a drawbridge at night was not warranted by usage. *Held*, that the tug was guilty of negligence, and liable for the damages.—Booye v. L'Engle, (D. C.) 57 F. 306.

7. The master of a schooner knowingly engaged a tug of inferior power to tow him to sea from Charleston harbor. In passing down the Swash channel, the schooner being under sail, with a breeze sufficient to take her to sea without the aid of steam power, she negligently ran aground on the north side of the channel, and thereafter negligently lowered her mainsail, making it impossible for the tug to get her off. *Held*, that the tug did not contribute to the accident, and was not liable for any further service under the contract of towage.—Wilson v. Charleston Pilots' Ass'n, (D. C.) 57 F. 227.

8. A tug is guilty of negligence in running its tow upon an obstruction which competent and experienced pilots would have avoided. 48 F. 917, affirmed.—Rose Brick Co. v. The Mascot, (C. C. A.) 57 F. 512.

TRADE-MARKS AND TRADE-NAMES.

What will be protected.

1. In a suit in the courts of a state for infringement of the trade-mark "Prince's Metallic Paint," title to the trade-mark being claimed by both parties, relief was refused on the ground that, even if plaintiff had title, it had forfeited its equity by using the trade-mark in connection with paints made from ores dug from other than the original Prince mine. *Held*, that the defendant in that litigation, who had always used the trade-mark in connection with paints not coming from the Prince mine, had no equity to sustain a suit for infringement against the former plaintiff. —Prince's Metallic Paint Co. v. Prince Manuf'g Co., (C. C. A.) 57 F. 938.

2. The city of Carlsbad, Bohemia, sole owner of the celebrated mineral springs of that city, having for 50 years been engaged in the business of evaporating the waters, and selling the salts thus obtained under the names "Carlsbad Salts" and "Carlsbad Sprudel Salts," is entitled to an injunction to restrain other parties from using these words, even with the word "Artificial" added thereto, as names for artificial salts containing the same chemical elements, although the artificial salts may be superior to the natural product.—City of Carlsbad v. W. T. Thackeray & Co., (C. C.) 57 F. 18.

3. A right may be acquired to use a geographical name as a trade-name in connection with mineral waters derived from springs in that locality by persons who own all of such springs, and the use of such name by others who obtain their waters elsewhere will be enjoined. —La Republique Francaise v. Schultz, (C. C.) 57 F. 37.

Treaty with France.

4. The word "Vichy," used in connection with mineral waters, and derived from the locality in France where the waters are obtained, is a trade-name, or "nom commercial," within the meaning of the industrial property treaty with France of 1883, art. 6, (25 Stat. 1376,) and as such is entitled to protection in the United States, though it has not been deposited as required by the treaty in the case of

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